Citation: *R.* v. *Cardinal,* 2013 YKTC 30

Date: 20130411
Docket: 10-11019A
11-00142
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

JONATHAN GEORGE CARDINAL

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court pursuant to sections 486.4 of the *Criminal Code*

Appearances:
Jennifer Grandy — Counsel for the Crown
Melissa Atkinson — Counsel for the Defence

REASONS FOR SENTENCING

[1] This matter was before me on April 4, 2013. At that time I gave oral reasons and indicated that written reasons were to follow. These are my written reasons.

[2] Jonathan Cardinal has entered guilty pleas to having committed two offences of sexual assault contrary to s. 271 of the *Criminal Code* ("*Code*"). An Agreed Statement of Facts was filed setting out the circumstances of the offences.

[3] With respect to the sexual assault against F.G., she stated that on May 30, 2010 Mr. Cardinal approached her outside a bar in Whitehorse at approximately 2:00 a.m. She was uncertain whether she had known Mr. Cardinal previously. They walked away

together and went behind a hotel, where they sat on the tailgate of a truck behind a hotel and smoked a joint.

[4] When she went to leave, Mr. Cardinal grabbed her around the neck, pulled her towards him and tried to kiss her. He ignored her protestations, forced her onto her back, pinned one hand above her head and pulled her pants off. She tried to kick him off and yell for help, but he was choking her to the point where she felt that she could not breathe or scream. He had forced sexual intercourse with her, continuing to choke her until she stopped resisting. She feared for her life and asked Mr. Cardinal not to kill her, stating that she had a brother and sister. Mr. Cardinal subsequently stated “No, no, I can’t do this” and ran away. F.G. was uncertain as to whether Mr. Cardinal ejaculated.

[5] The sexual assault against M.J. took place in the early morning hours of July 18, 2010, in Dawson City, after she agreed to smoke a joint with Mr. Cardinal. There is no information as to whether she had known him previously. M.J. was quite intoxicated and remembers being choked by Mr. Cardinal while he held her down. Mr. Cardinal was observed by witnesses to be on top of M.J. in a back alley holding her down. She did not have any pants or underwear on. She was crying and asking for her pants back and Mr. Cardinal was telling her to be quiet. When the witnesses intervened, Mr. Cardinal sat up and M.J. pushed him off of her. There was a DNA match to Mr. Cardinal from semen found in the vaginal swabs taken from M.J.

[6] I wish to make one comment with respect to the agreed facts as they pertain to F.G. only. The Agreed Statement of Facts set out what F.G. “stated” had occurred. It is of greater assistance to the Court to be provided facts which set out what actually

occurred, rather than what has been stated by a victim to another party. Alternatively, there should at least be a paragraph indicating that the offender accepts that the facts as stated are in fact what the offender is prepared to accept as having occurred. (***R.*** v. ***Surge***, 2010 Y.K.T.C. 123, para. 10)

[7] Mr. Cardinal claims to have no recollection of the May 30 sexual assault and little memory of the July 18 sexual assault. He is not, however, taking any issue with the facts as they are set out in the Agreed Statement of Facts and as stated by F.G.

Positions of Counsel

[8] Crown counsel is seeking a period of custody of five years, pointing to the two sexual assaults occurring close in time to each other, and both involving the sexual assault of heavily intoxicated women who were also choked in the course of the sexual assaults.

[9] Crown accepts that in mitigation are Mr. Cardinal's youth, guilty pleas and expressions of remorse.

[10] In addition, Crown counsel seeks a finding that Mr. Cardinal be designated as a long-term offender under s. 753.1(3) and subjected to a 10 year period of supervision.

[11] Defense counsel suggests that a shorter period of custody closer to four years, as I understand her submissions, could be imposed and she questions the necessity of declaring Mr. Cardinal a long-term offender. That said, while defense counsel appeared in her submissions to be opposing Mr. Cardinal being subjected to a long-term offender designation, her arguments were short and superficial at best and, while pointing out

some considerations, she offered no compelling reasons why I should not make such a designation.

Circumstances of Mr. Cardinal

[12] A Pre-Sentence Report ("PSR"), *Gladue* Report and Psychiatric Report were provided to the Court.

Gladue Factors

[13] The author of the *Gladue* Report, Mark Stevens, provided a summary of his qualifications and background related to the provision of *Gladue* Reports prepared by him for use in the Yukon. He is currently employed full-time as the community justice co-ordinator for the Carcross/Tagish First Nation and, since 2010, has been involved in the preparation of approximately 20 *Gladue* Reports that have been submitted to the Yukon courts.

[14] Mr. Cardinal is a 23 year old member of the Shuswap First Nation from Alkali Lake, British Columbia.

[15] He was born in Vancouver's downtown east side. His mother, Lisa, and his maternal grandmother are Secwepemc [Shuswap] citizens of the Es'ketemc First Nation in Alkali Lake.

[16] His father's family is Heiltsuk First Nation from the community of Bella Bella situated on Campbell Island, British Columbia. His father was addicted to drugs and alcohol. He left Mr. Cardinal's mother shortly after Mr. Cardinal was born. Mr. Cardinal can only recall one meeting with his father when he was growing up. This occurred

when he tracked his father and older brother down on the streets of either Victoria or Vancouver when he was 14 or 15 years old.

[17] Mr. Cardinal's mother and father live separately in the East Hastings area of Vancouver. He states that he does not really know either parent that well. He says that he loves his mother but has been unable to help her leave East Hastings and her ongoing alcohol and drug lifestyle. He believes his mother has been involved in the sex trade to support herself. He recounted the following story to his cousin Irene Johnson on one of his visits to Alkali Lake:

> I went to see my effing mom and she's in this hotel sleeping with this 80 year-old man, and I wanted to effing kill the guy. And my mom was so high on cocaine she couldn't even tell I was there.

[18] Mr. Stevens writes as follows:

> Lisa grew up living with her mother in a succession of cheap, run-down hotels catering to people who were often struggling with addictions and/or mental health issues. By all accounts, Lisa's mother was battling a very serious addiction to alcohol while Lisa was growing up.
>
> …
>
> Lisa, her sisters and her mother were part of a growing demographic of First Nations' people who were moving into the downtown east side neighbourhood to take advantage of cheap accommodation, a mild climate and easy access to drugs such as heroin and cocaine.
>
> …A large percentage of this population [downtown east side], particularly aboriginal women, end up leading very high risk lifestyles. Many end up working in the sex trade and find themselves trapped in what has been described as "survival sex work" because of their illicit drug addictions.

[19] On another occasion in or about 2006, Mr. Cardinal located his mother in a bar in Vancouver. He stated: “I found her in a bar, went up to her and bought her a couple of beers. She didn’t even recognize me, although she said I reminded her of someone.”

[20] Mr. Cardinal was first apprehended by the British Columbia Ministry of Children when he was approximately two years old. For a time he lived with Ms. Johnson in Alkali Lake until his mother took him to Vancouver. He was brought back to Ms. Johnson’s place when he was approximately 8. He was then returned briefly to his mother. Shortly afterwards he was brought to Williams Lake, a community approximately a one hour drive from Alkali Lake, where he was placed with a First Nations’ family. This placement at the home of Edward Chelsea and Shirley Hance-Chelsea was originally intended to be for a couple of weeks, but Mr. Cardinal ended up residing with them for approximately five years. He made his own choice to leave at the age of 13, although Mr. Chelsea and Ms. Hance-Chelsea continue to consider him like a son and express their ongoing care and concern for him. During his stay with them, Mr. Cardinal was introduced to horses and rodeo, which ultimately contributed to his involvement in rodeo activities and competitions. He had some competitive success until he broke his leg just prior to competing in the British Columbia Rodeo Association finals.

[21] Since leaving this home, Mr. Cardinal has lived at numerous foster homes, group homes and safe houses. He described incidents of physical abuse at some of these placements. In his addendum to the *Gladue* Report, submitted after being provided an opportunity to review the Psychiatric Report prepared by Dr. Lohrasbe, Mr. Stevens states that:

> Dr. Lohrasbe's recommendations must be considered within the context of Jonathan's traumatic life circumstances. His dysfunctional upbringing, his experiences while in foster care, and his subsequent history of substance abuse and criminal activity, all cry out for closer examination by the Court. He has no immediate family members who are in a position to support him. His mother continues to live a rough and potentially dangerous existence on the streets of Vancouver's downtown east side. Her ongoing addiction to drugs and alcohol, plus the fact that she may be at least be partially supporting her addictions by selling sex in a high-risk environment, is something that must re-traumatize Jonathan daily, especially in the light of the recent missing and murdered women's inquiry in British Columbia. Certainly, the memories he has of his mother are, for the most part, not happy ones. It is much the same story with his father.
>
> His experiences in foster care are equally distressing. With the exception of the time he spent with Edward and Shirley (and his cousin Irene), the majority of his placements resulted in his mistreatment at the hands of his (usually Caucasian) foster parents. These experiences certainly qualify as examples of systemic racism and should be considered as such by the Court at sentencing.
>
> Given the above, his subsequent involvement in criminal activities such as drug-dealing should come as no surprise. There is an undeniable link between his experiences growing up and the predicament he finds himself in today. Shirley, his long-time foster mother, is right when she says that if Jonathan had received the help he needed when he was younger, he would not be where he is today. Sadly, Jonathan's story is a common one among so many aboriginal people who find themselves at odds with the criminal justice system.

