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(Thompson Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Monique Cam
	)	Inderjit L. Singh
- and -	)	for the Crown
	)	
CORY MURDOCK SCRIBE,	)	Crystal L. Antila
	)	Candace A.D. Olson
accused.	)	for the accused
	)	
	)	Judgment Delivered:
	)	July 15, 2024

GRAMMOND J.

INTRODUCTION

[1] The Crown applied, pursuant to s. 753(1) of the ***Criminal Code***, R.S.C. 1985, c. C-46, to have Cory Murdock Scribe found to be a dangerous offender and to have a sentence for an indeterminate period of detention imposed upon him with respect to a conviction for manslaughter.

[2] Mr. Scribe submitted that the court should impose upon him for the manslaughter conviction a 10-year fixed sentence less time served, followed by a 10-year long-term supervision order ("LTSO").

[3] The Crown also sought the imposition of the following ancillary orders, which Mr. Scribe did not oppose:

a) a lifetime firearms and weapons prohibition order pursuant to s. 109(3) of the ***Code***;

b) a mandatory primary offence DNA order pursuant to s. 487.051(1) of the ***Code***; and

c) an order directing that all relevant reports and transcripts of Mr. Scribe's guilty plea and sentencing proceedings be forwarded to the Correctional Service of Canada, pursuant to s. 760 of the ***Code***.

[4] On April 10, 2024, I designated Mr. Scribe as a dangerous offender and sentenced him to an indeterminate period of detention for the manslaughter, with written reasons to follow. These are those reasons.

BACKGROUND

[5] On June 21, 2021 Mr. Scribe pleaded guilty to the offence of manslaughter relative to the death of his childhood friend, Johnathon Hart. A brief summary of the material facts of the offence is as follows.

[6] On October 25, 2019, Mr. Scribe, Mr. Hart and others consumed alcohol and attended a number of drinking parties in Norway House First Nation. The following morning Mr. Scribe and Mr. Hart exchanged words, and Mr. Scribe slipped and hit his head. Mr. Hart mocked him and, unprovoked, Mr. Scribe punched Mr. Hart in the neck area. The punch caused Mr. Hart's head to rotate and damaged his vertebral artery, which caused his death.

[7] These events occurred approximately 23 days after Mr. Scribe's release from custody following an assault on his intimate partner.

ISSUES

[8] The two issues before me are:

a) Is Mr. Scribe a dangerous offender as described in s. 753 of the Code?

b) If so, is there a reasonable expectation that a measure less than an indeterminate sentence will adequately protect the public against the commission of murder or a serious personal injury offence by Mr. Scribe?

ISSUE 1: IS MR. SCRIBE A DANGEROUS OFFENDER?

The Law

[9] Section 754 of the ***Code*** requires that the following procedural steps be taken prior to a dangerous offender hearing, all of which were completed in this case:

a) the Attorney General consents to the application;

b) the Crown gives to the offender at least seven days notice of the basis for the application; and

c) a copy of the notice of the application is filed with the court.

[10] Section 753(1) of the ***Code*** provides that the court shall find an offender to be a dangerous offender if it is satisfied beyond a reasonable doubt that the offence for which they have been convicted is a serious personal injury offence, and that they constitute a threat to the life, safety, or physical or mental well-being of other persons on the basis of evidence establishing certain behaviour or patterns of behaviour (***R. v. Boutilier***, 2017 SCC 64, at para. 46, ***R. v. Currie***, 1997 CanLII 347, at para. 42).

[11] It is clear that the offence of manslaughter, to which Mr. Scribe pleaded guilty, is a serious personal injury offence, and as such the first criteria is met in this case.

[12] With respect to the second criteria, the Crown argued that a pattern of behaviour has been established under both ss. 753(1)(a)(i) and (ii) of the ***Code***. Subsection 753(1)(a)(i) requires a pattern of repetitive behaviour by an offender showing a failure to restrain their behaviour, and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through a failure in the future to restrain their behaviour.

[13] The defence acknowledged, and I agree on the evidence before me, that in this case such a pattern by Mr. Scribe has been established under s. 753(1)(a)(i). Certainly, the manslaughter offence that constitutes the predicate offence before me forms part of that pattern, together with Mr. Scribe's previous conviction for manslaughter and the 13 other convictions on his criminal record for offences involving violence, threats, and weapons, as well as his extensive record for violence in institutions.

[14] Given that a pattern of repetitive behaviour has been established pursuant to s. 753(1)(a)(i), I need not consider whether the Crown has proven a pattern of persistent aggressive behaviour and complete indifference to the reasonably foreseeable consequences of behaviour pursuant to s. 753(1)(a)(ii). Having said that, I note that Mr. Scribe's persistent aggression is readily apparent in his offending even where physical violence was not involved, when he has made threats or exhibited other unruly behaviour, both in the community and in custody. In addition, for the reasons that follow, I am satisfied that Mr. Scribe is substantially indifferent to the reasonably

foreseeable consequences of his behaviour. This includes physical injuries to his victims and the danger that he poses to others while under the influence of substances.

[15] The remaining criteria of a dangerous offender application was described in ***Boutilier***, at para. 26, quoting ***R. v. Lyons***, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, as follows:

> …it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others… Also explicit in one form or another in each subparagraph of s. [688, now 753] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable.
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> [emphasis in ***Boutilier***]

[16] The court in ***Boutilier*** added at paragraph 27 that "intractable" conduct is "behaviour that the offender is unable to surmount", and that sentencing judges are to "conduct a prospective assessment of dangerousness". More specifically, at the designation stage the court must assess the future threat posed by an offender whereas at the penalty stage, the court must consider whether the risk arising from the offender's behaviour can be adequately managed outside of an indeterminate sentence (***Boutilier***, at paras. 31 and 45).

[17] In other words, to determine whether Mr. Scribe is a dangerous offender I must conduct a prospective inquiry into whether he poses a high risk of harmful recidivism and is resistant to treatment or change. If, having considered all of the relevant evidence, I am satisfied beyond a reasonable doubt that there is a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct, I must designate him as a dangerous offender (***Boutilier***, at paras. 41 and 46).

[18] When considering this aspect of the test I must consider whether Mr. Scribe will continue to be "a real and present danger in the future", and unable to overcome the pattern of violent conduct. More specifically, I must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects (***Boutilier***, at para. 43).

Likelihood of Harmful Recidivism

[19] The law is clear that the court may consider clinical evaluations identifying the presence of mental illnesses in an offender and the treatability thereof, the presence of deeply ingrained personality traits or disorders that are likely to persist over time, and the presence of substance abuse disorders, as all of these factors are relevant to understanding the offender's repetitive, aggressive behaviours and the relationship of that behaviour to the predicate offence. The presence of impulsivity, a lack of empathy, and the need for immediate gratification at the expense of others will assist the court in examining the risk assessment and management of risk factors (***Boutilier***, at para. 44).

[20] In this case, the Crown submitted, given Mr. Scribe's diagnoses of personality disorders and the other risk factors present, that he is at high risk of harmful recidivism. More specifically, the Crown argued that there is a likelihood that Mr. Scribe will cause death, injury, or psychological damage to other persons through a failure to restrain his behaviour, and that he will show a substantial degree of indifference regarding the reasonably foreseeable consequences of his behaviour to other persons.

[21] Conversely, Mr. Scribe submitted that the risk of future harm that he poses has lessened, as evidenced by his behavioural changes since the predicate offence. He also submitted that his issues can be addressed adequately given the availability of appropriate resources in Correctional Service Canada ("CSC") institutions. Mr. Scribe pointed to the following factors in support of his submissions:

a) he has not retaliated when assaulted in custody;

b) he has had fewer instances of institutional infractions;

c) he has sought out psychiatric help repeatedly;

d) he has sought out assistance from Elders and has participated in cultural practices repeatedly; and

e) he has shown a clear willingness to engage in the rehabilitative programing that CSC offers.

Analysis

[22] I will begin my analysis of the likelihood of harmful recidivism with a review of the medical evidence tendered by the Crown. Mr. Scribe did not call evidence at the sentencing hearing, and accordingly the only medical evidence before me is an Assessment Report dated May 5, 2022 and a Supplementary Report dated August 23, 2023, both prepared by Dr. Andrew Haag, psychologist, ("Dr. Haag") pursuant to s. 752.1 of the ***Code***. Dr. Haag testified at the hearing, having been qualified as an expert in the area of Forensic Psychology, including the assessment, treatment, and management of violent and sexual offenders[1].

[1] Mr. Scribe did not challenge Dr. Haag's expertise or qualifications.

[23] Dr. Haag testified that he interviewed Mr. Scribe on five occasions in February 2022, totaling approximately nine hours, and that he also interviewed Mr. Scribe's mother.

Use of Institutional Records

[24] Dr. Haag also testified that he conducted an extensive review of Mr. Scribe's files, and the extent of that review is evidenced in the reports, which set out various events in Mr. Scribe's history, many of which were taken from Mr. Scribe's files including "running records" in various institutions.

[25] I recognize that running records are maintained by corrections staff and that they do not constitute a complete record of every single interaction between staff and an inmate. In addition, an inmate is generally not asked for their position with respect to the contents of the running record, such that it could be one-sided. Having said that, corrections staff who testified in this matter maintained that the contents of the running record is accurate.

[26] I note that in ***R. v. Gardiner***, 1982 CanLII 30 (SCC), [1982] 2 SCR 368, the court stated that in a sentencing hearing, "…hearsay evidence may be accepted where found to be credible and trustworthy." I am also mindful of the comments of the court in ***R. v. Jones***, 1994 CanLII 85 (SCC), [1994] 2 SCR 229, that:

> In the case of dangerous offender proceedings, it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety.
>
> …
>
> The sentencing stage places a stronger emphasis on societal interests and more narrowly defines the procedural protection accorded to the offender.

[27] In ***R. v. Gregoire***, 1998 CanLII 17679 (MBCA), (at paras. 62 and 63), the court confirmed that documentary records, including corrections records, made contemporaneously by someone having personal knowledge of the matters being recorded and with a duty to make the record should be received as *prima facie* proof of the facts stated therein. The court stated that this approach is a well-recognized exception to the hearsay rule, and is permissible under the ***Canada Evidence Act***, R.S.C., 1985, c. C-5.

[28] All of the foregoing principles were accepted and applied in ***R. v. Piche***, 2006 ABCA 220.

[29] In this case, Mr. Scribe was aware of the Crown's intention to rely upon both the records and Dr. Haag's reports which reference the records. He could have challenged the accuracy of any of the records but he did not do so, and I am satisfied that he was not denied procedural safeguards either leading up to or during the sentencing hearing.

[30] For all of these reasons, and given the applicable law, I am satisfied that the various records in evidence can be relied upon to decide the issues before me.

