Case Name:

R. v. R.L.

Between
Her Majesty the Queen, Applicant, and
R.L., Respondent

[2008] O.J. No. 5952

Court File No. P 771/05

Ontario Superior Court of Justice

A.M. Gans J.

Heard: October 15-19, 2007; January 21-24,
March 3-6, 13 and May 30, 2008.
Oral judgment: May 30, 2008.

(107 paras.)

Counsel:

Mary A.L. Humphrey, for the Applicant.

Alana V. Page, for the Respondent.

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TABLE OF CONTENTS

REASONS FOR JUDGMENT

A.M. GANS J. (orally):--

Introduction

1 R.L. turned 52 last September. He has been imprisoned for almost two thirds of his life, primarily for having raped women of a certain age. To say that he has not led an exemplary life would be an understatement. It is but no wonder the Crown sought to have him designated a Dangerous Offender (DO) pursuant to s. 753 of the *Criminal Code* after his guilty plea in April 2007 to various serious personal injury offenses including the aggravated sexual assault he committed against a middle aged woman in 1995 (the "predicate offenses").

2 This case, like many DO applications, has taken several unexpected, if not interesting, twists and turns, as a function of the manner in which the evidence, primarily on behalf of R.L., was elicited and presented. The hearing of evidence first proceeded before me for a week in mid-October 2007, when I heard from each party's competing 'expert'. In late January 2008 I heard

testimony for several days from R.L.'s '*bonne amie'*, or partner and his treating therapist at Warkworth Institute ("Warkworth"). Finally, during the first week of March, R.L. took the stand on his own behalf.

3 The disposition that I am now called upon to mete out is made all the more complex by virtue of the fact that R.L. has been in custody since his arrest in late January 2005 for the 1995 predicate offenses. He has spent most of that time at Warkworth because his parole, in respect of his past miscreant behaviour had been suspended, without any form of hearing or independent assessment, the holding of which he apparently, if not implicitly, waived. Since August 2007, however, he has been at Warkworth by virtue of the 10 month sentence I gave to him for a plea to an additional charge of theft. This offence was committed at the time of the predicate offenses. He plead to this charge in order to ensure that he remained at Warkworth and received psychotherapy pending the conclusion of the instant hearing. Finally, he spent almost 1 year of these past 3 plus years in either a provincial detention centre or at Kingston Penitentiary (KP). He was not in Warkworth over this one year period because he was either awaiting the hearing of this matter or he was between attendances at one of the courts in which he needed to be present.

4 Before embarking upon my analysis of the many issues at play in this proceeding, I would like to take this opportunity to thank both counsel for the material each provided me before the January last hearing. Previous to the January hearing dates it was thought that the matter would then proceed to argument based upon the Agreed Statement of Facts; the extensive dossier compiled by the Crown and received on consent, all of which spoke to R.L.'s involvement with, and while incarcerated in, various penal institutions in central Canada; and the expert testimony of Drs. Pallandi and Wilson, a psychiatrist and psychologist called on behalf of the Crown and the defence, respectively. I have read the facta of Ms. Humphrey and Ms. Page each several times now, as well as their supplementary arguments, and commend them both for their work product. Interestingly enough, and because each brief is compelling, my task has been made all the more vexing.

5 Having regard to R.L.'s chequered and continuous involvement with the administration of justice, I have appended, as Appendix "A" to these reasons, a copy of the timeline that Ms. Humphrey prepared, which I incorporate by reference, but without regard to the modest editorializing which dots that synopsis. I might add that the timeline was of great assistance in keeping R.L.'s innumerable activities and sessions in and out of the institutions intelligible.

Statutory regime

6 The operative section of the *Criminal Code*, which guides my inquiry, is as follows:

> 753(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied:

(a) That the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well being of other persons on the basis of evidence establishing

i. a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

ii. a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

iii. any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behaviourial restraint.

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

7 There is little to separate the Crown and the Defence in terms of the operation of the above section. It was all but conceded by the Defence, almost from the commencement of the proceedings before me, that the Crown had or could prove beyond a reasonable doubt each of the constituent elements of subsections 753(1) (a) and/or (b) in terms of R.L.'s historic pattern of behaviour and the intended or resultant consequences visited upon his victims over the past thirty plus years. Indeed, counsel were agreed that R.L. suffered from *paraphilia*, which, in simple terms, is a life-long psychosexual disorder characterized by recurrent intense sexual urges or arousing fantasies. At times this condition may be coupled with behaviour involving the use of inanimate objects, in order

to inflict suffering or humiliation on the offender's non-consenting partners.

8 As will be discussed in greater detail later in these reasons, what was in issue, during this hearing, was the nature and extent of this disorder and whether it could eventually be controlled in the community.