[22] Mr. Cardinal has an older brother and a younger sister. When his father left his mother, his father took his older brother with him, leaving Mr. Cardinal and his sister with their mother. The author of the PSR states that Mr. Cardinal "… was not too sure if his dad loves him or not stating that he is resentful towards his father, he is mad at him because his father took his older brother and not him. Mr. Cardinal was left to the care of the Ministry of Children and Family Development".

[23] When Mr. Cardinal was first apprehended, an aunt took his sister into care. When he was 13 he attempted to locate his sister and his Aunt. He was discouraged from contacting his sister as his Aunt did not want his sister to learn about her parents or discover that his Aunt's family was not hers. He does not really know his sister.

[24] Mr. Cardinal was sexually assaulted when he was four or five by one of his mother's boyfriends and again, two or three years later, by a cousin. On both occasions he was forced to perform fellatio.

[25] Mr. Cardinal indicated that he developed a pattern of leaving and returning to the British Columbia Ministry of Children and Family Development. Mr. Cardinal lived with his brother for several months in Vancouver when he was 15. He stated that during his time on the streets as a youth he witnessed considerable violence involving weapons and firearms. During this time he became hooked on crystal meth, losing considerable weight. He was also involved with a crew in dealing drugs. He checked into a safe house after seeing a friend over-dose and was returned to Alkali Lake where he lived with his cousin Irene for several months while withdrawing from his drug use.

[26] Mr. Cardinal moved to Williams Lake and then Vancouver where he again became involved in an on-again, off-again cycle of drug use and dealing.

[27] Mr. Cardinal's public education lasted until he was expelled in Grade 8. He has done some upgrading to Grade 10 and 11 subjects. Generally speaking, his school experience was not a positive one, involving numerous fights, absenteeism and disruptive behaviour. He stated that while he was in school he was diagnosed as suffering from Attention Deficit Hyperactivity Disorder ("ADHD"). He did enjoy some

subjects, however. Ms. Hance-Chelsea advised the author of the *Gladue* Report that Mr. Cardinal began to get into trouble in grades five through seven. She stated: "People tried to label him, I guess, because he was fostered, and that's really hard on foster children. It causes a lot of grief, and a lot of 'not belonging' feelings".

[28] Mr. Cardinal described his childhood as 'normal', stating that he didn't know any different, although looking back he recognizes that it was not pleasant.

[29] The author of the PSR provided a Case Study which contained *The Alkali Lake Community Story*. This document briefly chronicles the tragic decline of a once healthy community and its struggle to rebuild itself upon a solid foundation. The critical factor in the community's decline was the initial introduction of alcohol to the community in 1940 by a fur trader who opened a general store and trading post. Once alcohol entered the community "…there was a gradual deterioration of the health and well-being of the people." The Alkali Lake community was subjected to other pressures as well, including the fact that a whole generation of their young people were sent off to residential schools. While some acknowledged that educational opportunities were enhanced through these schools, two very negative outcomes also resulted.

[30] The first was that "…a generation of children grew up apart from their parents and family life". At these schools the children were punished for speaking their native language, and their cultural beliefs and values were derided as being primitive, inferior to European ways and sinful. The author of the case study draws the conclusion that:

> The flagrant psychological and spiritual colonization of Alkali Lake's children engendered a kind of racial/cultural self-hatred. The mind-set this process engendered led many Alkali people to believe at a deep, subtle

> and mostly unconscious level that unless they somehow became culturally "white" they were "no good," "savages," "primitive," "flawed," "less than," "unable," "inferior," "useless" people who could never really stand as worthy and equal human beings in comparison to their Euro-Canadian neighbours. This insidious way of thinking was not unique to Alkali Lake. Most indigenous communities in Canada have been heavily impacted by similar processes of internalized oppression.

[31] The second negative outcome was the introduction of widespread physical and sexual abuse. In the mid-1980's it was estimated that upwards of 90% of the entire population of Alkali Lake's young people had been sexually abused.

[32] The author of the Case Study makes the following additional comments:

> When the residential school generation returned to the community to start their own families, many did so having been raised through a large part of their childhood by large, impersonal and sometimes dysfunctional institutions. Because they had not been parented themselves and because they had not internalized the traditional family values and processes so vital to healthy family and community life, Alkali Lake people were much more vulnerable to the culture of alcohol. Add to this vulnerability the pattern of physical and sexual abuse and it becomes clear that during the darkest period (1965 to 1985) growing up and living in Alkali Lake was something of a walking nightmare for most people.
>
> A once hard-working people now lived in a village strewn with years of accumulated garbage and broken-down cars. Their once well-tended houses now had holes in the walls, paint peeling off the outside, windows broken and covered with cardboard, furniture broken and dirty, and a general spirit of sadness that filled up the spaces.
>
> Children often came to school (when they came at all) hungry, bruised and numbed by neglect, psychological humiliation, or the prolonged terror of physical or sexual abuse. It became commonplace for them to see their parents and other adults staggering from house to house in search of a bottle or the next party. Children learned to cower and hide when their parents got into screaming matches, which often ended in physical or sexual abuse or worse. And with the alcoholism came poverty, hunger,

> sickness, suicides, and layer after layer of loss as loved ones died in accidents, from violence or from largely unnecessary disease brought about by constant abuse and neglect of the body.
>
> As one prominent community member put, “We had become what others called us: the Indians of Alcohol Lake.” Most of the people were so immersed in this reality that they were unable to “see” any other possibility for themselves. As another young man put it, “I thought that this was how Indians lived.”

[33] This is the community of Mr. Cardinal’s mother and his grandmother. He was born, albeit not in Alkali Lake, but as a product of this community nonetheless.

[34] Mr. Cardinal has been employed as a firefighter in Alkali Lake and enjoyed this work.

[35] He has been in five relationships with women, generally not lasting beyond seven months.

[36] Mr. Stevens concurs with Dr. Lohrasbe’s recommendations that Mr. Cardinal participate in programming that addresses his historic and on-going trauma and addictions issues, in a facility such as the Tsow Tun Le Lum treatment facility which is specifically designed to accommodate Aboriginal people.

[37] Mr. Stevens notes that Mr. Cardinal is, in the circumstances, not optimistic about the future, stating that “My life just got flushed down the drain”. He notes, however, that Mr. Cardinal was able to articulate a desire to one day make a family of his own, which the author feels “…may be born out of a need to establish some roots and not remain disconnected from everyone and everything”. Mr. Stevens further notes that “…in spite

of a life that can largely be characterised as one of disconnection and dislocation, it is clear that Jonathan is loved by those who found themselves caring for him."

[38] Mr. Stevens attributes this search by Mr. Cardinal "for a place to call home" as being a direct result of neo-colonial displacement. He states:

> As a victim of this displacement, it will be harder for him to find a supportive community to assist him with his reintegration, which could easily result in him spending longer in custody. It seems a cruel irony that he could potentially be re-victimized in this way.

[39] He describes neo-colonial displacement as being another example of systemic racism, citing the following passage from an academic paper:

> The problems of First Nations Peoples in urban centres are exacerbated because of differences in cultures, the loss of traditional Indigenous values and spirituality, and the absence of a support system for Aboriginal people in the city. Many urban First Nations people feel alienated from both the non-Aboriginal government and their own Indian band governments… These problems, therefore, must be considered a form of neo-colonial displacement. They emphasize how social exclusion is intimately connected to the legacy off colonial practices in Canada. (Schatz, Donna, *Unsettling the Politics of Exclusion: Aboriginal Activism and the Vancouver Downtown East Side*, a paper prepared for the Annual Meeting of the Canadian Political Science Association, Montreal, Quebec, 2010, p. 10)

[40] Mr. Stevens posits that Mr. Cardinal's chances of a successful rehabilitation:

> …will increase exponentially if he can find a way to establish some roots personally, socially and geographically. Put simply, he will need to build a community of support pretty much from scratch. And, as Dr. Lohrasbe suggests, Jonathan's chances of a successful re-integration will be greatly increased with long-term supervision and support.

Conduct while in Custody on Remand

[41] Mr. Cardinal has been in custody in the Whitehorse Correctional Center ("WCC") on consent remand for almost exactly two years.

[42] He has struggled during his time in remand, as illustrated by the following statements he made to the author of the PSR:

- It takes a lot not to hurt anyone in here
- He had been asked by other inmates to get a hold of and hurt someone
- That he copes with stressors by freaking out in his cell
- He wanted to hurt people in E-dorm and that there were four or five guys in there he did not like
- That he had stood with a razor in his hand over a sleeping inmate that he wanted to cut and hurt
- That another inmate was sick and disgusting because he had sexually assaulted his partner's little girl
- That another inmate was sick because he watched child pornography
- That if he assaults a Correctional Officer he would get another two years

[43] The entries on Mr. Cardinal's case file at WCC show both positive and negative behaviour. A custody status report was prepared by Mr. Cardinal's case manager, Sarah Ratel, providing information that of the 411 entries in Mr. Cardinal's log, 129 were negative. The last entry before me, which was negative, was made on January 22, 2013.