Dr. Haag's diagnoses

[31] Following Dr. Haag's review and assessment, he diagnosed Mr. Scribe with the following mental disorders found in the Diagnostic and Statistical Manual of Mental Disorders:

a) Antisocial Personality Disorder[2] ("APD"), defined as a "pervasive pattern of disregard for and violation of the rights of others, occurring since age 15

[2] Mr. Scribe's files reflect that he was similarly diagnosed in 2016, while in federal custody.

years". Dr. Haag pointed to Mr. Scribe's repeated criminal behaviour, his impulsivity or failure to plan ahead, and his irritability and aggressiveness, all occurring since the age of 15 years, in support of this diagnosis. He also testified that Mr. Scribe exhibited elements of three of the other diagnostic criteria of APD;

b) Borderline Personality Disorder ("BPD"), defined as a "pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity, beginning by early adulthood and present in a variety of contexts". Dr. Haag noted Mr. Scribe's pattern of unstable interpersonal relationships, damaging impulsivity, recurrent suicidal behaviour or self-mutilating behaviour[3], difficulty controlling anger, and periods of transient, stress-related paranoid ideation in support of this diagnosis;

c) Persistent Depressive Disorder (in remission at time of interviews);

d) Intermittent psychosis (likely substance induced);

e) Alcohol Use Disorder, Cannabis Use Disorder, Opioid Use Disorder, and Stimulant Use Disorder (collectively the "Substance Use Disorders"). Dr. Haag testified that all of these disorders were diagnosed in a similar way, as follows: Mr. Scribe was taking more substances than he should be taking, he built up a tolerance, he continued to use substances despite significant consequences, and said he would quit but failed to do so;

f) Fetal Alcohol Disorder (historical diagnosis); and

[3] Mr. Scribe's files reflect that on many occasions since approximately age 14 he has had suicidal thoughts, has threatened suicide, has attempted suicide, and has self-harmed.

g) ADHD (Attention Deficit Hyperactivity Disorder) (a historical diagnosis, of which Mr. Scribe was not currently displaying symptoms).

[32] Mr. Scribe did not dispute these diagnoses, and I accept Dr. Haag's evidence on these points.

[33] I have considered the diagnoses and Mr. Scribe's future treatment prospects in the context of a prospective risk assessment of Mr. Scribe, and in particular whether he will continue to be "a real and present danger in the future".

Dr. Haag's assessment of risk

[34] Dr. Haag testified that there are two broad methods that have been empirically validated to address the prediction and assessment of violent recidivism: the actuarial approach, which is purely statistical, and the structured professional judgment approach, wherein both literature and variables that are known to predict violence are considered. Dr Haag testified that each of these approaches has strengths and weaknesses. For example, the structured professional judgment approach is more readily reassessed and changed, whereas the actuarial approach has minimal bias. Dr. Haag testified that he used both approaches in assessing the risk presented by Mr. Scribe.

[35] Dr. Haag acknowledged that the risk assessment tools he used to assess Mr. Scribe have been subject to criticism in the medical community, but he also stated that he is aware of no risk assessment tool that is accepted universally as being 100% reliable. He testified that he selected these tools cautiously, which are of the broadest application, are well validated, and in which he has the most confidence.

[36] Dr. Haag acknowledged that cognitive status is not considered significantly within the variables of the tools, but he added that it is not very predictive of violent recidivism. Similarly, physical health is not taken into account by the risk assessment tools.

[37] Dr. Haag testified that he considered Mr. Scribe's Indigenous history when deciding what risk assessment tools to use and that he incorporated Indigenous history into his report. Having said that, he acknowledged that the tools' scoring does not adjust for Indigeneity or the impacts of historical traumatizing events upon Indigenous people. In addition, some of the criteria within the tools are static factors that are seen disproportionately in Indigenous populations.

[38] Dr. Haag also testified that while there is no certainty that the risk assessments are applicable equally to the Indigenous population and other populations, the risk factors and general predictors of crime are similar in all populations. He also stated that there are more consistencies than differences across populations, and expressed confidence that the tools are as predictive for both Indigenous and non-Indigenous populations. In other words, the best evidence available reflects that the predictive power of these tools is remarkably consistent in all contexts. Dr. Haag agreed, however, that more research regarding Indigenous populations specifically could improve the tools.

[39] Mr. Scribe submitted that since there are no specific studies testing the efficacy of the risk assessment tools for Indigenous persons, the court should exercise caution, and should not place undue emphasis on the tools' ability to predict the future

behaviour of Indigenous offenders. Mr. Scribe also argued that his physical health issues, which include chronic back pain and persistent heart issues, could be relevant to his future risk, and were not taken into account by the risk assessment tools utilized by Dr. Haag.

[40] The Crown submitted that Mr. Scribe has not identified any specific issues with either the risk assessment tools utilized by Dr. Haag or his application of those tools in this case. As such, the defence's concerns about the tools are hypothetical and Dr. Haag's assessment has not been undermined.

[41] Dr. Haag assessed Mr. Scribe using two different risk assessment tools, as follows:

a) the Historical Clinical Risk Management-20, version 3 ("HCR-20^{V3}"), which is a structured professional judgment tool developed in Canada used to consider factors relevant to the assessment of violent recidivism. Dr. Haag determined that 19 of 20 specific variables applied to Mr. Scribe and that Mr. Scribe's violence:

    1. Could involve anything from a threat to a homicide;

    2. Could be directed at either males or females;

    3. Could be committed against those known to him or complete strangers;

    4. Is likely to occur in the context of negative associates and/or while intoxicated; and

    5. Could occur in either the short or the relatively long term; and

b) the Violence Risk Appraisal Guide – Revised ("VRAG-R"), which is a 12-item actuarial scale designed in Canada to predict the risk of violent recidivism using the clinical record as a basis for scoring an individual. The VRAG-R also considers information gleaned from a person's psychosocial history, criminal record, the age at which they committed their index offence, and some elements of psychopathy. Mr. Scribe's score on this instrument was noted to be +36, which is in the highest possible risk category and at the highest possible end of the range in terms of a risk for future violence. In addition, Mr. Scribe's score was in the 97th percentile when compared to the normative sample of 1261 persons. Dr. Haag acknowledged that there are no specific studies of the use of this tool on the Indigenous population specifically and that some of the factors used on this scale can be more prevalent in the Indigenous population.

[42] Dr. Haag also assessed Mr. Scribe using the Psychopathy Checklist – Revised ("PCL-R"), which was designed to assess the personality and behavioural construct of psychopathy by considering a constellation of 20 factors that are assessed as being stable over time. Dr. Haag testified that the PCL-R has predictive utility because those who score highly on it are responsible for a disproportionate amount of violent crime. As such, it is used as part of a comprehensive risk assessment even though it was not designed as a risk assessment measure or a predictor of violence. In addition, there is

some clinical judgment involved in the PCL-R and a portion of the score is incorporated into the VRAG-R calculations of risk.

[43] Mr. Scribe received a score of 34 out of 40 on the PCL-R, which in the 96.4th percentile of a normative sample of North American male offenders[4], whose average score is 25 out of 40. Since Mr. Scribe's score exceeded 30, he is classified as psychopathic.

[44] Variables on the PCL-R on which Mr. Scribe scored two points (the maximum amount) included the need for stimulation, pathological lying, manipulative behaviour[5] including using threats to get his way, callousness and a lack of empathy, a parasitic lifestyle, poor behavioural controls, early behaviour problems, a lack of realistic long-term goals, impulsivity, irresponsibility, many short-term marital relationships, juvenile delinquency, revocation of conditional release, and criminal versatility.

[45] On cross-examination, Dr. Haag acknowledged that some of the evidence supporting his assignment of points on the PCL-R arose from events that took place before the predicate offence. He also acknowledged that factors other than psychopathy can contribute to the variables on the PCL-R. For example, there could be reasons other than psychopathy why a person has trouble setting realistic long-term goals for themselves. Dr. Haag testified that the PCL-R is not concerned with how a variable is present but whether it is present.

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[4] There is no normative sample for Indigenous offenders, although Dr. Haag testified that there have been specific studies on Indigenous versus non-Indigenous scorings on the PCL-R and that it performs remarkably similarly, though not identically, across populations.

[5] Mr. Scribe's files are replete with references to his use of threats and manipulation to achieve specific outcomes in a variety of situations.

[46] Dr. Haag conducted the risk assessments of Mr. Scribe prior to the completion of his assessment report on May 5, 2022. Mr. Scribe noted that Dr. Haag did not update the risk assessments or reapply the risk assessment tools thereafter, including when he prepared and completed the supplementary report dated August 23, 2023. Dr. Haag stated that any new materials which he reviewed in advance of preparing the supplementary report did not change his original assessment of the risk posed by Mr. Scribe.

[47] More specifically, Dr. Haag testified that he would be interested in changes in Mr. Scribe's behaviour, and that while long-term behavioural changes would adjust the risk assessment outcomes, Mr. Scribe's participation in programming in custody would have little impact on the outcome of the VRAG-R, for example. Conversely, time spent in the community without offending would impact its outcome, and that impact would increase over time. He acknowledged, however, that there is guidance that the HCR-20^{V3} risk assessment can be conducted annually, and that its outcome could be impacted.

[48] Mr. Scribe argued that he has exhibited a marked change in his behaviour as reflected in the new materials provided to Dr. Haag, which should be taken into account when the court considers Dr. Haag's opinions and conclusions.

[49] My conclusions with respect to Dr. Haag's use of risk assessment tools are as follows. I accept Dr. Haag's evidence that the use of these tools will lead to a much more accurate risk assessment than would raw clinical judgment that, by definition, would be laden with bias. Dr. Haag testified that clinical judgment is not useless, but

for the purposes of the long-term prediction of risk it is akin to a "coin flip" and is significantly inferior to the tools available.

[50] I note also that both the HCR-20^{V3} [6] and the VRAG-R were developed in Canada, and that the VRAG-R was validated using Canada's offender population. As such, while, unfortunately, there would have been a disproportionately high number of Indigenous offenders involved in that process given the demographic of Canada's prison population, the VRAG-R is relevant to the risk assessment of Indigenous offenders.

[51] I accept that any risk assessment tool can be improved upon with further research and study, and to the extent that this occurs in the future, both the HCR-20^{V3} and the VRAG-R may be enhanced. Having said that, Dr. Haag testified that these were the best risk assessment tools available to him in this case, and that their predictive power is remarkably consistent in all contexts.

[52] In ***R. v. Gracie***, 2019 ONCA 658, the court concluded that actuarial tools are reliable predictors of the future risk of recidivism in Indigenous offenders. Mr. Scribe submitted that this conclusion was based upon the evidence in that case, and that I must reach my own conclusion based upon Dr. Haag's evidence. Although I agree with that submission, I note that Mr. Scribe has not identified any specific issues with the use of risk assessment tools in this case. As such, I have concluded that the defence's concerns about the use of risk assessment tools are theoretical, and I agree with the Crown that Dr. Haag's use of the tools has not been undermined. I accept, therefore, that the predictive power of the risk assessment tools is quite consistent in all contexts.

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[6] Dr. Haag acknowledged that some of the variables of the HCR-20^{V3} are often different in Indigenous populations than in other populations.

[53] I also accept Dr. Haag's explanations as to why he did not update the risk assessments of Mr. Scribe prior to finalizing his supplementary report in August 2023. Dr. Haag opined that meaningful change in Mr. Scribe will take time, and that in this case the assessment results would not have changed materially from that reflected in his initial report.

[54] Most importantly, however, I note, as did the court in ***Gracie***, that the risk assessment tools were only one of several factors taken into account by Dr. Haag. His opinion regarding Mr. Scribe's risk of recidivism was also based upon his detailed review of Mr. Scribe's files, the application of a number of psychometric tools, his lengthy interviews of Mr. Scribe, and his interview of Mr. Scribe's mother.

[55] This multi-pronged approach is important because in ***R. v. Natomagan***, 2022 ABCA 48, at para. 97, the court cautioned, and I agree, that "[w]hile risk assessments are helpful, courts should remain alert to the potential for erroneous over-prediction of future violence".

[56] Dr. Haag concluded, based upon multiple factors, that Mr. Scribe is a high-risk for violent recidivism, and could pose a threat to anyone at any time. Having considered the context of Dr. Haag's evidence and his opinion as a whole, including the totality of the factors that formed the basis of his opinion, I am prepared to attribute significant weight to his conclusion.

[57] I accept, therefore, that Mr. Scribe poses a high risk of harmful recidivism and that he will continue to be "a real and present danger in the future".

Intractability

[58] Having found that Mr. Scribe poses a high risk of harmful recidivism, the next question that I must consider is whether this risk is substantially or pathologically intractable.

[59] As referenced above, consideration of an offender's future treatability is relevant at both the designation stage and the sentencing stage of a dangerous offender proceeding. The law is clear that the court will consider prospective treatment options (***Boutilier***, at para. 44).

[60] In ***R. v. Cook***, 2010 MBQB 237, the court stated:

> [31] In *R. v. Pedden*, 2005 BCCA 121, 194 C.C.C. (3d) 476, in which leave to appeal to the Supreme Court was refused, the British Columbia Court of Appeal held that the trial court need not find that the accused is absolutely intractable. Where the possibility of successful treatment exists, but it is unlikely that successful treatment would occur within the time contemplated by the long-term offender provisions, then a finding that the accused is a dangerous offender is correct.
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> …
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> [39] In *R. v. McCallum* (2005), 2005 CanLII 8674 (ON CA), 201 C.C.C. (3d) 541, the Ontario Court of Appeal held that evidence which amounts to no more than a **hope** that the offender would either be amenable to treatment, or would be treatable within a definite period of time, cannot meet the requirement in s. 753.1(1)(c) (reasonable possibility of eventual control of the risk in the community) to justify making a long-term offender, rather than a dangerous offender, designation. There must be evidence of treatability that is more than an expression of hope and there must be an indication that he can be treated within a definite period of time. See *R. v. Higginbottom* (2001), 2001 CanLII 3989 (ON CA), 156 C.C.C. (3d) 178 (Ont. C.A.).
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> [emphasis in original]
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> …
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> [42] There must be an air of reality to the possibility of reducing or controlling the risk. See *R. v. Casemore*, 2009 SKQB 306, [2009] S.J. No. 440 (QL), at para. 19; *R. v. D.W.A.P.*, 2006 BCSC 1288, [2006] B.C.J. No. 1961 (QL). One of the questions for determination is whether there is a reasonable possibility of controlling the risk inherent in returning the offender to the community.

[61] The Crown echoed that there must be an air of reality to the possibility of reducing or controlling risk. In other words, there must be both a reasonable plan that is not speculative or hypothetical, and evidence of treatability that involves more than mere hope or empty conjecture that Mr. Scribe can be treated within the timeframe of a determinate sentence.

[62] Mr. Scribe submitted that there is more than a mere expression of hope of treatment in this case, because there is evidence that he has demonstrated a shift in his willingness to be treated and to engage in programming. Moreover, Dr. Haag did not say it was impossible for Mr. Scribe to reduce his risk or that he could not benefit from programs. Mr. Scribe submitted that going forward he will have greater opportunities for programming, and that many of the reasons why he did not complete past programming, which were out of his control[7], will no longer apply. Mr. Scribe also noted that there are elements of clinical judgment in Dr. Haag's assessment, and that no professional person can necessarily predict whether someone will be rehabilitated by programming.

Treatment of APD

[63] Dr. Haag testified that while there is no data available on the treatment of APD itself, there is a wealth of data on the treatment of behaviour exhibited by people who have APD. More specifically, their behaviour can be treated using cognitive behavioural therapy ("CBT"[8]) or other approaches. Having said that, a person's treatment is made

[7] Mr. Scribe submitted that this includes time spent in segregation, transfers between institutions, and limited programming options.

[8] CBT entails an examination and challenge of the thoughts, feelings, behaviours, activities, or situations that preceded a negative event, such as a violent event, with a view to addressing them and having a plan to prevent another event at the earliest possible stage.

more difficult and complex by their childhood and upbringing, because the factors that must be examined in CBT are a product of their lifetime, did not arise quickly, and may be very persistent in the person's mind.

[64] Dr. Haag opined that the treatment of behaviours associated with APD would take a minimum of six months of full-time therapy, followed by years of maintenance programming, because the treatment is intended to address a person's traits, or tendency to respond in a certain way, and even the most well-intentioned person will take time to embrace new ideas and implement them consistently. He stated also that the longer that a person's traits have been in play, the longer it will take to see that they have changed. Moreover, some of the person's thoughts that contribute to their negative behaviours could be counterproductive to their treatment. For example, if someone saw the people around them as hostile, their treatment in a group setting could be impeded.

[65] Dr. Haag also testified that facets of APD can contribute to the prediction of violent recidivism, because the two factors are correlated. In other words, there is a high correlation between APD and criminal behaviour. Having said that, psychopathy has been found to be a relatively powerful predictor of disproportionate amounts of violent offending moreso than APD.

[66] Dr. Haag testified that a diagnosis of APD would not impact someone's criminal responsibility, in that they would understand the consequences of their actions upon other people, and that they were hurting someone, although they may be callous in that regard. Having said that, APD could impact a person's ability to restrain their

aggressive behaviour, because impulsivity is a potential feature of the disorder, and is an issue for Mr. Scribe. APD would be an impediment, therefore, to successfully controlling or restraining one's behaviour because it makes it more difficult for them to stop and think before they act.

[67] Dr. Haag is a psychologist and not a medical doctor, but he testified that he is unaware of any prescription medications available to treat APD.

[68] Dr. Haag described his view of Mr. Scribe's chances of overcoming his long-term pattern of antisocial behaviour as "guarded", because Mr. Scribe has had many opportunities to address his behaviour in the past (as discussed below), but for many reasons he has not done so.

[69] Mr. Scribe noted that there are many CBT programming options available in institutions for Mr. Scribe to access, and that he has already begun to access them.

Treatment of BPD

[70] Dr. Haag testified that BPD can be treated with Dialectical Behavioural Therapy ("DBT"), which is a variation of CBT with an emphasis on the immediacy of what someone is experiencing at a given time, and what tools they can use to deal with their intense emotions at that time. He stated that ideally, treatment would be administered in a setting where all medical personnel are trained in DBT, so that they can respond appropriately when required.

[71] Dr. Haag testified that he is not aware of any true DBT programs being offered in Canada, though he believes that DBT informed treatment is offered in certain hospitals or correctional institutions such as regional psychiatric centres, but at a lower

dosage than that which he is recommending. One CSC witness testified that DBT is offered by CSC at regional psychiatric centres including in the Province of Saskatchewan, but it is unclear whether CSC offers DBT in a setting where all medical personnel are trained in DBT, as Dr. Haag recommended for Mr. Scribe.

[72] Dr. Haag testified that the prospects of treating Mr. Scribe's BPD are guarded, given his behaviour over the long-term, and that if DBT was successful for Mr. Scribe it would be necessary to follow-up with him for years after treatment. In addition, the fact that Mr. Scribe has been diagnosed with both APD and BPD is a comorbidity that provides additional reasons to be guarded, because both disorders reflect some common features.

Treatment of Substance Use Disorders

[73] Dr. Haag characterized Mr. Scribe's various substance use disorders as "reasonably severe", and noted that substance use has contributed to Mr. Scribe's past offending, in that it has induced psychosis in him. In addition, Mr. Scribe's use of substances makes it much harder for him to restrain his behaviour, and to consider the consequences of his behaviour in a given situation.

[74] Dr. Haag testified that although substance use disorders can be treated with self-help groups, CBT, various medications, and institutional programming, they can take a very long time to treat. In addition, people tend to have multiple relapses over the course of treatment, including Mr. Scribe, who has repeatedly expressed a willingness to receive treatment, but has returned to substance use in the past which in turn contributed to his offending behaviour. In addition, although the use of multiple

substances is common, it is a complicating factor, which Dr. Haag testified made his assessment of Mr. Scribe's treatment prospects more guarded.

[75] On cross-examination, Dr. Haag acknowledged that substance use is treated commonly in institutions, using a variety of different treatment options, including pharmacological options, some of which Mr. Scribe has taken in the past. He also agreed that if Mr. Scribe addressed these disorders, there would be a dramatic impact upon his risk. Having said that, Dr. Haag also noted Mr. Scribe's advice that his opioid use started while he was in federal custody in the Atlantic Region.

Treatment of Psychopathy

[76] Dr. Haag testified that he is not aware of any empirically validated treatment programs for psychopathy, but that the specific behaviours involved can be treated. In that sense, the treatment approach is similar to that for APD as described above.

[77] Dr. Haag also testified that any one of the 20 variables on the PCL-R has the potential to present a challenge or an obstacle to an individual's motivation to change. In other words, while it is conceivable that Mr. Scribe's psychopathy can be treated, the presence of the PCL-R variables will be a barrier going forward and could inhibit effective treatment and management.

[78] Dr. Haag testified that he was not aware of how Mr. Scribe could overcome the classification of a psychopath. He opined that, theoretically, after 10 years of behaviour contrary to his past behaviour, his scores on the PCL-R could be lowered. In other words, his behaviour over the long-term would have to be evaluated.

[79] Dr. Haag testified that treating psychopathy is a challenge because the relevant behaviours are ingrained over a lifetime. For example, in July 2002, when Mr. Scribe was 14 years of age, the following was noted by Probation Services in a supplementary report prepared for court use:

> [Mr. Scribe] … has mastered the skills of using his size in order to intimidate and manipulate people into doing what he wants them to. In addition, he has a tremendous amount of difficulty in understanding that he is not always able to get what he wants, when he wants and there are rules and expectations. This is a concern for this writer as the safety of MYS staff/residents and the general public are at risk should they encounter Cory when he chooses to become violent.

Past Treatment of Mr. Scribe

[80] I have reviewed the treatment that has been offered to Mr. Scribe over the years and the treatment that he has undergone. Certainly, there have been occasions on which Mr. Scribe has participated and engaged in programming actively, and has demonstrated an awareness of his risk factors. He has also requested and participated in sweats and sessions with Indigenous Elders or other spiritual mentors on many occasions. In addition, he has engaged repeatedly with psychiatry and psychology services.

[81] Mr. Scribe submitted that he has a willingness to engage in treatment and to address the concerns underlying his past behaviour. He also argued that when he has accessed resources in the past, he has done so meaningfully and genuinely. He noted that going forward, he will have consistent access to programming both in custody and in the community after his release.

[82] Dr. Haag testified that in considering Mr. Scribe's prospects for future treatment, he reviewed Mr. Scribe's past participation in risk management and risk reduction

treatment and programs. He did so for a variety of reasons, including to determine the treatment modalities to which Mr. Scribe has been exposed, whether there were patterns to be observed, and whether past treatment was effective.

[83] As Dr. Haag noted, the record reflects that since Mr. Scribe was an adolescent he has been offered correctional programming and mental health treatment in a variety of subject matters (including anger management and substance abuse) on multiple occasions. Some of the programming included an Indigenous-specific component, and/or one-on-one sessions with mental health professionals.

[84] I note that at different times over the years, Mr. Scribe has been offered and has received support and programming from each of Probation Services, Manitoba Corrections, and CSC.