[44] His case manager, Sarah Ratel, noted that:

> The negative entries in Mr. Cardinal's progress log document a disregard for the rules of the facility, failure to comply with the directions of staff

> members, and disrespectful attitude towards officers. Mr. Cardinal's progress log also indicates that he has threatened to become aggressive if privileges are taken away from him, and has threatened to harm other inmates in his unit. He said that there are 4 – 6 inmates living in his unit that he would like to hurt, and has indicated that he feels he has nothing to lose.

[45] More recently, Ms. Ratel indicated to the author of the PSR that "…it would be fair to say that there has been an improvement in his behaviour…entries in Mr. Cardinal's progress log indicate that he has been on his 'best behaviour' and 'making a good attempt at following the Centre's rules". Mr. Cardinal was considered as showing more respect to officers and having positive interactions with other inmates.

[46] The positive entries in Mr. Cardinal's progress log describe him as "…appropriate, polite, friendly, and someone who can demonstrate good social skills."

[47] He has been found on several occasions with contraband in his cell, including razor blades, non-prescribed drugs and alcohol. Mr. Cardinal was charged internally at WCC for the drug and alcohol possession and received internal dispositions.

[48] While in custody, Mr. Cardinal voluntarily participated in and completed the Substance Abuse Management program ("SAM") between November 20, 2012 and December 9, 2012. He was assessed as being open and honest in his participation in this program, as well as being positive and respectful throughout.

[49] Mr. Cardinal is currently taking Seroquel, Venlafaxine (Effexor) and Motrin.

[50] He has been working with Dr. Heredia in order to find the right medication to help him and to get his impulse behaviours under control, and he states that he "…sees a light at the end of the tunnel".

[51] During his time in custody at the Prince George Regional Correctional Centre ("PGRCC") Mr. Cardinal struggled as well. He was considered to be pushing staff boundaries to see how far he could go, as well as being demanding, needy, rude, disrespectful and cynical. His behaviour was considered to be poor and childish. One entry reads:

> You have demonstrated a real disregard for the rules and regulations at PGRCC. Your consistent and substantial pattern of non-compliance with rules and with living unit officer's directions is the reason why you are classified to the ESP program…

[52] Notwithstanding the many negative reports, there were also positive comments regarding him being polite and mostly well-behaved.

Risk assessment as identified in the PSR

[53] Mr. Cardinal was assessed in the PSR as having a moderate level of problems related to alcohol abuse, although the author of the PSR had concerns that the assessment, using the Problems Related to Drinking Scale assessment tool, "…may not accurately reflect the true extent of Mr. Cardinal's difficulty, if any, with alcohol".

[54] Mr. Cardinal was assessed, using the Drug Abuse Screening Test assessment tool, as having a low level of problems related to drug abuse. Interestingly, Mr. Cardinal says that while alcohol is not a problem for him, drugs are.

[55] Mr. Cardinal was assessed as being a very high risk to re-offend, using the Level of Service/Case Management Inventory (LS/CMI).

[56] He was further assessed using the Risk for Sexual Violence Protocol assessment tool. The author of the Assessment Report makes the following comments:

> When considering a flat trajectory of risk i.e. if the characteristics of the offences for which Mr. Cardinal is being sentenced were to remain largely the same, some conclusions can be drawn as to the nature, severity, imminence, frequency and likelihood of a similar sexual assault occurring in the future.
>
> If Mr. Cardinal were to commit another sexual assault it would likely involve forced penetration with considerable psychological harm to the victim and with the possibility that the sexual violence could be life threatening…warning signs upon release that risk is increasing would include: victim access, sexual pre-occupation, hostility or rejection of treatment and supervision, psychopathy, alcohol and drug relapse, collapse of social supports or other unique factors that result in emotional dysregulation.
>
> …
>
> In the risk scenario described here and if the above warning signs present themselves, it is highly likely that Mr. Cardinal will commit a similar offence.
>
> The following are risk factors relevant for case management strategies: escalation of sexual violence, physical coercion, denial of offences, problems with self-awareness and problems resulting from child abuse, problems with substance abuse, recent violent ideation, problems with intimate relationships, problems with planning and problems with supervision.
>
> Mr. Cardinal was determined to be **high risk** with respect to case prioritization and **high risk** that future sexual violence may involve serious or life threatening physical harm.

[57] The PSR notes that while serving his sentence for his adult offences, Mr. Cardinal was assessed by the PGRCC as being a high public safety risk, a high escape risk and it was noted that he required a high level of institutional management.

[58] The police reports for both these sexual assaults indicate that Mr. Cardinal was under the influence of alcohol and MDMA (Ecstasy) at the time of the assaults.

Psychiatric Assessment

[59] Dr. Lohrasbe reviewed numerous materials and met with Mr. Cardinal. He "…found Mr. Cardinal to be an intelligent young man with whom it was easy to establish rapport. His remorse appears genuine, as does his expressed interest in attempting to understand himself and his actions…". In relation to the May 30 sexual assault, Mr. Cardinal stated to Dr. Lohrasbe that "It scares me that I did those things and I have no memory for it". Dr. Lohrasbe noted that when Mr. Cardinal read the Agreed Statement of Facts he shook his head and stated "I can't believe I did this". Dr. Lohrasbe stated that Mr. Cardinal "…came across as genuinely bewildered, shaken and saddened".

[60] Dr. Lohrasbe concluded that the following psychiatric diagnoses applied to Mr. Cardinal:

- Alcohol and drug abuse/dependence
- Antisocial Personality Disorder

[61] Dr. Lohrasbe concluded that the following psychiatric diagnoses do not apply to Mr. Cardinal:

- Psychopathy

- Attention Deficit Hyperactivity Disorder (although likely applicable when he was a child)
- Sexual deviancy

[62] Dr. Lohrasbe notes that risk assessment is a complex process. An individual assessed as being a high risk may in fact be manageable, whereas an individual assessed as a low risk may not be. A critical component is the individual's motivation to change, which, if present, may result in the individual accessing suitable treatment and improving self-control, thus making the risk manageable.

[63] Mr. Cardinal's inability to recall details of the sexual assaults limited Dr. Lohrasbe's ability to offer a comprehensive and specific clinical formulation of risk. Dr. Lohrasbe noted that Mr. Cardinal's use of physical violence in these sexual assaults, in particular the choking of his victims, is a matter of great concern and speaks to the "…seriousness facet of the risk that he poses if he were ever to reoffend again". Dr. Lohrasbe does not consider the diagnoses of substance abuse/dependence and Antisocial Personality Disorder as causative of the sexual offences but rather correlative.

[64] Therefore, in the absence of Mr. Cardinal being able to recall what he was thinking in relation to the sexual assaults, an adequate understanding cannot be had of what occurred. Dr. Lohrasbe states that "Until all relevant risk factors have been identified and adequately addressed, it cannot be said that the likelihood of any act of future sexual violence is 'low', 'moderate', or 'high'; it is unknown". However, Dr. Lohrasbe rated Mr. Cardinal's risk as 'high' based on the serious dimension of risk, given Mr. Cardinal's "…demonstrated capacity to use physical violence during the

sexual assaults, and the damage that choking can inflict on a future victim (even unintentionally)."

[65] In his oral testimony, Dr. Lohrasbe reiterated that while it is not possible to assess the likelihood of Mr. Cardinal committing a future sexual offense, it is possible to determine that, if Mr. Cardinal re-offends sexually, based upon the physical violence he used in these two sexual assaults, the seriousness of the impact on the victim is enough to consider Mr. Cardinal to be a high risk for violence.

[66] In considering the Risk for Sexual Violence Protocol guidelines, Dr. Lohrasbe concluded, based upon the information provided to him, that the following factors do not apply to Mr. Cardinal:

- Chronicity of Sexual Violence
- Diversity of Sexual Violence
- Escalation of Sexual Violence
- Psychological Coercion in Sexual Violence
- Extreme Minimization or Denial of Sexual Violence
- Attitudes that Support or Condone Sexual Violence
- Sexual Deviance (significant)
- Psychopathic Personality Disorder (significant)
- Major Mental Illness
- Violent or Suicidal Ideation (although present in the past)
- Problems with Non-intimate Relationships.

[67] Dr. Lohrasbe concluded that the following risk factors apply to Mr. Cardinal:

- Physical Coercion in Sexual Violence (significant)
- Problems with Self-Awareness (significant)
- Problems with Stress or Coping
- Problems Resulting from Child Abuse
- Problems with Substance Abuse (significant)
- Problems with Intimate Relationships
- Problems with Employment (partially present)
- Non-Sexual Criminality

[68] Dr. Lohrasbe concluded that the following risk factors cannot be assessed at this time:

- Problems with Planning
- Problems with Treatment
- Problems with Supervision

[69] In his oral testimony, based upon information contained in the PSR, including the statement that Mr. Cardinal wanted to injure an inmate, Dr. Lohrasbe changed his conclusion to find that the risk factor regarding Violence or Suicidal ideation was still present.

[70] Dr. Lohrasbe concluded that Mr. Cardinal is treatable. He considered Mr. Cardinal to be motivated and pointed to several sources for this motivation:

- He cannot reconcile what he has done with whom he considers himself to be and is "…eager to understand how he could have done what he did"

- He is frightened by the potential of finding himself immersed in the criminal subculture with its accompanying depravity and violence and wants to break away from it

- He has positive role models, in particular Irene and Fred Johnson

- He knows that he has good work skills and is capable of living a pro-social lifestyle and that he has untapped intellectual, emotional, vocational and creative potential to live a satisfying and meaningful lifestyle, and does not have the despair and hopelessness that many usually older offenders have.