[85] I will comment upon specific examples of the programming or treatment undertaken by Mr. Scribe as follows. This review is not intended to be comprehensive, because Mr. Scribe's files reflect examples of programming attempts dating back to approximately 2000 that are too voluminous to include in these reasons. I have focused, therefore, upon examples from the last 10 years, and I have referenced both instances with successful outcomes, and instances in which Mr. Scribe either did not take offered treatment or failed to complete programming. Certainly, there are many notations in Mr. Scribe's file[9] that at times he was not trying in earnest, was blaming others, was not taking responsibility for his actions, or was not learning.

[9] Unfortunately, this theme recurred consistently over the years, and some examples are referenced in these reasons at paragraphs 86, 87, 90, 101, 106, 107, 112, and 119.

[86] In November 2014, it was noted that Mr. Scribe was showing a commitment to change after participating in programming, but he was later discovered to have been distributing illegal drugs in the institution while the programming was ongoing. As such, the programming did not seem to have had a true impact on his attitude or behaviours.

[87] In April 2017, Mr. Scribe was assessed and admitted to the Regional Mental Health Centre ("RMHC"), where he was reported to:

a) have done his homework;

b) be open to intervention;

c) participate well at times;

d) resort mainly to medications to stabilize his condition;

e) have trouble with self-regulation;

f) continue to struggle with anxiety, hallucinations and emotional outbursts; and

g) have trouble acknowledging his delinquent behaviour, and tend to downplay or deny his actions, which impacted his ability for self-criticism, reflection and accountability.

[88] Unfortunately, Mr. Scribe assaulted another inmate at the RMHC, and was discharged in May 2017 for aggressive and intimidating behaviour. In other words, he remained at the RMHC for less than two months. Mr. Scribe was then noted to have expressed dissatisfaction that he was discharged, and expressed feelings of abandonment.

[89] In early 2018, while out of custody, Mr. Scribe registered for, participated in, and completed programs, including anger management and strengthening families. He also enrolled in but did not complete the Culturally Appropriate Program and attended at the Eyaa-Keen Healing Centre from May 1, 2018 until his arrest on May 8, 2018 (for a charge of break enter and commit assault against his intimate partner at the time).

[90] Shortly thereafter, in May 2018, Mr. Scribe applied to the Winding River program in Headingley Correctional Centre ("HCC"), which is a program for inmates with substance abuse issues. Mr. Scribe was denied admittance to the program because of his history, the seriousness of his criminal record (which included a conviction for manslaughter), his risk assessment, and his failure to meet the security criteria required for that program (inmates with gang associations are not accepted into the program). Instead, Mr. Scribe was offered one-on-one CBT programming but he rejected that option, stating that he wanted programming all day, every day, and would seek admittance into the Winding River program again. He was also noted to have said that he wanted to do programming so it would look good in court.

[91] In the summer of 2018, Mr. Scribe participated in and completed the Coming to Terms program at HCC, and was noted to have done excellent work in the program. Coming to Terms is a 20 hour, 10 session, CBT based program focusing upon a participant's alcohol and drug use and the effect thereof on their life.

[92] From March 29 to April 15, 2019 Mr. Scribe participated in the End to Aggression program at HCC which included 30 hours of CBT, and he was noted to be an active participant. He identified his struggles with managing anger and identifying his warning

signs. He also expressed empathy and understood the importance of recognizing warning signs. He participated in other programming and one-on-one counselling, in which he was reported to have done well. In other words, it seemed that Mr. Scribe was making progress.

[93] Unfortunately, all of the foregoing programming successes and failures (and many others that I have not referenced specifically) preceded the predicate offence which took place on October 26, 2019. I will comment now upon some of the programming and other activities in which Mr. Scribe was involved after the predicate offence.

[94] Shortly after the predicate offence, an in-custody non-communication order issued, prohibiting Mr. Scribe from contacting the witnesses to the homicide of Mr. Hart, whether by telephone, or in any other way, including through any other person. In February and March 2020, Mr. Scribe contacted two of these witnesses by telephone, and through Facebook, threatening them not to attend court and testify against him with respect to the predicate offence. He also instructed third parties to contact the witnesses for the same reason.

[95] In February 2020, Mr. Scribe took steps to contact his former intimate partner, who was the subject of a different no-contact order relative to an assault by Mr. Scribe.

[96] In August 2020, Mr. Scribe participated in a Level of Service Case Management Inventory ("LS/CMI") interview, on which he scored a 38, which is very high. He was noted to be "not surprised" by the score, and to have commented "of course I am going to reoffend, I told you that."

[97] In October 2020, Mr. Scribe participated and completed the Thinking Awareness Group, which is a 20 hour program that introduces the concepts of CBT processes, including how thinking affects feelings and behaviour. Mr. Scribe attended 8 of the 10 sessions, appeared to understand the material, and completed all of his assignments.

[98] In December 2020, Mr. Scribe again contacted his former intimate partner, while continuing to be bound by a non-communication order, and threatened her not to attend court and testify against him. He also instructed two third parties to contact her for the same reason.

[99] From July 2021 to December 2022, Mr. Scribe was held in the Intensive Supervision Units ("ISU") in HCC. A witness from HCC testified that the results of Mr. Scribe's participation in programming during that time were mixed. More specifically, at times he participated in programming and at other times he refused to do so. He asked for and participated in sessions with an Elder and a psychologist, and he requested CBT workbooks.

[100] In December 2021, Mr. Scribe was the victim of an assault in custody when another inmate struck him in the back of the head with a food tray. Mr. Scribe did not retaliate, and he followed the directions of corrections staff immediately following the incident.

[101] In July 2022, Mr. Scribe started the Coming to Terms program (described in paragraph 91 above), and although he failed to attend a session he was given special

permission to rejoin the program. Having said that, Mr. Scribe again failed to attend the sessions and he did not complete the program[10].

[102] On December 26, 2022, Mr. Scribe had an outburst in the medical cell at which time he yelled at staff and punched the inside of his cell repeatedly. He took steps to calm himself down and later apologized to staff for his behaviour.

[103] From February to August 2023, just prior to the sentencing hearing in this matter, Mr. Scribe participated in at least five Life Skills informational sessions on topics which included managing stress, maintaining employment, anger management, understanding feelings, and "thoughts to action". According to the HCC witness, these informational programs are two-hour sessions led by correctional officers, not program facilitators, and consist of information being provided to inmates, but there is no homework or group work involved. In other words, these programs appear to entail a lecture-style approach wherein inmates are expected to listen to the information provided, rather than participate actively.

[104] On June 24, 2023, Mr. Scribe participated in an informational session while getting a haircut. On two occasions (June 26, 2023 and July 29, 2023), Mr. Scribe's participation and contributions in the informational sessions were noted in the running record, including that he asked questions, led the group in discussion, and spoke openly about complex feelings and the strategies he employs to manage his feelings and the expression of his emotions, including the importance of controlling one's reaction to anger.

[10] The running record reflects that issues arose in Mr. Scribe's family on each of July 9 and 13, 2022, which was at the same time that the Coming to Terms program was ongoing.

[105] The Crown argued that these informational sessions are the easier programs that did not require Mr. Scribe to do meaningful work, and that his efforts to complete longer term programming have been "lacklustre". The Crown also described Mr. Scribe's programming efforts as short-lived and sometimes insincere, noting that there have been numerous attempts at treatment and programming, including the completion of programs prior to the predicate offence.

[106] In April 2023, Mr. Scribe was involved in a physical altercation with another inmate, which began with Mr. Scribe slapping the other inmate in the face, and was followed by a fight between them. Since neither individual heeded the verbal directions of corrections staff to stop, pepper spray was used to end the altercation. Mr. Scribe was found guilty of an unlawful act and received eight days in segregation. This incident occurred on the same date on which Mr. Scribe refused to participate in an anger management session.

[107] In July 2023, Mr. Scribe completed an assignment in a CBT workbook on alcohol and drugs. His effort was ranked as a 2 out of 10. He did not ask for assistance with completing the assignment.

[108] The HCC witness testified that programming continued to be offered to Mr. Scribe within the weeks leading up to the sentencing hearing in the fall of 2023 and that he declined to participate.

[109] Mr. Scribe submitted that his behaviour has reflected a marked departure from previous periods of custody, in that he has accessed programming and has had fewer instances of institutional infractions. In addition, he can recognize when he is not in a

good mental state, and uses positive coping mechanisms to disconnect and divert his anger, such as asking for time-out space away from other people. Mr. Scribe submitted that there is more than a speculative hope for his future progress, as he is not just going through the motions but is making a real effort to address his issues.

Segregation and Institutional Behaviour

[110] I note that prior to 2019, Mr. Scribe spent a significant amount of time in segregation while he was incarcerated. CSC witnesses testified that while in segregation, an inmate's access to programming was very limited, but they had some access to Elders. In 2019, administrative segregation was abolished and replaced with the Structured Intervention Unit ("SIU"), for those offenders who cannot integrate or reside in a mainstream population. The SIU has allowed inmates to have greater, ongoing interactions and access to programming.

[111] Over the years, there were instances in which Mr. Scribe was put into segregation for his own protection, because there were concerns about housing him in an open population. In other instances, Mr. Scribe was placed in segregation as a punishment for bad behaviour, or because he asked or demanded to be put there.

[112] Regardless of the reasons for his placement in segregation, it is clear that, at times, these placements inhibited Mr. Scribe's ability to access programming. For example, in July 2014 Mr. Scribe was enrolled in the Integrated Correctional Program Model ("ICPM") Aboriginal Primer Program and he completed the non-intake primer in August 2014, receiving good feedback in the program. In September 2014, however, he was suspended from the program because of the length of his placement in

segregation, which was due to continuous drug use. At the time, it was noted that Mr. Scribe's ability and commitment to using skills to manage his substance abuse had not changed and needed a lot of improvement.

[113] Dr. Haag testified that although segregation can impact a person's mental health negatively, it is a remarkably complex issue and segregation does not necessarily equate to negative mental health. Having said that, feelings of loneliness and isolation due to a lack of human interaction can have detrimental effects on a person's mental health, and can lead to behavioural problems such as acting out to get human interaction.

[114] On cross-examination, Dr. Haag testified that segregation could lead to suicidal thoughts and paranoia, (although he was not aware of literature on the latter) and that those issues can be heightened in persons with cognitive deficits. Dr. Haag also acknowledged that these issues can become obstacles to effective therapy and that someone in segregation could be less likely to engage in programming.

[115] Mr. Scribe submitted that his time in segregation and the resultant impact upon his behaviour must be taken into account when assessing his participation in and completion of programming.

[116] Another factor that appears to have impacted Mr. Scribe's ability to participate in and complete programming is his movement among institutions while incarcerated.

[117] As Dr. Haag noted, Mr. Scribe has been exceedingly difficult to manage in terms of where he can be housed, and into what population he can be integrated. On many occasions, he has been moved within institutions or from one institution to another

institution. Dr. Haag noted that "within federal corrections, Mr. Scribe has never been able to maintain his placement in a correctional population long enough to complete substantive programming".

[118] For example, between December 2010 and December 2017, Mr. Scribe served time in seven different federal institutions. In clinical interviews, Mr. Scribe advised Dr. Haag that there are only two federal institutions in which he can be housed.

[119] There are many subsequent references within Mr. Scribe's files to his removal from an institution or from a unit within an institution. For example, in May 2020, Mr. Scribe was removed from a unit in Milner Ridge Correctional Centre, which was noted to have been done for the "good order" of the unit. In November 2020, Mr. Scribe was noted as "proven to be unable to reside in a dormitory setting". More specifically, he exhibited predatory behaviour towards more vulnerable inmates including "muscling" them for medication and exhibiting threatening, intimidating, and assaultive behaviour. He was also noted to be involved in moving medication between units, setting others up to be assaulted, personally assaulting other inmates, tattooing, and acting disrespectfully towards staff.

[120] The Crown noted that Mr. Scribe's challenges integrating with other individuals were identified early on in his youth, pointing to comments at an April 1, 2004 sentencing (when Mr. Scribe was 16 years of age) when the court noted that Mr. Scribe's placements were breaking down repeatedly because other people were rubbing him the wrong way. The court queried "is it always somebody else to blame?"

Age of the Offender

[121] In assessing the future risk posed by Mr. Scribe, I have also considered the concept of "age out" or "burn out", which Dr. Haag testified is an age-effect in forensic psychology, that criminal behaviour tends to be disproportionately committed by young persons. In other words, the older that a person gets, the less criminal behaviour they will exhibit. Dr. Haag testified that these effects may commence at around age 40, and will increase over time, becoming more pronounced by age 60 or 70.

[122] Dr. Haag testified that he did not see meaningful evidence of desistance in Mr. Scribe, currently age 36, given that age alone is not as effective a predictor of future recidivism as are other variables such as criminal history. Having said that, he agreed that he could not comment upon how the concept of "burn out" might affect Mr. Scribe in the future. He agreed that a decline in Mr. Scribe's physical health, such as a heart problem, could impact the commission of some offences, such as crimes of violence, but not others, such as threats.

[123] Mr. Scribe noted that the go-forward portion of the custodial sentence that he has proposed would end at around age 40, and that the proposed LTSO period would end at around age 50. As such, with programming and his health issues, his risk would be reduced greatly. Mr. Scribe also noted that the test on a dangerous offender application involves the risk of a serious personal injury offence, which does not include uttering threats.

[124] The Crown noted that when a threat is combined with another criminal act, it could constitute a serious personal injury offence as defined in the ***Code***.

[125] In ***R. v. Poutsoungas***, 1989 CarswellOnt 996 (WL), [1989] O.J. No. 1033, the court stated, with respect to the "burn out" theory that:

> 5 It may be noted that this evidence, in its own terms, refers to the tendency to violence to lessen noticeably – not to any cure … If this theory did apply to the accused it would merely indicate, at best, that the serious life-threatening offences would be less frequent.

[126] In ***R. v. Innocent***, [2009] O.J. No. 3663 (QL), 2009 CarswellOnt 4791, the court stated:

> 53 … I acknowledge the possibility that the "burn out" phenomena will result in a reduction of Mr. Innocent's violent tendencies at some point in the future. However that is a general and non-specific phenomena and I am not persuaded, at least on this evidentiary record, that Mr. Innocent will, in effect, grow or mature out of his violent tendencies in the foreseeable future. If he were to be in the community in an intoxicated state, and with a gun, violence would be expected from this offender even if he was in his forties or perhaps older.

Analysis

[127] My analysis with respect to intractability, including Mr. Scribe's past treatment, his time in segregation, his institutional behaviour, the concept of "burn out", and his future treatment prospects is as follows.

[128] There is no question that Mr. Scribe has expressed repeatedly to corrections staff, health care professionals, and others that he wants to address his anger and substance abuse issues, change his criminal lifestyle, and live a productive life. He has also said on multiple occasions that he needs treatment, and should avoid negative influences or activities.

[129] Mr. Scribe has also acknowledged that his behaviour in custody was often poor and disruptive, that he abused staff and other inmates, and that he abused substances. He also stated that he wished he had taken advantage of the programming, supports,

and resources offered to him as a youth because doing so may have changed his life. Having said that, he has also stated that he was prohibited from engaging with the supports offered because of his lifestyle.

[130] As referenced above, at times Mr. Scribe seems to have done well in programming, and has received favourable feedback, but subsequent events have shown that the training was not wholly successful. For example, the End to Aggression program in which Mr. Scribe participated at HCC in the spring of 2019 was intended to help him avoid assaultive and/or aggressive behaviour by understanding how his thinking can affect his feelings and his actions. Unfortunately, after completing the program Mr. Scribe assaulted his intimate partner and committed the predicate offence. Over the years there have been other occasions on which he committed an offence shortly after completing programming.

[131] Dr. Haag stated, with regard to Mr. Scribe's past treatment, that:

> Despite repeatedly voicing some awareness of the issues in his life that he needs to change (eg. anger, intoxicants…) and a desire to change the same, Mr. Scribe has consistently failed to follow through with his commitments to complete and/or benefit from criminogenically focused programming.

[132] Dr. Haag also stated that:

> Mr. Scribe has never, over the long term, altered his behaviour as a consequence of acquired knowledge or introspection. Put a different way, Mr. Scribe has never meaningfully demonstrated the ability to generalize the concepts he has learned from programming in either correctional institutions or the community.

[133] Dr. Haag acknowledged that Mr. Scribe is to be given credit for his desire to seek programming, though he noted that similar pledges were made in the past and Mr. Scribe has also stated that he took programming to look good. Dr. Haag

concluded, therefore, that Mr. Scribe's stated desires will have meaning only if he completes programming and internalizes the content over the long term.

[134] In other words, Mr. Scribe's past engagement in programming has been mainly superficial. I agree with Dr. Haag that in the past Mr. Scribe has had difficulty correlating good behaviour with obtaining his desired outcome. Instead, he often expected to be provided with what he wanted to help him cope. In other words, Mr. Scribe has tended to look for external solutions to his problems and he either could not or would not do the work to improve himself. Having said that, Mr. Scribe does appear to have improved somewhat at recognizing his own mental state, and there have been occasions on which he has used coping mechanisms and other strategies to divert his anger.

[135] I have concluded, as did Dr. Haag, that over the long term Mr. Scribe has not sufficiently altered his behaviour as a consequence of the knowledge or introspection that he acquired in the programming in which he participated. He has not shown "buy-in" to programming and a true motivation for treatment, which Dr. Haag defined as hearing a concept, considering the concept, and applying it in the real world going forward. Dr. Haag said, and I agree, that this approach has been notably absent in Mr. Scribe's case and that none of the past programming has been effective in reducing Mr. Scribe's risk for violent recidivism over the long term.

[136] In other words, although at times Mr. Scribe says or does the right things, his overall past conduct has not reflected a true commitment to deal with his problems.

His negative or non-productive behaviour far outweighs both his words and his positive behaviour.

[137] I appreciate that when Mr. Scribe has not completed available programming at a given time, there were a variety of reasons for that reality, some of which were beyond Mr. Scribe's control, and some of which were within his control. One such reason, as referenced above, was Mr. Scribe's time in segregation. Having said that, there were many other reasons why Mr. Scribe did not engage in or complete programming, including his outright refusal to participate or his failure to engage. In other words, although time in segregation was a cause for Mr. Scribe's failure to complete programming at times, it was not the only cause.

[138] Having said that, I recognize that going forward, Mr. Scribe will not be housed in segregation as before, and that if he is housed in the SIU, he will have access to programming.

[139] With respect to the concept of "burn out", in my view the above-quoted statement from ***Innocent*** applies equally to Mr. Scribe. He has been diagnosed with multiple mental health conditions, and it is treatment for those conditions, and not his changing level of maturity, that may alter his behaviour. Although it is possible that he will grow out of his violent tendencies in the future, at this time that possibility is speculative and not grounded in evidence.

[140] I acknowledge Mr. Scribe's submission that his inside record has improved since the predicate offence. Having said that, after the predicate offence, and more specifically from November 1, 2019 to April 10, 2023, which is a period of

approximately 41 months, Mr. Scribe incurred 24 inside convictions, including 14 convictions for threatening or abusive conduct, and 10 convictions for other conduct such as possessing drugs and damaging property.

[141] I note also Mr. Scribe's repeated threats of witnesses in 2020, both in this case and another matter, in breach of various court orders. Dr. Haag testified that these threats represent more evidence of psychopathy, and Mr. Scribe's attempt to manipulate the system for his own self-gain, which is an obstacle to treatment. Dr. Haag testified, and it is very obvious, that Mr. Scribe is difficult to manage while in custody, and the threats to witnesses are a serious example of that difficulty, which gives rise to significant concern going forward.

[142] Although the frequency of Mr. Scribe's inside convictions may have decreased since the predicate offence when compared with his previous inside record, Mr. Scribe has not shown ongoing, stable behaviour. Instead, he has shown less bad behaviour. If any "burn out" has happened, it has not been significant enough to impact Mr. Scribe's behaviour in a material way. Similarly, although Mr. Scribe's medical records reflect that he has experienced some physical health issues, he remained able to engage in a physical fight with another inmate as recently as April 2023.

[143] With respect to future programming recommendations, Dr. Haag concluded that Mr. Scribe should complete and internalize high intensity programming to address the general use of violence, domestic violence and substance abuse, and to acquire employment skills, money management skills, and a grade 12 education.

[144] Mr. Scribe noted that he has already undertaken some of these efforts through Provincial Corrections and that all of them can be done within CSC, including as part of the ICPM. In addition, CSC programming can be individualized and there are specific streams of programming for Indigenous inmates that can be modified for cognitive functioning issues.

[145] Dr. Haag also recommended that after completion of the recommended programming and before Mr. Scribe is released into the community, he should complete multiple years of institutional maintenance programming in general violence, domestic violence, substance abuse, and abstention, at multiple levels of security, and demonstrate in multiple institutional environments that he is consistently applying the concepts over a period of multiple years after program completion.

[146] In other words, Dr. Haag recommended that Mr. Scribe complete programming, and internalize the content over the long term, which is more than to voice a desire to engage in treatment. Dr. Haag noted that to date, Mr. Scribe has maintained only short-term commitments to maintaining a pro-social life, when he should demonstrate a consistent and diligent application of the concepts learned over a period of years.

[147] Dr. Haag testified that to observe different behaviour in Mr. Scribe over a period of years, in different institutional settings, would be real evidence that programming is having the desired effect. Dr. Haag suggested that Mr. Scribe needs to demonstrate behaviour that permits him to gradually progress to institutional environments with less restrictive security (eg. maximum to minimum), because with each change of security level there would be an increase in liberties and responsibilities. Dr. Haag suggested

that this would be a graduated way for Mr. Scribe to demonstrate that he can use the skills he has learned. In other words, Dr. Haag suggested that Mr. Scribe needs to establish a "track record" of what he is supposed to do before a conditional release.

[148] If Mr. Scribe is able to do so, and the National Parole Board of Canada ("Parole Board") determines that his risk in the community is acceptable, Dr. Haag recommended a series of release conditions to apply to Mr. Scribe in the community, including that he should: reside in a supervised setting for years upon his release, be subjected to random urine screening, avoid establishments geared towards intoxicants, follow psychiatric advice and take medications as prescribed, avoid gang members, and seek and maintain employment. Mr. Scribe noted that all of these conditions could be imposed were he to be released to a Community Corrections Centre ("CCC"), which is a halfway house run by CSC.

[149] I accept that Dr. Haag's recommendations, both for treatment and programming in custody, and conditions in the community, are appropriate for Mr. Scribe. Mr. Scribe's various diagnosed disorders are serious, particularly when taken together, and although treatment is not impossible, significant time and effort will be required for success, which is more than Mr. Scribe has exhibited to date.