[71] Dr. Lohrasbe states that Mr. Cardinal "…has the intellectual capacity, curiosity and emotional stability to explore many possible influences on his sexual violence. With guidance, he should be able to explore the role of his childhood experiences of sexual and physical violence on many relevant issues, such as the development of his attitudes towards women, his lifestyle, his sadness and anger, his recklessness, his sense of entitlement or payback, and his capacity to use physical force to meet his immediate needs".

[72] Dr. Lohrasbe considers Mr. Cardinal to be "…a good candidate for a range of treatment programs designed to reduce risk for general violence and sexual violence". He recommends that Mr. Cardinal be provided access to programs specifically designed for First Nations' offenders and delivered, if possible, by First Nations' therapists, such as Tsow Tun Le Lum on Vancouver Island.

[73] Dr. Lohrasbe concluded that:

> With a comprehensive series of general life skills programming (education, vocational, anger management, substance abuse) and more specific sex offender and violent offender programs, along with the development of

> cultural and spiritual identity, there is good reason to anticipate that Mr. Cardinal's risk can be lowered to the point where he can be managed in the community in the foreseeable future.
>
> Following such programming, he will require a lengthy period of transition so that he can demonstrate his capacity and ability to apply the gains he has made between now and the time of such release. It will be important for him to be monitored closely and to be provided additional support if he encounters major obstacles. The longest period of parole would be of assistance for risk management in the community.

[74] In his oral testimony, Dr. Lohrasbe stated that the importance of Mr. Cardinal being provided culturally appropriate treatment was tremendous and, in fact, critical and necessary. Dr. Lohrasbe elaborated on the recommendation in his report that Mr. Cardinal be supervised for the longest period possible. He stated that when an inmate who is progressing well is taken from the constrained prison environment and returned to the community, the greater availability of distractions and other risk factors, such as "alcohol and drugs to companions, mindsets and so on", can lead to a rapid decline in the positive effects the inmate may have gained in the constrained prison environment. Mr. Cardinal, with the poor modelling he has experienced, and with his history of abuse and abandonment and limited stable identity, will need maximum support for the maximum period of time. This said, as Mr. Cardinal grows older he will become increasingly manageable and more usefully supervised in the community.

[75] One area of concern that Dr. Lohrasbe noted in his oral testimony were the reports of Mr. Cardinal's negative behaviour while in WCC. These behaviours are consistent with Mr. Cardinal identifying with others who were antagonistic towards the system. This mindset, Dr. Lohrasbe stated, if continued, would prevent Mr. Cardinal

from really getting going with treatment. Based upon his interview with Mr. Cardinal, Dr. Lohrasbe was disappointed with these actions. It caused him to question whether Mr. Cardinal was really ready to make positive changes.

Criminal History

[76] Mr. Cardinal has a number of criminal findings of guilt as a youth, which are accessible in this sentencing hearing in accordance with s. 119 of the *Youth Criminal Justice Act ("YCJA")*. These include two charges under s. 355(b) of the *Code*, possession of property obtained by crime, three charges under 348(1)(a), break and enter with intent, one charge under s.129(a), obstruct peace officer, one charge under s. 351(1), possession of break-in instruments, one charge under s. 430(4), mischief, (indictable election made), one charge under s. 334(b), theft, one charge under s. 145(2)(b), failure to attend court, one charge under s. 145(3), breach of court order, one charge under s. 145(1)(b), unlawfully at large, and under charge under 137 *YCJA*, breach of sentence or disposition. Mr. Cardinal received sentences of deferred custody, open custody and closed custody at various times on some of these charges.

[77] Mr. Cardinal was convicted on February 3, 2011 of having committed offences contrary to ss. 348(1)(a), 129(a) and 268(2), aggravated assault. These offences were committed after the date of the commission of the offences for which he is being sentenced today, while he was on release on a Promise to Appear in respect of these offences. He was sentenced to two months custody, concurrent on all offences, after being given six months credit for time in custody on the s. 348(1)(a) and s. 268(2) offences. He was also placed on probation for a period of 18 months.

[78] The above findings of guilt and criminal convictions put into evidence by the Crown with defense counsel's consent, do not appear to match Mr. Cardinal's criminal history as referred to in the *Gladue* Report. I will, however, rely on what the Crown has tendered.

Appropriate Sentence

[79] Both of these sexual assaults are extremely serious. A sexual assault is, in and of itself, an act of violence. In both these cases, the choking of the victims is a significant aggravating factor. Mr. Cardinal befriended both of these intoxicated women and then took advantage of them by forcing violent sexual intercourse with them. The impact upon the victims was, and continues to be, significant. It is unlikely that either of them will ever entirely recover from the psychological harm and associated fear and distrust that they now live with.

[80] In mitigation is Mr. Cardinal's guilty plea and acceptance of responsibility. He has spared the victims the additional trauma of having to testify at a preliminary hearing, and/or a trial, or a sentencing hearing.

[81] ***R.*** v. ***White***, 2008 YKSC 34 provides a detailed analysis of sexual assault sentencing cases in the Yukon. The facts in brief are that Mr. White, who knew the victim from attending classes at Yukon College, was talking to her outside a local bar after closing time. She was intoxicated. The victim agreed to go to Mr. White's room in the College dormitory. She and Mr. White were on his bed talking and kissing. She then indicated that she wanted to sleep as she had to get up for school in the morning. He told her that was okay and that she didn't have to worry. She later woke up with her

pants and underwear removed and Mr. White attempting to force sexual intercourse with her. Despite her protestations, he continued in his attempts for approximately 10 minutes before stopping. Mr. White was convicted after a trial.

[82] Mr. White was a 39-year-old Aboriginal offender who continued to deny having committed the offence. He had a prior, albeit dated, criminal history, including a conviction for aggravated assault. He was assessed as being at a high risk for reoffending in general and as being at a moderate risk for re-offending sexually.

[83] Justice Gower found that there were several aggravating circumstances:

- There was an element of a breach of trust in that the victim knew Mr. White and he provided assurances to her, and to a friend, that he could be trusted;
- Mr. White took advantage of the victim while she was asleep and unable, at least initially, to consent or resist;
- Mr. White did not stop the assault despite the victim's protestations;
- The victim suffered some injury to her perineal area;
- Mr. White had a prior criminal record for 10 offences, including one of violence;
- Mr. White's high and moderate risk assessment;
- Mr. White's serious alcohol and drug addiction problem for which he refused treatment, thus increasing his risk for future re-offending.

[84] Justice Gower found as mitigating factors Mr. White's Aboriginal status and associated dysfunctional upbringing, including abuse, his attempts to upgrade his education despite suffering from learning disabilities, and the positive reports of his helpfulness and volunteer work.

[85] Neutral factors included the lack of proof of actual penetration during the attempted intercourse, the denial of responsibility for the commission of the offence and the 16 year age difference between Mr. White and the victim.

[86] Gower J. concluded that the principles of deterrence and denunciation were paramount and sentenced Mr. White to incarceration for a period of 26 months.

[87] He concluded in paras. 85 - 87 that:

> …the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.
>
> I note that the upper end of this range is slightly lower than the upper end of the range for similar circumstances in sentences imposed in the Northwest Territories and elsewhere in western Canada. However, that is a matter for consideration by our Court of Appeal and not one for this Court to pass judgment on.
>
> Further, as noted in *Bernier* [*R. v. Bernier*, 2003 BCCA 134], I am not suggesting this range is conclusive. Greater or lesser sentences will be justified where circumstances warrant. This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

[88] In para. 61 of ***White***, Gower J. refers to the comments of Schuler J. in ***R.*** v. ***Soldat*** [1996] N.W.T.J. No. 122 (S.C.), at para. 16 wherein she stated that:

> …there is no distinction between a case involving a sleeping or unconscious victim as it is "the contemptuous disregard for the feelings and personal integrity of a victim" which was said in Sandercock to be the key to a major sexual assault. That disregard is a feature of sexual assault, whether the victim knows what is happening to her at the time it is happening or does not find out until later.

[89] I have reviewed the remainder of the cases filed by Crown counsel and considered those cases referred to in ***White*** as well as other Yukon cases including the cases of ***R.*** v. ***Poor***, 1999 Y.J. No. 45 (T.C.) and ***R.*** v. ***Anderson***, 2011 YKSC 6.

[90] I am also mindful of the purposes and principles of sentencing set out in s. 718 – 718.2 of the *Code*.

[91] Clearly, denunciation of Mr. Cardinal's conduct, deterrence, both specific and general, and separation of Mr. Cardinal from society for a period of time are all purposes of sentencing that are paramount in this case. In addition, there must, through the imposition of these sentences, be an acknowledgment of the harm that Mr. Cardinal caused to these two victims and the community, and reparations made for the harm caused, to the extent that this is possible, as little comfort as this may provide to the victims. Further, the sentences imposed must strive to bring home to Mr. Cardinal the extent to which he is responsible for the harm he has caused. This last purpose is critical in allowing the sentences to assist in Mr. Cardinal's rehabilitation.

[92] While the interplay between these purposes and the ultimate balancing of them will vary from case to case, all of them play a role in providing guidance towards a fair and just sentence.