[150] Having considered all of the foregoing, I have concluded that Mr. Scribe's pattern of aggressive and violent criminal behaviour will be very difficult to change or treat. Although he has at times stated good intentions, he has not followed through consistently when presented with opportunities for treatment, and his past behaviour

has not improved sufficiently. He has also expressed self-serving motives for seeking treatment.

[151] As such, although it is impossible to prove that Mr. Scribe will re-offend, it is unlikely that he will be treated successfully within the next few years, if ever. In my view, his stated willingness to engage and internalize treatment is no more than an expression of hope, with no air of reality to the possibility of reducing or controlling the risk. Certainly, there is no indication that he can be treated within the timeframe of a determinate sentence. I accept therefore, that he is resistant to treatment or change and that his pattern of behaviour is intractable.

Conclusion on Dangerous Offender Designation

[152] I am satisfied beyond a reasonable doubt that there is a high likelihood of harmful recidivism, and that there is an intractability of Mr. Scribe's violent pattern of conduct.

[153] The Crown has met its onus with respect to the requirements of s. 753(1) of the ***Code***, and as such I must designate Mr. Scribe as a dangerous offender.

ISSUE 2: THE SENTENCE

[154] Pursuant to s. 753(4) of the ***Code***, if the court finds an offender to be a dangerous offender it shall impose:

(a) an indefinite sentence;

(b) a fixed sentence followed by a long-term supervision order; or

(c) a fixed sentence.

[155] Section 753(4.1) of the ***Code*** provides that:

> The court *shall* impose a sentence of detention in a penitentiary for an indeterminate period *unless it is satisfied* by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
>
> [emphasis added]

[156] In other words, s. 753(4.1) curtails the discretion of the court to impose an indefinite sentence. Having said that, in ***Boutilier***, at paras. 62 - 69, the court confirmed that s. 753(4.1) does not constitute a presumption that an indeterminate sentence is a fit sentence for a dangerous offender. Similarly, it does not impose upon the offender a burden to adduce evidence to demonstrate a reasonable expectation that a lesser measure will adequately protect the public. In fact, there is no particular burden of proof on either party to determine whether the offender can be managed with a less restrictive sentence[11]. Rather, s. 753(4.1) guides the exercise of discretion by the sentencing judge who must determine a fit sentence based upon all the evidence adduced at the hearing. The primary sentencing objective in this proceeding is the protection of the public (***R. v. Johnson***, 2003 SCC 46, at paras. 19 and 29).

[157] As set out at paragraph 16 above, I must consider whether the risk arising from Mr. Scribe's behaviour can be adequately managed outside of an indeterminate sentence (***Boutilier***, at paras. 31 and 45). More particularly, as set out at para. 70 of ***Boutilier***, I should adopt the following process when exercising my discretion under s. 753(4.1) of the ***Code***:

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[11] ***R. v. R.M.***, 2007 ONCA 872, para. 45 and ***Innocent***, at paras. 14 and 47.

> 70 … First, if the court is satisfied that a conventional sentence, … will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

[158] In exercising this discretion, it is important to emphasize that the sentencing judge is not entitled to set aside or otherwise disregard the objectives and principles of sentencing set out elsewhere in the ***Code***. As the court in ***Boutilier*** stated:

> 63 … an offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public. [The] suggestion to the contrary has been repeatedly rejected by this Court in relation to any of the *Criminal Code's* sentencing regimes and, in effect, seeks to read a prohibition into s. 753(4.1) where none exists.

[159] The Crown argued that there is no reasonable expectation that any measure less than an indeterminate sentence can protect the public adequately from Mr. Scribe. The Crown also submitted that when assessing reasonable expectations, I should consider the nature of the predicate offence, the diagnosis and prognosis of Mr. Scribe's mental disorders, his previous response to treatment, his previous response to supervision, and the availability and viability of resources to control his risk.

[160] Mr. Scribe submitted that the risk of future harm can be lowered, such that there is a reasonable expectation that a fixed sentence and LTSO will protect the public adequately. He argued that I should consider the programs he has taken, his

engagement in those programs, and the improvement in his behaviour. In addition, he suggested that his behaviour has been more stable recently than ever before, and that his past incompatibility issues will not cause the same challenges as before. Moreover, he will still be able to access programming, including modules in ICPM, from the SIU, and his programming will not be disrupted if he is transferred to another institution.

[161] For the following reasons, I agree with the parties that a conventional sentence will not adequately protect the public against the commission of murder or a serious personal injury offence by Mr. Scribe. I have also considered whether I am satisfied that a conventional sentence followed by an LTSO will protect the public adequately, as requested by defence counsel.

[162] I note that the sentencing principles found in ss. 718 to 718.2 of the ***Code*** must be considered when sentencing Mr. Scribe as a dangerous offender. Having said that, the protection of the public is the paramount consideration in these proceedings, though all other sentencing principles, including ***Gladue*** principles, remain relevant to my analysis. (***Boutellier***, at paras. 53 – 63, ***R. v. Osborne (C.G.)***, 2014 MBCA 73, at paras. 96 – 97 and ***R. v. Sanderson***, 2018 MBCA 63, at paras. 9 - 12).

Past Record

[163] Mr. Scribe has an extensive criminal record as both a youth and an adult. His first conviction was for a charge of break, enter and commit theft when he was 14 years of age. His youth record also includes convictions for multiple assaults, weapons related offences, obstructing a peace officer, uttering threats, theft, mischief, as well as 21 convictions for failing to comply with court orders or failing to attend court.

[164] As an adult, his most serious conviction is for manslaughter, arising from the group beating death of a complete stranger to Mr. Scribe and his co-accused. A few days after that offence, Mr. Scribe committed a carjacking and led police on a high-speed chase through Winnipeg which ended when he entered a dwelling house unlawfully. His adult record also includes resisting a peace officer, robbery, break and enter commit assault, assault, dangerous driving, impaired driving, pointing a firearm, possession of drugs, uttering threats, theft, and 6 convictions for failing to comply with court orders.

[165] In addition, Mr. Scribe has had a difficult time during his many periods of incarceration, such that he was the subject of approximately 125 inside charges while incarcerated, including for threatening and assaultive behaviour, drugs, destruction of property, disobeying orders, and other unlawful acts.

[166] As referenced above, after the predicate offence, over a period of 41 months, Mr. Scribe incurred 24 inside convictions. Although there may have been a decrease in the frequency of Mr. Scribe's inside convictions when compared with his earlier inside record, Mr. Scribe continued to exhibit bad behaviour frequently, and in my view any improvement is insufficient to impact this sentencing decision in a material way.

[167] As referenced above, Mr. Scribe's behaviour was so bad that, on repeated occasions, he was either removed from or rejected by institutions. I will not list every example of those instances, since they are voluminous, but I will note two examples. At age 14, Mr. Scribe was removed from Macdonald Youth Services Group Home because, given his defiant and aggressive behaviour, it could not provide a safe

environment for other residents and staff. Ten years later, in October 2012, Mr. Scribe asked to complete his first manslaughter sentence in a Manitoba Provincial facility. This request was declined because he had previously been involved in approximately 50 incidents involving violence, assaults, drugs or gang relations. In addition, there were 27 inmates in the facility with whom Mr. Scribe was "incompatible", and he was noted to be incompatible with gangs.

Circumstances of the Offender

[168] Mr. Scribe endured a very difficult childhood. He was removed from his parents' care at a young age due to their substance abuse and neglect. He was placed with relatives and suffered multiples abuses. He was later placed in various foster homes and group homes.

[169] Mr. Scribe attended school as a young person, and completed Grade 7. In school, he had trouble paying attention and staying on task. He was diagnosed with FASD, and was reported to have trouble learning from his mistakes. He was aggressive and out of control in open environments, would not comply with rules, and was suspended. He was seen by the school psychologist, but was reported to be involved in fighting, drinking, stealing, smoking, skipping, and pulled the fire alarm because it was fun.

[170] Mr. Scribe started using drugs and alcohol regularly between the ages of 11 to 13 in his home community, and began stealing to support his habits.

[171] Mr. Scribe has a limited employment history as a youth, but has not held employment in the community as an adult. While out of custody he has supported himself by criminal activity, including selling drugs.

[172] Unfortunately, from age 15, Mr. Scribe has spent the majority of his life in custody. Mr. Scribe later admitted that his behaviour was out of control, and that he was entrenched in pro-criminal lifestyle including gang involvement, substance abuse, and other negative behaviours. He acknowledged that supports were offered but stated that he was not motivated to change at that time.

[173] Over the years, Mr. Scribe has been bound by a variety of court orders including various conditions. In early 2018, he was in the community under supervision by the Criminal Organization High Risk Offender Unit ("COHROU"), which provides the highest level of support and supervision available. For example, in early April 2018, members of Probation Services attended with Mr. Scribe to obtain mental health assistance when he was experiencing serious issues.

[174] Shortly thereafter, Probation Services personnel advised Mr. Scribe that he could not continue to live with his intimate partner due to concerns about his mental health, his controlling behaviour towards her, and bruising observed on her face. Mr. Scribe's reaction to this decision was intimidating, as a result of which his community safety plan was suspended, and staff could no longer meet with him outside of the Probation Services Office due to concerns for their safety.

[175] Mr. Scribe's COHROU probation officer testified that Mr. Scribe appeared to engage in "impression management", in that although he reported to Probation Services

and attended programming as directed, there were ongoing concerns about violence in his intimate partner relationship. On May 8, 2018, he committed a break, enter and assault at his intimate partner's residence, in front of her three children.

[176] In other words, in 2018, Mr. Scribe was in the community for a period of months, with strong supports, and was unable to succeed or follow the conditions by which he was bound.

[177] As referenced above, Mr. Scribe submitted that he has since changed his perspective. For example, when he was assaulted in December 2021 he did not retaliate. As the Crown noted, however, Mr. Scribe did not testify at the hearing to explain his current motivations, compared with his past motivations or experiences, and how they may or may not have impacted his decisions to participate in programming or not to do so.

[178] Mr. Scribe also submitted that he renounced his gang status, and suffered the consequences for having done so. Mr. Scribe's files do not appear to reflect any indication of gang ties after 2018, and I accept that he appears to have maintained that status for several years.

[179] Mr. Scribe submitted that the absence of a gang affiliation will reduce his incompatibilities in custody and in turn the need for him to be housed separately from the mainstream population. The Crown submitted that there is no evidence before me that Mr. Scribe's incompatibilities have decreased, or that his pattern of difficult placements has improved.

[180] In determining Mr. Scribe's sentence, I have also considered ***Gladue*** factors. His maternal and paternal family members attended residential schools, including his mother, grandfather, and aunt. After being removed from his parents' care, Mr. Scribe was placed with his grandfather and aunt, where he was abused. He has stated that he felt the impact of their residential school experiences in how they raised him. He has also been subjected to racism, including while incarcerated.

[181] I accept that Mr. Scribe has participated in Indigenous activities repeatedly over the years, including engagement with Elders, attending sweat lodge ceremonies and community pow-wows, and participating in smudges.

Circumstances of the Offence

[182] As set out above, Mr. Scribe caused Mr. Hart's death with one punch. I appreciate Mr. Scribe's submissions that, as such, the circumstances of the predicate offence were very different from those of his first manslaughter offence, which involved a group beating. Mr. Scribe argued that Mr. Hart's death was more of a "near accident" than a "near murder", such that his moral culpability is diminished. The defence submitted, therefore, that the ten-year fixed sentence that they proposed would be at the high end of the range, even for an individual with an unenviable criminal record.