[93] The extent to which rehabilitation plays a role in sentencing will vary, often in accordance with the motivation of the offender to change his or her behaviour, the ability of the offender to do so and the opportunities which will be available to him or her.

[94] Regardless, however, in cases where significant violence has been committed against a victim, such as here, rehabilitation, while important and not to be disregarded, will generally be subrogated to the principles of denunciation, deterrence and the need for separation of the offender from society. That said, in many cases, including this one, affording an offender every reasonable opportunity to take steps to change his or her offending behaviour ultimately benefits not only the offender but the community, for a rehabilitated offender will not victimize others and may in fact be in a position to prevent or discourage individuals from committing criminal offences and victimizing others.

[95] The various reports that have been provided to me make it clear that rehabilitation is a very realistic possibility for Mr. Cardinal. While there are certainly unknown factors associated with Mr. Cardinal that will bear on his motivation and ability to live a pro-social life, there is much known that points towards him having a realistic chance to do so and to thus allow me to impose a sentence in which rehabilitation is also significant.

[96] I also keep in mind the need to impose sentences on Mr. Cardinal that are consistent with sentences imposed on similar offenders for similar offences committed in similar circumstances, keeping in mind that the overall sentence, if sentences are made consecutive to each other should not be unduly long or harsh. As Mr. Cardinal is an Aboriginal individual, I must also, in accordance with section 718.2(e), pay particular attention to his circumstances in considering whether there are sanctions other than imprisonment available to me. This section refers not only to the difference between imposing a sentence of imprisonment or not, but also to the length of any imprisonment I impose.

[97] Section 718.2(e) has been recently considered by the Supreme Court of Canada in ***R.*** v. ***Ipeelee***, 2012 SCC 13. In para. 80 the Court stated:

> An examination of the post-*Gladue* jurisprudence applying s. 718.2(e) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.

[98] The Court stated in paras. 82 and 83 that it is not necessary to establish a causal connection between an offender's Aboriginal heritage and the commission of the offence for which he or she is being sentenced because to do so:

> …displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*.
>
> …
>
> Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[99] With respect to the irregular and uncertain application of *Gladue* principles to serious or violent offences, the Court stated, in para. 85:

> Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear, at para. 82, that sentencing judges have a *duty* to apply s. 718.2(e): "There is no discretion as to whether to consider the unique situation

> of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence." (*Gladue*, at para. 82. Similarly in *Wells*, ([2001] 1 S.C.R. 207), Iacobucci J. reiterated at para. 50 that
>
> > [t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

[100] Finally, the Court stated, in paras. 86 and 87, that:

> In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered serious for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious' (R. Pelletier, "The Nullification of Section 719.2(e) :Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 Osgoode Hall L.J. 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which the sentencing judge can deem any number of offences to be 'serious' " (Pelletier at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: who are the courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.
>
> The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of

> Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

[101] It is true in the case of every offender, Aboriginal or not, that the sentencing judge must only deprive them of liberty if less restrictive sanctions are not appropriate and, further, that all available sanctions that are reasonable in the circumstances must be considered. It is, however, necessary that particular attention be paid to the circumstances of Aboriginal offenders.

[102] The sentencing judge shall pronounce a sentence that reflects a consideration of the unique circumstances of the Aboriginal offender that is before him or her. Such options as are available must be considered and can be utilized in determining the appropriate sentence so long as the sentence, in the end, is just and fair, and finds and strikes an appropriate balance in consideration of all the applicable purposes and principles of sentencing.

[103] Clearly, many of Mr. Cardinal's personal circumstances are consistent with what this court has seen, and other courts have commented on, regarding the negative impacts of the residential school system on Aboriginal peoples. There is a reason that Prime Minister Stephen Harper apologized, on behalf of the Government of Canada, to Aboriginal peoples on June 11, 2008, stating, in part, that:

> ... the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.
>
> The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.

[104] It should be no surprise to anyone, and should in fact be obvious, that the damaging impacts and resultant social problems include the participation of some Aboriginal individuals in the commission of criminal offences. There is a context in which such criminal acts are done, and while a context does not create an excuse, it nonetheless assists in determining a just and fair sentence. Generally speaking, when you apologize to someone for having wronged them, you also endeavour to try to provide some recompense for the wrong that was done. You try to fix things as much as possible. To the extent possible, and without unduly compromising the safety of the community and other purposes and principles of sentencing, when sentencing an Aboriginal offender, every reasonable opportunity should be provided to allow the offender a chance to turn away from a destructive and criminal lifestyle and find, and walk on, a positive, pro-social path.

[105] In this case, there is no information before me, including in the Victim Impact Statements, regarding the ancestry of the victims. I suspect, however, based upon some of the information before me, and my observation of the victims in the courtroom at the sentencing hearing, that they both may in fact be of Aboriginal ancestry. As I stated in ***R.*** v. ***Atkinson***, 2012 YKTC 62, para. 33:

> While courts properly make inquiries into the Aboriginal heritage of offenders in order to determine the appropriate sentence to be imposed and to give full effect to the purpose and principles of sentencing, the Aboriginal heritage of victims is

> also an important consideration for the Court in ensuring that the offender understands the impact and consequences of his or her crime. This is particularly true in cases of sexual assault. All too often the Aboriginal heritage of a victim has contributed to the occurrences of many other prior forms or acts of victimization. The full impact of the crime an offender is being sentenced for having committed upon the victim needs to be placed in the context of the victim's past and heritage as well. The leadership and members of communities need to be alert and give recognition to both the offender's and the victim's Aboriginal heritage when a crime is committed and when dealing with the consequences of it. While this is particularly true when both offender and victim are of Aboriginal heritage and are of the same Aboriginal community, it is true to some extent in all cases.

[106] In conclusion as to the appropriate sentence for these two sexual assaults, I am satisfied that the total sentence should be a period of custody of 52 months. I will deal later with how this period of custody will be apportioned.

Long-term offender designation

[107] While I appreciate that Dr. Lohrasbe in his assessment commented favourably about imposing a long term supervision order (”LTSO”) on Mr. Cardinal, and I accept that a term of community supervision would protect the public and assist Mr. Cardinal with his rehabilitation and reintegration, the idea of designating a youthful offender with relatively few criminal antecedents a long-term offender does cause me some concern.

Eligibility

[108] In terms of Mr. Cardinal’s eligibility for a long-term offender designation and LTSO order, the requirements are set out in s. 753.1 of the *Code*:

Application for finding that an offender is a long-term offender

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 271 (sexual assault) …; 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.

[109] In the circumstances, and notwithstanding my reluctance, I find that the requirements for finding Mr. Cardinal to be a long-term offender and for the imposition of an LTSO are met.

[110] Firstly, as described in detail above, a sentence over two years is just and fit in the circumstances, given the violent and random nature of the two sexual assaults, the fact they occurred within a relatively short time frame, and the relevant sentencing jurisprudence.

[111] Secondly, I am satisfied that there is a substantial risk that Mr. Cardinal will reoffend. Sexual assault is enumerated in s. 753.1(2)(a), and I find that he fits the requirements of s. 753.1(2)(b)(ii).

[112] Thirdly, based on the report of Dr. Lohrasbe, I accept that there is a reasonable possibility that Mr. Cardinal's risk of reoffending can eventually be controlled in the community.

Section 753.1(2) – "substantial risk"

[113] In terms of whether Mr. Cardinal poses a substantial risk of reoffending, and the application of s. 753.1(2)(b)(i) and whether there is a "pattern of repetitive behaviour", I do not think that this is entirely clear-cut, and I prefer to base my conclusion on s. 753.1(2)(b)(ii). As noted, Mr. Cardinal has a limited record, consisting of primarily process and property-related offences as a youth. His only conviction for an offence of violence was an aggravated assault that occurred after these offences but for which he was sentenced before, along with a concurrent mischief and s. 129(a) conviction.

[114] The Ontario Court of Appeal in ***R. v. Hogg,*** 2011 ONCA 840 recently discussed what constitutes a pattern of repetitive behaviour, albeit in the context of the similarly-worded provision in s. 753 regarding the dangerous offender designation. Unlike s. 753, s. 753.1 does not contain a requirement that the pattern show a failure on the part of the offender to restrain his or her behaviour, but both sections require that the pattern, including the predicate offence, 'shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons'.

[115] Speaking for the Court in *Hogg,* Feldman J.A. cited the reasons of the B.C. Court of Appeal in ***R. v. Dow***, 1999 BCCA 177 and ***R. v. Pike***, 2010 BCCA 401, as well as earlier decisions of the Ontario Court of Appeal in ***R. v. Jones*** (1993), 63 O.A.C. 317 and ***R. v. Langevin*** (1984), 45 O.R. (2d) 705, and the decision of the Alberta Court of Appeal in ***R. v. Neve***, 1999 ABCA 206. From these I conclude that the existence of a pattern requires that the court find "a number of significant relevant similarities between each example of the pattern" (***Dow***, para. 25). The relationship between the pattern and the predicate offence is also important, as:

> … [i]t would be inconsistent and unfair if the ultimate threat determination were to be made on the basis of a perceived threat unrelated to either the predicate offence or the pattern of behaviour it reveals as still persisting. (***Pike***, para. 82)

[116] "Remarkable" similarity is not necessarily required in all circumstances, but where there are fewer offences, the requirement for similarity is increased. As stated in

Neve at para. 113: "…the requirement for similarity in terms of kinds of offences is not crucial when the incidents of serious violence and aggression are more numerous".