[183] The Crown submitted that there are similarities between the two manslaughter offences that include the excessive consumption of intoxicants while prohibited from doing so by a court order, and an inability for Mr. Scribe to control his impulses.

[184] Mr. Scribe advised Dr. Haag that he is ashamed of what he did to Mr. Hart, and stated that he did not stop when he could have and should have done so. He said that

he is triggered if he is disrespected, cannot often control the urge to fight, and that he was taught to use his hands if someone makes fun of him. He also stated that he "never would have thrown the punch" if he knew what the outcome would be. Mr. Scribe stated that at the material time, upon seeing that Mr. Hart was deceased, he cried, kissed the victim, and closed his eyes. Mr. Scribe shared with Dr. Haag his realization that he is an angry person, which he attributes to how he was raised, including that he was never allowed to be a kid.

[185] Mr. Scribe submitted that he feels genuine remorse and regret for the death of Mr. Hart that he did not show for prior offences, which has shifted his subsequent response to programming, his desire for change, and the steps he is taking. Mr. Hart was a close, lifelong friend, and Mr. Scribe did not intend his death. Mr. Scribe relives the event regularly and wishes he could go back and change it, which has shown in his actions since.

[186] Dr. Haag noted that Mr. Scribe's files also reflect expressions of sorrow and apologies for other, previous crimes on at least five occasions, but that the actions that Mr. Scribe reported after Mr. Hart's death (kissing him and closing his eyes) are different from the other offences.

[187] I accept that Mr. Scribe feels some genuine remorse for the predicate offence. Mr. Hart was his childhood friend, and they grew up together as brothers. At the sentencing hearing, Mr. Scribe addressed both the court and Mr. Hart's family and apologized for his actions, stating that if he could go back to the day of the offence he would not have thrown the punch. He also asked for forgiveness from the family, and

stated that he knows he has to change, including with respect to alcohol use, and that he will do so.

[188] I accept that Mr. Scribe meant the words that he said at the time, but I note that he commented also upon his own suffering, relative to the predicate offence and the trauma that he experienced as a child, for which he never got help. He also commented upon his own physical health issues and the help that he has provided to other inmates.

Future Programming

[189] As set out above, in the past Mr. Scribe has failed to engage productively to address the problem areas identified in his behaviour. Given Mr. Scribe's history, future programming and treatment will be of significant importance to his progress. I have considered the programming that will be available to Mr. Scribe in federal custody.

[190] Witnesses from CSC testified that when an offender commences a federal sentence, information is gathered regarding their family or community history of victimization, suicide, substance abuse, experience with poverty and the child welfare system, and the Sixties Scoop. This information is used to shape the offender's correctional plan and informs the decisions made by CSC with respect to the offender.

[191] In addition, programming is delivered through the ICPM, which is divided into multiple streams and modules, including an Indigenous stream. The basis and foundation of most CSC's programming including the ICPM (and its predecessor, the Violence Prevention Program) is CBT, and encompasses general violence, family violence, substance abuse, and general crime prevention programming. In the

Indigenous stream, the focus is on a holistic approach including the engagement of Elders, ceremony, and program delivery by Indigenous workers.

[192] CSC witnesses also testified that within institutions there can be wait lists for programming, in which case priority is given to those inmates with the earliest release dates. As such, dangerous offenders may be at the bottom of a wait list depending on how long they have been in custody and the length of the wait list. Having said that, the ICPM will be available to Mr. Scribe regardless of what institution he is in. As Mr. Scribe noted, this program has not been available to him since the predicate offence.

[193] I appreciate that Mr. Scribe, as a dangerous offender, may be at the bottom of wait lists for programming, despite having access to enhanced resources if he is housed in the SIU. While that is an unfortunate reality, I am mindful of the repeated opportunities afforded to Mr. Scribe in the past, only some of which he pursued, and none of which he was able to internalize and implement.

[194] In addition, the evidence reflects that dangerous offenders usually have a maximum security classification, such that they are not often admitted to the Pathways program, which is tailored to Indigenous offenders in both the medium and minimum security units in Stony Mountain Institution[12]. One CSC witness testified, however, that an offender's security classification can improve over time if their overall pattern of behaviour improves significantly. Typically, when an offender's security classification is reviewed, the last 12 – 18 months of their behaviour is scrutinized.

[12] One CSC witness testified that at present there is at least one dangerous offender in the Pathways program at Stony Mountain Institution.

[195] The Crown submitted that once in custody, Mr. Scribe would likely be placed into the SIU. CSC witnesses testified that offenders housed in the SIU have the same access to intensive programming as do other inmates, including the ICPM. Having said that, the groups within SIU are generally much smaller, and there is a possibility of 1-on-1 programming, including with respect to substance abuse, violence prevention and educational opportunities. The Crown submitted that, accordingly, Mr. Scribe will have better access to programming than otherwise, because CSC does not want to house inmates in the SIU, and seeks to return them to the mainstream population. As such, the SIU has the most staff, programming, and other resources, and inmates within the SIU are prioritized for programming with a view to exiting that unit.

[196] After an offender completes a particular program, a maintenance component is offered at all facilities in Canada which includes help for mental health issues, and specifically one-on-one counselling with psychologists, psychiatrists (who are on-site periodically), mental health nurses, social workers, and occupational therapists to whom inmates can be referred or can self-refer. Time with Elders and spiritual care is also available.

[197] CSC witnesses also testified that dangerous offenders can access all programming offered to federally housed inmates in Canada, and that when a dangerous offender is released, their access to programming is the same as long-term offenders.

Release into the Community

[198] I have also considered the circumstances surrounding the release of offenders into the community. CSC witnesses testified that the goal for all offenders, including dangerous offenders, is to create both a correctional plan that will be amended over time as the offender improves their skills, and a viable reintegration plan pursuant to which they are released safely into the community. In other words, the main goal for any offender's release is to manage their risk in the community.

[199] Where an LTSO is imposed after a fixed sentence, the offender is released into the community at their warrant expiry date, regardless of whether they have done any programming while incarcerated. The offender is released to a CCC, which is a partially independent living setting where offenders are not monitored continuously, and are able to leave the facility unaccompanied and unsupervised. They are, however, subject to a curfew. If an offender breaches curfew, the National Monitoring Centre is contacted and a warrant may issue.

[200] Offenders cannot be forced to take any medications while residing in a CCC, though the facility will administer their medications for them. The substance use of offenders is monitored through random urinalysis, the frequency of which varies depending upon the offender, but ranges between 4 and 12 instances over a 90-day period.

[201] If an offender on an LTSO breaches any condition of that order, they are returned to custody for 90 days and if no charge is laid, they are released into the community thereafter, regardless of their risk level. If they are convicted of a breach,

the LTSO cannot be revoked but it can be suspended. In addition, the LTSO can be suspended if the offender's behaviour deteriorates or they pose a threat to public safety.

[202] Conversely, if an offender with an indeterminate sentence gets parole and breaches their conditions, their release can be revoked, and the offender has the onus of showing they can be released safely at a future parole application.

[203] As set out above, Dr. Haag made a series of recommendations as to the conditions that should be imposed upon Mr. Scribe if he was given a fixed sentence followed by a LTSO. One of those conditions was that Mr. Scribe participate in programming once released, but unfortunately, there is no mechanism by which to force Mr. Scribe to do so. In other words, once released he can refuse to participate in programming[13] Similarly, I can order Mr. Scribe to seek out the services of a mental health professional, but no professional can be forced to take him on as a patient, which could make compliance difficult.

[204] I note that many of the conditions recommended by Dr. Haag are similar to conditions that have been imposed upon Mr. Scribe in the past. For example, when Mr. Scribe was released from custody on September 17, 2019, he was bound by both a s. 810 peace bond and a probation order. The conditions to which he was subject included a curfew with curfew checks and a requirement to attend and complete treatment, counselling, and/or community programming as directed. Although Mr. Scribe attended meetings with his probation officer as directed, he was returned to

[13] If the Parole Board were to impose programming as a special condition of Mr. Scribe's release and he failed to comply, his release could be suspended. I do not have that option.

custody for a domestic assault on September 27, 2019 and then released on October 3, 2019, just a few weeks before the predicate offence.

[205] The Crown provided to the court a summary of the approximately 35 occasions on which Mr. Scribe was released from custody into the community between December 2001 (when he was 14 years of age) and October 2019 (just before the predicate offence), as well as the substantive offence or act of non-compliance that followed each release. The length of time between Mr. Scribe's various releases and the next bad act ranged from 0 to 135 days, but in approximately 30 instances the timeframe was less than 56 days (or eight weeks). Of particular note are the offence dates of Mr. Scribe's two manslaughter convictions, which were 14 days (the first manslaughter) and 23 days (the predicate offence) after his release from custody.

[206] In other words, Mr. Scribe's history of reinvolvement in crimes of violence within a short period of time after release into the community, his failure to complete and integrate addictions programming, and his failure to control his impulses indicate that he remains a real risk to public safety. This troublesome pattern of re-involvement along with his repeated refusals to participate in and complete meaningful programs militates against the imposition of a fixed sentence followed by an LTSO.

[207] Dr. Haag reviewed Mr. Scribe's history of being managed in the community, and I agree with him, on the basis of the foregoing, that Mr. Scribe's record of conditional release has been "repugnant". In other words, he has been unsuccessful on conditional release, whether in Winnipeg or Norway House, has frequently failed to follow conditions or directions, and has reoffended while in the community. I recognize also

that there have been periods of time in which Mr. Scribe reported faithfully, and as directed. For example, he did so from August to October 2005.

[208] At the time of the predicate offence, Mr. Scribe was bound by three court orders: a release order, a probation order, and a s. 810 peace bond, all of which reflected curfew provisions and a requirement to abstain from the consumption of alcohol. He was living in Norway House with his mother, and reported to Probation Services in person on each of October 7, 15 and 24, 2019, at which time his court ordered conditions were reviewed with him, including the abstain and absolute curfew conditions. Nevertheless, prior to committing the predicate offence on October 26, 2019 Mr. Scribe breached both the abstain and curfew conditions.

[209] I will add that, at times, Mr. Scribe has spoken candidly about his intentions. In October 2014, Mr. Scribe expressed the desire to reside in Norway House after release from his first manslaughter sentence, and stated that he would not comply with a residency requirement, such that he would go unlawfully at large. Ultimately, Mr. Scribe was released to Winnipeg.

[210] Mr. Scribe advised Dr. Haag that there is no halfway house to which he can go successfully, and that there is "no … way I'm living in a halfway house in Manitoba" (or Saskatchewan or Alberta).

[211] The defence submitted that the motivation for this comment was Mr. Scribe's fear for his personal safety, and that he meant he would not comply with a residency condition if he felt unsafe. The defence noted that Dr. Haag did not explore, in

response to Mr. Scribe's comment, whether there is a halfway house where Mr. Scribe would feel safe.

[212] The Crown submitted that there is no evidence of a safety issue at a CCC and that the defence's explanation of Mr. Scribe's comment is speculative.

[213] Unlike a fixed sentence followed by an LTSO, where an indeterminate sentence is imposed, there is no statutory release date, and an offender has to earn parole. Having said that, an offender with an indeterminate sentence is eligible for full parole seven years after the date of their arrest for the predicate offence and can apply for day parole three years before that date.

[214] On a parole application, the Parole Board will consider whether the risk presented by an offender can be managed in the community safely, including the offender's overall behaviour, whether they have met the objectives of their correctional plan, whether they have participated in programming, whether they have made gains, and whether they are willing to comply with rules. The offender bears the onus of proving that the risk they pose is manageable in the community, and the Parole Board has the ability to impose special conditions based on what it believes is needed to address any public safety concerns. CSC witnesses testified that the release of dangerous offenders is rare, however, because public safety is a paramount consideration. Where a dangerous offender is granted full parole, they are monitored for their lifetime. Where parole is not granted, the offender can re-apply after two years, or more quickly if CSC supports their request.

Victim Impact

[215] I have considered also the impact of the predicate offence upon the family of Mr. Hart. Heartfelt victim impact statements were provided by his mother, sister, and son at the sentencing hearing, all of whom expressed how emotional and impactful Mr. Hart's death was for them. Moreover, they continue to struggle with losing him, particularly in his role as supporter, companion, and the "man of the house".

Analysis

[216] As set out above, when sentencing Mr. Scribe I must consider whether there is a reasonable expectation that a measure less than an indeterminate sentence will protect the public adequately against the commission of murder or a serious personal injury offence. In other words, I must exercise restraint, and impose an indeterminate sentence upon Mr. Scribe only if there are no less restrictive means to protect the public.

[217] Dr. Haag concluded, and I have accepted, that Mr. Scribe is a high risk to re-offend violently. In addition, Dr. Haag concluded that there is no reasonable prospect of Mr. Scribe being managed in the community. The evidence reflects that Mr. Scribe's diagnoses are difficult to treat, he struggles with supervision, and that his addictions make his prognosis bleak.

[218] Mr. Scribe submitted that he has shown a clear willingness to engage in rehabilitative programming and has participated in programming. In addition, when he was in the community in the spring of 2018 he reached out to Probation Services/COHROU for assistance when he was having significant mental health issues.

[219] Mr. Scribe also pointed to his improved behaviour in custody since the predicate offence, and submitted that his proposal of a 10-year fixed sentence followed by a 10-year LTSO will allow for the treatment that Dr. Haag has recommended to address his risk, and to observe a further departure from his past behaviour, both in and out of custody.

[220] Mr. Scribe argued that when all of the applicable sentencing principles are balanced, it is clear that his risk factors can be lowered and an indeterminate sentence is not appropriate. He noted that all of the components necessary to reduce his risk will be available to him both in custody and in the community, and that these treatment options are neither hypothetical nor speculative. Conversely, the Crown's submission that he will not engage in programming is speculative, because his behaviour has shifted already, such that he can be managed in the community in the future.

[221] I accept that there has been some improvement in Mr. Scribe's behaviour in recent years, but I note that at the time of the sentencing hearing, he was being housed at HCC, alone in a cell that can accommodate three inmates, with a private television and private telephone. It is not surprising that, in these circumstances, Mr. Scribe's behaviour has improved. At the very least, any improvements in his behaviour must be examined with that circumstance in mind.

[222] As recently as October 2022 and December 2022, Mr. Scribe exhibited verbally and/or physically aggressive and threatening behaviour to correctional staff. He was also found in possession of contraband. In addition, as referenced above, in April 2023, Mr. Scribe was involved in a physical fight with another inmate. In other words,

Mr. Scribe has continued to exhibit bad behaviour frequently, and any improvement in the frequency of his bad behaviour is insufficient to impact this sentencing in a material way.

[223] There is compelling evidence that Mr. Scribe has multiple issues that must be treated before he can be managed in the community. He has consistently been difficult to manage in an institution where his time is structured and he is supervised. Although there has been some de-escalation of his behaviour in the institution, significant treatment would be needed for him to live in the community, where he would have much less structure than in an institution.

[224] Although Dr. Haag did not opine that treating Mr. Scribe would be impossible, there is no evidence that Mr. Scribe can be treated successfully. In other words, there is an absence of evidence regarding if, or when, his risk can be managed.

[225] The Crown argued that when Mr. Scribe was last in federal custody, he developed an opioid addiction, was involved in many disciplinary incidents, and offended shortly after this release, which reflects that he internalized little to none of the programming in which he participated in custody. The Crown also submitted that although appropriate programming must be made available to Mr. Scribe, it cannot succeed without his commitment, internalization, and implementation going forward. His statements that he wants to change are not enough, and have proven meaningless in the past. I accept the Crown's submission that his past failures are likely a reflection of his diagnoses of psychopathy and APD.

[226] Mr. Scribe submitted that he can be treated, because DBT is offered by CSC through the regional psychiatric centre, which Dr. Haag testified is necessary treatment for BPD. Leaving aside Mr. Scribe's other diagnoses, this path to recovery is possible, theoretically, but I agree with Dr. Haag, based upon Mr. Scribe's past behaviour, that he is unlikely to embrace and internalize future programming to the extent necessary to exhibit years of demonstrated good behaviour in custody.

[227] With respect to the issuance of an LTSO, it is very clear that the conditions on which Mr. Scribe was released in the past were inadequate to prevent serious acts of aggression. Dr. Haag struggled to find any past approach taken with Mr. Scribe that was meaningfully successful, and concluded that it is difficult to conceive of a community situation that would adequately manage Mr. Scribe's risk. I agree.

[228] Put simply, there is no evidence that Mr. Scribe can or will follow court-ordered conditions. His record of past behaviour makes it clear that he has no regard whatsoever for conditions imposed upon him. He was bound by various conditions at the time of both manslaughter offences, and continued to breach conditions after the predicate offence, by contacting and threatening witnesses and asking others to do the same on his behalf. In other words, his aggressive behaviour has not been controlled in custody, so I fail to see how it could be controlled in the community, where he would be responsible for complying with conditions without stringent supervision.

[229] In my view, Mr. Scribe's candid refusal to reside in a halfway house in Manitoba reflects that he remains unmotivated to follow conditions and has little intention of doing so. At the very least, his attitude reflects an obstacle to managing his risk in the

community, which is of concern. The reality is that any legitimate safety concerns regarding Mr. Scribe's residence in a particular halfway house would have to be addressed upon his release, as were ongoing concerns about his safety while in custody.

[230] I note also Mr. Scribe's advice to Dr. Haag that Norway House was the "perfect" location to which he should be released after serving his sentence for the predicate offence. I agree with the Crown that this suggestion illustrates Mr. Scribe's lack of insight into the structure, supervision, and support that he would need to live in the community safely. I also agree with the Crown that Mr. Scribe simply does not understand that the goal upon his release would be the protection of the public.

[231] In summary, Mr. Scribe would need to make significant changes and sustain those changes to support a conclusion that there is a reasonable expectation that a measure lesser than an indeterminate sentence will adequately protect the public against the commission of murder or a serious personal injury offence. At this time, there is little or no evidence to support that conclusion, and the notion that Mr. Scribe can be controlled in the community is speculative, at best.

[232] I will add that Mr. Scribe's record reflects a significant history of violence, and the fact that he has caused Mr. Hart's death with one punch does not mitigate the risk that he poses to the public. If anything, this circumstance enhances the risk to the public, because, as submitted by the Crown, violence is normative for Mr. Scribe, he uses it as a coping mechanism in negative situations, and he often cannot control his

urge to fight. Mr. Scribe's files also reflect that he has often used his size to his advantage.

[233] Certainly, the circumstances of Mr. Scribe's first manslaughter conviction were more egregious than the predicate offence, because Mr. Scribe and his co-accused attacked a stranger and subjected him to a vicious group beating. I appreciate, therefore, Mr. Scribe's argument that the predicate offence constituted a de-escalation of his conduct. Having said that, the one-punch and seemingly instantaneous death of Mr. Hart does not support the reasonable expectation that a measure less than an indeterminate sentence will protect the public adequately against the commission of murder or a serious personal injury offence by Mr. Scribe. Despite his physical health issues, Mr. Scribe can cause the death of another person in an instant, with no weapon other than his fist.

[234] I have considered the applicable ***Gladue*** factors, and have concluded that those important principles do not persuade me that an indeterminate sentence should not be imposed. Similarly, although Mr. Scribe's guilty plea to the predicate offence is a mitigating factor, the impact is insufficient to avoid an indeterminate sentence.

[235] As set out above, I have considered also Mr. Scribe's age and the concept of "burn out". There is insufficient evidence before me to support the notion that Mr. Scribe's violent offending is fading over time. Although it is certainly possible that he will outgrow his violent tendencies in the future, that possibility is speculative at this time.

[236] I accept the submission of the Crown that Mr. Scribe will not be ready for release within the next few years. He must complete programming, internalize it, and demonstrate that he has done so over a period of years.

[237] As such, I have concluded there is no reasonable sanction in this case that is less than an indeterminate sentence. The only viable option to ensure Mr. Scribe's eventual safe and gradual release into the community is to impose an indeterminate sentence. I echo the comments of the court in ***Innocent*** that the Parole Board will be in a better position than am I to evaluate Mr. Scribe's progress in custody, engagement in recommended treatment, and whether his patterns of behaviour have changed. I recognize that historically, the Parole Board has released dangerous offenders on rare occasions only, but the fact remains that a regular review process in in place and the possibility of release is real. Mr. Scribe is responsible for doing the work necessary to achieve his release in the future.

[238] Mr. Scribe was arrested for the predicate offence on October 29, 2019, such that he will be eligible to apply for full parole in October 2026, and he became eligible to apply for day parole in October 2023. If he does not so apply, his status will be reviewed bi-annually, or perhaps sooner if his case management team is supportive of his release. In other words, there is a possibility that Mr. Scribe will earn his release over time, with significant effort and commitment on his part. If he implements the changes that he spoke about at the sentencing hearing, he will get parole. Having said that, there is no way to predict if and when Mr. Scribe will take the necessary steps.

[239] In conclusion, I am not satisfied on the evidence before me that there is, at present, a reasonable expectation that the imposition of a lesser measure upon Mr. Scribe will adequately protect the public against the commission of murder or a serious personal injury offence. In other words, I cannot say that there is a reasonable expectation that Mr. Scribe's violent tendencies can be eventually controlled in the community. Accordingly, a conventional sentence and LTSO is inadequate in the circumstances of this case, and I must impose upon Mr. Scribe detention in a penitentiary for an indeterminate period of time.

CONCLUSION

[240] The Crown has met its onus of proving beyond a reasonable doubt that Mr. Scribe meets the criteria set out in the ***Code*** and is therefore a dangerous offender.

[241] Having found that Mr. Scribe is a dangerous offender, I have come to the following conclusions:

a) a conventional sentence will not adequately protect the public against the commission of murder or a serious personal injury offence;

b) a conventional sentence followed by a LTSO for a period that does not exceed 10 years, will not adequately protect the public against the commission by the offender of murder or a serious personal injury offence; and

c) s. 753(4.1) requires, therefore, that I must impose a detention in a penitentiary for an indeterminate period of time.

[242] Accordingly, I have sentenced Mr. Scribe to detention for an indeterminate period of time on the predicate offence of manslaughter.

[243] The following ancillary orders are also imposed:

a) a lifetime firearms prohibition order pursuant to s. 109 of the ***Code***;

b) a primary offence DNA order pursuant to s. 487.051(1) of the ***Code***;

c) a copy of all relevant reports and transcripts of the trial and sentencing proceedings be forwarded to the Correctional Service of Canada pursuant to s. 760 of the ***Code***.

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J.