[117] The Court in ***Hogg*** concluded as follows:

> [40] To summarize, the pattern of repetitive behaviour that includes the predicate offence has to contain enough of the same elements of unrestrained dangerous conduct to be able to predict that the offender will likely offend in the same way in the future. … [T]he offences need not be the same in every detail; that would unduly restrict the application of the section.

[118] Although I recognize that the implications of a long-term offender designation are far less drastic than those of a dangerous offender designation, in my view the rationale of ***Hogg*** applies. To reach the threshold of substantial risk under s. 753.1(2)(a)(i), I need to be satisfied that Mr. Cardinal's past behaviour bears enough resemblance to these current sexual assaults that I can predict that he is likely to offend in the same way in the future. While it is true that the two sexual assaults for which he is now being sentenced bear a marked resemblance to one another, his short history of offending only includes one other offence of violence. This offence is totally dissimilar on its facts. In these circumstances I am not prepared to find that a "pattern of repetitive behaviour" has been established.

[119] That finding is not the end of the matter, though, as pursuant to 753.1(2)(b)(ii), I can also find that Mr. Cardinal has a substantial risk of reoffending if his conduct in a sexual matter "has shown a likelihood of causing injury, pain or other evil to persons in the future through similar offences".

[120] The two predicate sexual assaults with choking undeniably caused significant psychological injury and pain to the victims, and, in the case of the first victim, she was choked to the point where she felt that she could not breathe and feared for her life. The fact that the offences bear significant similarity to one another and took place within a short time frame is also a relevant factor to consider in determining whether there is a likelihood that Mr. Cardinal will commit similar offences with similarly damaging consequences.

[121] As noted by Dambrot J. in ***R. v. Johnson***, [2008] O.J. No. 4209 (S.C.), 'likelihood' means more probable than not. Given the extremely troubling context of the two predicate offences and the conclusion of Dr. Lohrasbe with respect to the nature of Mr. Cardinal's offending, I have no difficulty finding it likely that future offences committed by Mr. Cardinal will cause injury, pain or other evil. However, while Dr. Lohrasbe did provide an opinion that there was a high risk that any future offence committed by Mr. Cardinal would cause injury or pain, he had insufficient information to allow him to determine whether Mr. Cardinal also poses a high risk of reoffending in general. I understood Dr. Lohrasbe to be saying that, based on his conversations with Mr. Cardinal and a consideration of his history and criminal antecedents, he cannot conclude whether Mr. Cardinal is likely or unlikely to commit a similar offence, but he can conclude that if Mr. Cardinal does reoffend, there is a high risk that the consequences will be significant.

[122] Given Dr. Lohrasbe's conclusions about Mr. Cardinal's risk, coupled with the fact that the two predicate offences happened within a short period of time and in very similar circumstances, and also considering some of the other risk analyses, such as

the very high risk rating identified in the LS/CMI and the level and type of risk identified through the Risk for Sexual Violence Protocol assessment, I am prepared to conclude that it is more likely than not that Mr. Cardinal, left to his own devices, will commit future similar offences.

Discretionary nature of the designation and importance of rehabilitation

[123] Regardless of the fact that the Crown has satisfied me that a long-term offender designation is available, the order is still discretionary.

[124] As I indicated, I do have some concern about labelling a youthful offender with a limited and mostly non-violent criminal record a long-term offender. His longest previous sentence was a total of 8 months. There is some authority for the idea that the long-term offender provisions should be narrowly construed, as noted by Nordheimer J. in ***R. v. P.H.*****,** [2005] O.J. No 5698 (S.C.). At para. 22 of that decision, he cites the 1995 Federal/Provincial/Territorial Task Force on High Risk Violent Offenders: Strategies for Managing High Risk Offenders (Victoria: Department of Justice, January 1995), which apparently formed the basis for the long-term offender provisions in the *Code*. Specifically:

> … In that report, the authors state, at page 19,
>
> > "A sentencing option providing for a long term supervision would be aimed at cases where an established offence cycle with observable cues is present, and where a long term relapse prevention approach may be indicated. The success of an LTS 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"

[125] Nordheimer J. also commented that given that the offender in the case before him was a young person, the court should have particular regard to the greater impact that a designation could have on him. I agree with that observation, however part of the concern in ***P.H.*** was driven by the view that the long-term offender provisions are directed more towards protecting society than rehabilitation of the offender. Given the decision of the Supreme Court of Canada in ***Ipeelee***, this is clearly not the case.

[126] In ***Ipeelee,*** the Court clarified the two-fold purpose of an LTSO, and firmly dismissed the line of cases that suggested that rehabilitation plays only a limited role in the long-term offender regime. As stated at para. 50 of the majority decision:

> … The purpose of an LTSO is two-fold: to protect the public *and* to rehabilitate offenders and reintegrate them into the community. In fact, s. 100 of the *CCRA* singles out rehabilitation and reintegration as the purpose of community supervision including LTSOs. As this court indicated in *L.M.*, rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime. To suggest, therefore, that rehabilitation has been determined to be impossible to achieve in the long-term offender context is simply wrong.

[127] While I agree that the courts should exercise restraint in labelling offenders, especially youthful offenders, as long-term offenders, the characterization of LTSOs in ***Ipeelee*** in my view mitigates some of the concerns Nordheimer J. identified in ***P.H.***

[128] To properly reflect the gravity of the offences that bring Mr. Cardinal before the Court, I have imposed a sentence that emphasizes denunciation and deterrence as well as separation of Mr. Cardinal from society. However, I also noted that the sentencing

principle of rehabilitation should also factor largely in determining a fit sentence. Mr. Cardinal is a young man with a dysfunctional background and, while he has a limited criminal record, there are indicators that he has at times lived a socially acceptable lifestyle. He has some healthy and committed supports in the community. I believe that with appropriate treatment, counselling, programming and supports, he will be able to assume a position as a healthy and valued member of the community. As noted by Dr. Lohrasbe, a lengthy period of community supervision will greatly assist in Mr. Cardinal's rehabilitation. This conclusion is supported by Mr. Stevens in the *Gladue* Report. It is predominantly for this reason that I feel a long-term offender designation is appropriate, although I also feel that an LTSO is necessary for the protection of the public.

[129] Given this, I would like to make some comments about the consequences of a breach of this LTSO. ***Ipeelee*** also makes it clear that just because an LTSO breach can attract a significant penalty – up to ten years' imprisonment if prosecuted by indictment – that does not mean that a significant period of imprisonment should be imposed for every breach of an LTSO:

> … Breaches can occur in an infinite variety of circumstances. Parliament did not see fit to impose a mandatory minimum sentence. Where no minimum sentence is mandated by the *Criminal Code*, the entire range of sentencing options is open to a sentencing judge, including non-carceral sentences where appropriate. … (para. 54)

[130] In the case of Mr. Cardinal, given my view that the LTSO should serve a significant rehabilitative and reintegrative purpose, I am hopeful that if a breach should occur it will not automatically attract additional jail time or a long period of incarceration.

Obviously, the appropriate disposition will depend on the nature of the breach, but it is absolutely not my intention to have Mr. Cardinal spend many of the next years of his life on an installment plan in jail because he is having difficulty complying with an abstain condition, for example. That, to the extent that it could negatively impact and undermine his rehabilitation would not only be contrary to his best interests, but to the best interests of society as well.

Length of LTSO

[131] Section 753.1(3) reads as follows:

> (3) If the court finds an offender to be a long-term offender, it shall
>
> > (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.

[132] Ten years is the maximum supervision order I can impose. Taking into account Mr. Cardinal's youth, his limited criminal history, his other personal circumstances, including *Gladue* factors, and my initial reluctance to impose such a designation in the first place, I find that the appropriate length of the LTSO is a period of seven years.

[133] Frankly, had it not been for the opinions of Dr. Lohrasbe and Mark Stevens as to the need for Mr. Cardinal to have a long period of supervision after his release from custody, which serves, and in fact appears necessary, to assist in his rehabilitation as well as providing protection to the public, I would not have made this designation.

Credit for Remand Custody

[134] Sections 719(3) and(3.1) read as follows:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[135] Mr. Cardinal has been in custody for two years on these charges. Based upon the criteria set out in ***R.*** v. ***Vittrekwa***, 2011 YKTC 64, Crown counsel opposes Mr. Cardinal being given anywhere close to 1.5:1 credit, stating that he has not performed well in any of the three categories referred to in ***Vittrekwa*** as relevant to earned remission, these being employment, counselling and behaviour.

[136] One of the problems in using the ***Vittrekwa*** analysis, however, is that the evidence before the Court in ***Vittrekwa*** was in relation to an offender who had accumulated time on remand at WCC and was looking at a territorial sentence. As such, Mr. Vittrekwa was subject to an earned remission regime under both the federal and territorial legislation (*Corrections Act* S.Y., 2009, c. 3). In the present case, however, Mr. Cardinal is looking at a sentence in excess of two years and that would, in ordinary circumstances, be served in a federal institution. Therefore the evidence as to his actions while on remand in WCC are not directly relevant to a consideration about how likely it is that he would have received his statutory release had he been a serving prisoner at a federal institution.

[137] As stated in ***R.*** v. ***Stonefish***, 2012 MBCA 116, in paras. 50 – 54:

> **50** Federal statutory release is the concept that applies to sentences served in federal penitentiaries, while "earned remission" is an abatement of a sentence covered by provincial legislation and practice. Federal statutory release is governed by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, and provincial remission is governed by the *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20, and *The Correctional Services Act*, C.C.S.M., c. C230. See Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 8th ed. (Markham: LexisNexis Canada Inc., 2012) (at para. 13.39):
>
> > About half of all of those serving determinate federal-length sentences are released at the two-thirds - or "statutory release" - point of their sentence. The other 50 per cent are released by way of parole. Only 2 to 3 per cent of federal prisoners serve every day of their sentences before being released.
>
> **51** Remission is earned by a prisoner by obeying prison rules and by actively participating in programs. That earned remission may be forfeited in whole or in part if the prisoner commits a breach of the prison rules… .
>
> **52** Approximately 95 per cent of imprisoned offenders received provincial sentences and the vast majority of those are released on remission without terms and conditions at approximately the two-thirds point in their sentence (see Ruby, Chan & Hasan at para. 13.38).
>
> **53** Almost all of the provinces rely on the federal parole and statutory release rules (see s. 127 of the *Corrections and Conditional Release Act*). In Manitoba, *The Correctional Services Act* simply provides that the National Parole Board is empowered to address parole in Manitoba (see s. 22).
>
> **54** In the present case, the accused has received a jail term of a duration of less than two years and is, therefore, subject to the *Prisons and Reformatories Act* and *The Correctional Services Act*. The relevant provisions of the *Prisons and Reformatories Act* having to do with remission allow for the operation of provincial remission rules (see s. 6 of the *Prisons and Reformatories Act*, reproduced in para. 51 herein, and Part 3.1 of the *Correctional Services Regulation*, Man. Reg. 128/99).

[138] The *Corrections and Conditional Release Act* (“*CCRA*”) reads, in part, as follows:

> **127.** (1) Subject to any provision of this Act, an offender sentenced, committed or transferred to penitentiary is entitled to be released on the date determined in accordance with this section and to remain at large until the expiration of the sentence according to law.
>
> **...**
>
> (3) Subject to this section, the statutory release date of an offender sentenced on or after November 1, 1992 to imprisonment for one or more offences is the day on which the offender completes two thirds of the sentence.

[139] There are circumstances in which the automatic statutory release of an inmate can be denied. Section 129 of the *CCRA* sets out the procedures and criteria:

> ***DETENTION DURING PERIOD OF STATUTORY RELEASE***
>
> **129.** (1) Before the statutory release date of an offender who is serving a sentence of two years or more that includes a sentence imposed for an offence set out in Schedule I or II or an offence set out in Schedule I or II that is punishable under section 130 of the National Defence Act, the Commissioner shall cause the offender's case to be reviewed by the Service.
>
> (2) The Service shall, more than six months before the day on which an offender is entitled to be released on statutory release, refer the case to the Board — and provide the Board with any information that, in the Service's opinion, is relevant to the case — if the Service is of the opinion that
>
> > (*a*) in the case of an offender who is serving a sentence that includes a sentence for an offence set out in Schedule I, including an offence set out in Schedule I that is punishable under section 130 of the National Defence Act,
> >
> > > (i) the commission of the offence caused the death of or serious harm to another person and there are reasonable grounds to believe that the offender is likely to commit an offence causing death or serious harm to another person before the expiration of the offender's sentence according to law, or
> > >
> > > (ii) the offence was a sexual offence involving a child and there are reasonable grounds to believe that the offender is likely to commit a sexual offence involving a child or an offence causing death or serious harm to another person before the expiration of the offender's sentence according to law;…

[140] The Parole Board of Canada website provides the following information:

> **Statutory release:**
>
> - By law, most federal inmates are automatically released after serving two-thirds of their sentence if they have not already been released on parole. This is called statutory release.
> - Statutory release is not the same as parole because the decision for release is not made by the PBC.
>
> …
>
> - The Correctional Service of Canada (CSC) may recommend an offender be denied statutory release if they believe the offender is likely to:
>
> - commit an offence causing death or serious harm to another person;
> - commit a sexual offence involving a child; or
> - commit a serious drug offence before the end of the sentence.
>
> In such cases, the PBC may detain that offender until the end of the sentence or add specific conditions to the statutory release plan… .
>
> (Parole Board of Canada Website www.pbc-clcc.gc.ca, accessed April 4, 2013)

[141] The Correctional Service of Canada website defines Statutory Release as:

> The requirement that federally sentenced offenders serve the final third of their sentence in the community, under supervision and under conditions of release similar to those imposed on offenders released on full parole. Offenders serving life or indeterminate sentences are not eligible. Offenders on statutory release are inmates who either did not apply for release on parole, or who were denied release on full parole.
>
> (www.csc-scc.gc.ca, accessed April 4, 2013)

[142] I recognize that these website references are not legal authority, however they are statements by the Government of Canada intended to assist individuals in understanding the statutory scheme.

[143] Mr. Cardinal's time in custody, therefore, needs to be treated on the basis of him being an offender who will be receiving what would ordinarily be a federal sentence. As such, his time on remand at WCC needs to be considered in light of the regime under the *CCRA*. He, as a sentenced offender, and subject to s. 129 considerations, would have been entitled as of right to be released after completing 2/3 of his sentence.

[144] Mr. Cardinal's offences are Schedule 1 offences for the application of s. 129. As his sexual offences did not involve children, the question that would be before the Commissioner is whether:

> (i) the commission of the offence caused the death of or serious harm to another person and there are reasonable grounds to believe that the offender is likely to commit an offence causing death or serious harm to another person before the expiration of the offender's sentence according to law...(s. 129(2)(a)(i)).

[145] When I consider the application of statutory release under the *CCRA* to Mr. Cardinal's case, I recognize that I cannot say with any certainty whether Mr. Cardinal would or would not receive his statutory release after serving 2/3 of his sentence. These sexual assaults constitute serious bodily and psychological harm to the victims. The evidence I have before me is not clear one way or the other that Mr. Cardinal's statutory release would likely be denied on the basis of s. 129. As Dr. Lohrasbe has indicated, there is much about Mr. Cardinal's potential for risk that is unknown, although Dr. Lohrasbe makes it clear that there is a substantial risk that if Mr. Cardinal reoffends sexually the harm to the victim could be significant. It is impossible to ascertain what Mr. Cardinal's personal circumstances would have been after he had been provided opportunity to access federal programming.

[146] As the Court noted in ***Stonefish***, only 2 or 3% of federal prisoners serve every day of their sentences, 50% are released on parole and almost 50% are released on statutory release after serving 2/3 of their sentence. I believe that the likelihood, based upon this and other information, is that Mr. Cardinal would be released after serving 2/3 of his sentence. In making this determination, I consider the positive aspects for rehabilitation Dr. Lohrasbe has provided to the Court. Mr. Cardinal does not present as an individual who is incorrigible, unrepentant and committed or pre-disposed to pursue a violent criminal lifestyle. There is risk and uncertainty, but there are also many positive indicators which allows me to believe that Mr. Cardinal may benefit from further programming, including in particular what would likely have been available to him in a federal institution.

[147] I recognize that offenders released on parole or on statutory release are subject to conditions with which they must be compliant if they wish to remain in the community. By crediting Mr. Cardinal more than 1:1 for his time on remand on the basis of the denial of the opportunity to be paroled or receive statutory release, I am allowing him the equivalent of time in the community, but without such conditions. However, as he will be supervised in the community pursuant to the terms of the LTSO, I am satisfied that that difference does not amount to such as would cause me to limit his credit. Time in the community subject to conditions is still considerably less restrictive than time spent incarcerated.

[148] Several courts of appeal have now concluded that s. 719(3.1) of the *Code* allows for enhanced credit to be provided for an inmate's pre-sentence custody solely on the

basis of the loss of the opportunity to earn remission or parole. (See ***R.*** v. ***Summers***, 2013 ONCA 147; ***R.*** v. ***Carvery***, 2012 NSCA 107 and ***Stonefish***.

[149] In ***Summers*** the Court stated the following in paras. 98 - 112

> **98** The proportionality requirement embodied in s. 718.1 of the Code is not of recent origin. On the contrary, it has long been at the heart of the principles that guide sentencing under Canadian law. In *Ipeelee*, at paras. 36-37, the Supreme Court explained the fundamental importance of the proportionality requirement in sentencing law…
>
> > The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender…
> >
> > *The fundamental principle of sentencing (i.e. proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions*. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, *the resulting sentence must respect the fundamental principle of proportionality*. *Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence*. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.
> >
> > *Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender*. In this case, the principle serves a limiting or restraining function and ensures justice for the offender. *In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other*. [Citations omitted; Emphasis added.]
>
> **99** In addition to the core principle of proportionality, the principle of parity in sentencing, codified in s. 718.2(b) of the Code, promotes consistency in the law by directing that like offenders are to be punished in a similar manner for like offences. This approach fosters fairness in sentencing and enhances public confidence in the proper administration of justice.

100 In light of these principles, I am unable to conclude that the crediting discretion accorded to sentencing judges under s. 719(3.1) does not extend to consideration of the loss of remission and parole eligibility during remand custody. Such a conclusion would set s. 719(3.1) on a collision course with the touchstone sentencing principles of proportionality and parity, leading to unjust sentences and a corresponding erosion of public faith in the criminal justice system.

101 If, as the Crown maintains, the lack of remission and parole eligibility during remand custody can *never* justify enhanced credit for pre-sentence custody under s. 719(3.1), then the effective sentences of offenders denied bail or who do not seek bail, instead remaining in custody pending trial, will be longer than those of like offenders, charged with like offences, who do seek and are granted bail…

102 The sentencing judge in this case granted enhanced credit for pre-sentence custody at the rate of 1.5:1 precisely to avoid this type of disparate and inequitable treatment of offenders, in contravention of the proportionality and parity principles of sentencing.

103 In my view, under the applicable rules of statutory interpretation and in the interests of justice, an interpretation of s. 719(3.1) of the Code that avoids such unfair sentencing disparities is clearly preferable to one that facilitates such disparities. As the CLAO points out, whether an accused has been granted bail or held in custody pending trial is not a proper consideration on sentencing. While the relevant considerations on a bail hearing are in some respects similar to those applicable at a sentence hearing (*e.g.* the existence of a prior criminal record or community support mechanisms), the test for bail and the determination of a fit sentence are conceptually and functionally different.

…

110 What, then, was the intention of Parliament in enacting ss. 719(3) and (3.1)? As suggested by the long title of Bill C-25 -- "*An Act to amend the Criminal Code (Limiting Credit For Time Spent in Pre-Sentencing Custody)*", the Act is indisputably designed to limit the amount of credit available for pre-sentence custody. This purpose is manifest from the introduction of maximum credits for pre-sentence custody under both ss. 719(3) and (3.1).

111 Contrary to the Crown's submission, this legislative purpose is neither defeated nor impaired by an interpretation of s. 719(3.1) that permits consideration of the loss of remission and parole eligibility during remand custody as a circumstance that may support enhanced credit for pre-sentence custody. I say this because the Act eliminates any prospect for crediting such custody at a 2:1, or greater, rate. Indeed, it limits such crediting to the maximum rate of 1.5:1.

> These are dramatic changes to the previously established practice of ordinarily crediting pre-sentence custody at the 2:1 rate.
>
> **112** Limiting credit for pre-sentence custody to that calculated at a maximum rate of 1:1 (s. 719(3)) or at a rate greater than 1:1 up to a maximum of 1.5:1 (s. 719(3.1)) is a significant curtailment of the credit previously available for pre-sentence custody and of the wide discretion formerly exercised by sentencing judges when determining the appropriate amount of such credit to be granted in a particular case. A narrow construction of the phrase "if the circumstances justify it" is therefore not necessary to achieve the stated purpose of the Act.

[150] In ***Stonefish***, paras 109 – 114, the Court held that the circumstances to justify enhanced credit do not need to be exceptional, there is simply a need for the offender to establish on a balance of probabilities that the circumstances justify it.

[151] In paras. 44-46 of ***Stonefish*** the Court stated that:

> Circumstances adopted by courts that justify enhanced credit have included:
>
> 1) Conditions in remand facilities such as:
>
> - lack of programming or counselling available on remand - *e.g.*, *R. v. Haly*, **2012** ONSC 2302 (QL) (where a ratio of 1.2:1 was used); *R. v. Mullins (P.E.)*, 2011 SKQB 478, 388 Sask.R. 221; and *R. c. Auger*, **2012** QCCQ 568 (QL);
> - the number of lockdowns the offender experienced during PSC - *e.g.*, *Mullins*; *R. v. Oates*, **2012** ONCJ 461 (QL), but to the contrary, see *R. v. Sayed*, **2012** ONSC 843 (QL);
> - time spent by the offender in solitary confinement - *e.g.*, *R. v. Seymour*, 2011 BCSC 1682 (QL) (time spent there was for his own protection); *R. c. Guo*, 2011 QCCQ 10469 (QL); and
> - harsh circumstances in the remand facility - *e.g.*, *R. v. J.B.*, 2011 BCPC 158 (QL) (double-bunking, exposed to violence); *R. v. Clayton*, **2012** ABQB 333 (QL) (overcrowding, had to sleep on the floor); and *Auger* (no visitors while in PSC).

2) Post-trial delay not attributable to the accused, including delays caused by:

- the court - *e.g.*, *R. v. Dingwell (D.A.)*, **2012** PESC 13, 321 Nfld. & P.E.I.R. 263; *R. v. B.R.S.*, 2011 ONCJ 484 (QL); and *R. v. Sabatine*, **2012** ONCJ 310 (QL) (request for further submissions and time spent drafting reasons);
- the need to obtain a pre-sentence report or a *Gladue* (*R. v. Gladue*, [1999] 1 S.C.R. 688) report or a psychiatric assessment - *e.g*,. *R. v. House (Z.C.)* (**2012)**, 319 Nfld. & P.E.I.R. 197 (NL Prov. Ct.); *R. v. Sharkey*, 2011 BCSC 1541 (QL); and *R. v. Mozumdar*, **2012** ONCJ 151 (QL);
- multiple court appearances for the purposes of sentencing - *e.g.*, *R. v. Przybyla*, **2012** ABPC 183 (QL); and
- the Crown - *e.g.*, *R. c. Lefrançois*, **2012** QCCQ 5655 (QL).

45 There are also a number of cases which have identified circumstances where denying enhanced credit was justified. Such circumstances included delay caused by the offender and where an offender had a history of breaching court orders. In addition, where offenders have deliberately protracted their remand detention or otherwise endeavoured to manipulate the system, judges may well discount the credit ratio. See *R. v. Leggo (R.)* (**2012)**, 317 Nfld. & P.E.I.R. 252 (NL Prov. Ct.); *R. v. Morris*, 2011 ONSC 5206 (QL); *J.B.*; *Johnson*; and *Sabatine*.

46 None of the above factors are especially exceptional and I would conclude that the circumstances that justify enhanced credit in s. 719(3.1) of the *Code* need not be exceptional...

[152] Therefore I am providing Mr. Cardinal credit for his two years in remand custody at the rate of 1:5 to 1, for a total of 3 years.

[153] I wish to speak a bit further on this issue.

[154] It is clear that Mr. Cardinal's performance while in custody fluctuated from acceptable to unacceptable. By no means was his performance exemplary, but it also was not continuously or even mostly negative. Even by applying the criteria in

Vittrekwa, I would have provided Mr. Cardinal some credit above 1:1 for his time on remand due to loss of the potential to earn remission. I would also have provided him additional credit for the time he has spent in custody awaiting the preparation of the psychiatric assessment, the PSR and the *Gladue* Report, as well as for the time he has spent awaiting the preparation of this decision.

[155] I also consider Mr. Cardinal's Aboriginal background and the particular circumstances of his life, as well as the positive prospects he has for rehabilitation, as set out in the Psychiatric Report, the PSR and the *Gladue* Report as being circumstances that justify enhanced credit as per s. 719(3.1),. As a result, in applying the principles of s. 718.2(d) and (e), I would also have provided him some enhanced credit.

[156] We cannot, as judges who are tasked with imposing fair and just sentences, fail to take into consideration the harm that was done to Aboriginal families and communities through governmental policies such as the residential school system - harm that Canada has apologized for causing. The requirement to do so is implicit in a consideration of the purposes and principles of sentencing relevant in determining a fair and just sentence which, always, of course, consider the particular circumstances of the offence and the offender. By failing to consider Aboriginal status in determining the credit to be given an offender for his or her time in remand custody, the effect could well be the imposition of sentences that result in an offender spending more time in custody than would be fair and just, and would make a mockery of the apology Canada has offered to Aboriginal peoples.

[157] Justice requires that we “get right on crime”, and I have no difficulty stating that “getting tough on crime” does not always mean that we are getting it right.

[158] After taking all these circumstances in account, I would also have granted Mr. Cardinal 1.5:1 credit for his time on remand were he to be serving his time as a sentenced prisoner in WCC.

Sentence Imposed

[159] I have determined that a sentence of 52 months imprisonment in total is appropriate. The sentences for these two offences should be consecutive. I will not, for the purpose of arriving at this amount of custody, distinguish between the two offences and the two victims by imposing different sentences, notwithstanding that had I been sentencing Mr. Cardinal for one offence only, the sentence for that offence may have been different.

[160] Therefore, the sentence of 26 months for the sexual assault against F.G. will be reflected in time served. The sentence of 26 months for M.J. will be consecutive and will include credit for 10 months’ time served followed by 16 months custody.

[161] Mr. Cardinal is subject to a Long-Term Offender designation for a period of 7 years.

[162] A *Sex Offender Registration Act* Order (“SOIRA”) order is made under s. 490.012 of the *Code* and, in accordance with s. 490.013, this order will be for 20 years.

[163] These are primary designated offences as defined in s. 487.04 of the *Code* and I order that a sample of Mr. Cardinal’s DNA be taken for analysis as per s. 487.051.

[164] Mr. Cardinal will be subject to the mandatory prohibition order set out in s. 109 of the *Code* for a period of 10 years.

[165] I will waive the Victim Fine Surcharges, as he has been and will continue to be in custody for a considerable period of time.

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COZENS C.J.T.C