9 Each counsel further acknowledged that the Court retained a residual discretion not to designate an offender a "dangerous offender" even if either or both of the statutory criteria set out in paragraphs (a) and (b) had been met[1]. This residual discretion is, Ms. Page argued, underscored by a sentencing judge's obligation to have regard to s. 718.2(d) of the *Code,* which provides that an offender "... should not be deprived of liberty, if less restrictive sections may be appropriate in the circumstances". Furthermore, she argued that the Supreme Court in *Johnson* more than suggested that a sentencing judge was therefore obliged to consider whether the sanctions available under the long-term offender (LTO) provisions would be sufficient, in lieu of designating the offender a DO, to achieve the objectives mandated by the *Code*.[2]

10 The elements of the LTO designation are set out in section 753.1 of the Criminal Code:

> **753.1** (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> (*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (*b*) there is a substantial risk that the offender will reoffend; and
>
> (*c*) there is a reasonable possibility of eventual control of the risk in the community.
>
> (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
>
> (*a*) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child

> pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and
>
> (*b*) the offender
>
> (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
> (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offenses.

11 The Supreme Court further observed in *Johnson* that if an offender has satisfied the DO criteria, he or she is virtually guaranteed to have satisfied the first two LTO criteria[3]. The R.L. case is no exception to this general proposition, leaving only the third LTO criterion to be considered: namely, whether there is a reasonable possibility of eventual control of the risk in the community (s. 753.1(1)(c)). In arriving at a conclusion in respect of this last mentioned subsection, I am reminded that the Ontario Court of Appeal recently concluded that neither party in a sentencing hearing has the burden to prove or disprove the third LTO criterion. Simmons J.A. noted that in the final analysis "it is an issue for the sentencing judge concerning whether to exercise his or her discretion based on the whole of the evidence adduced".[4]

12 I remind myself, as well, as was urged upon me repeatedly by Ms. Humphrey during the course of argument, that a "reasonable possibility" indicates more than a "mere hope". In that respect, certain cases to which reference was made conclude that it must be reasonably possible to achieve control of the offender in the community within a fixed period of time.[5] Indeed, in some cases, courts have referred to the French version of the *Criminal Code*, where the LTO criterion reads "une possibilité réelle", to infer that an even higher level of "real possibility" is required instead of just a "reasonable possibility".[6]

Position of Counsel

13 It was Ms. Humphrey's position that given R.L.'s "... long and relentless pattern of offending, his intractable personality disorders, and his multiple paraphilias..."[7], which she says are distilled to a diagnosis of sexual sadism, the evidence leads but to an unalterable conclusion in favour of a DO designation. This conclusion, she argued in her usual forceful, but polite fashion, is underscored by

the great uncertainty attendant to whether or not R.L.'s high risk to re-offend can be managed in the community under the LTO provisions of the *Code*. Of equal importance, Ms. Humphrey argued throughout that R.L., simply put, could not be trusted and that he was, and will continue to be, a manipulator of the system. She went to the point of suggesting that his lack of 'recall' of the events underlying the predicate offenses is a further example of his manipulative behaviour, if not his egocentricity.

14 Alternatively, and in no way conceding the propriety of such a designation, Ms. Humphrey argued that if the Court accedes to the notion or exercises its discretion in favour of an LTO designation, then the appropriate sentence for the predicate offenses, in the aggregate, must be 16-20 years imprisonment having regard to R.L.'s record, and the need for the imposition of a sentence that pays more than lip service to the principles of deterrence, both general and specific, and denunciation.

15 Ms. Page, on the other hand, in an attempt to remain faithful to what she suggests is the prevailing approach to designating an offender a DO - which is basically to treat it as an order of last resort - has suggested that the appropriate determinate sentence should be 6-8 years, less the time served. She supports her position by averring to the circumstances of R.L., which she argued include not only his past involvement with the justice system, but his most recent long period of incarceration prior to this date. Additionally, Ms. Page 'concedes' that a long term supervision order of 10 years is more than warranted, if only to ensure that the public safety issues mandated by the case law are satisfied given R.L.'s acknowledgement of his lifetime disorder.

Approach

16 The evidence in this proceeding was presented in four *tranches*: the extensive institutional dossiers, which included R.L.'s involvement with all manner of correctional/psychological officials; the "risk assessment" evidence of Drs. Pallandi and Wilson and Mr. Losztyn, who is the director of psychological services at Warkworth; the community support network evidence, which was a mix of letters from community resources and the oral testimony of Madam Suzanne Hébert; and the evidence of R.L.. While I propose to comment upon each section of the evidence, I do not intend to cover all aspects of what I have read, heard or assimilated or what was underscored in argument. Such a task would be almost impossible.

17 However, as a precursor to the review, I intend to summarize, without intentional gloss, R.L.'s antecedents, his past offenses, the sexual therapy treatments he received in the institutions over the past almost 30 years, and the predicate offenses which bring us to this moment in time.

Antecedents

18 R.L. was born in Montréal in September 1955. Because, among other reasons, his mother suffered from depression when he was born, he spent the first several years of his life with his grandparents. His biological father was a police officer and was described as authoritarian, while his

mother was "emotionally and verbally 'absent.'"[8] At some point during his childhood, his father had an accident, lost mobility in his arms, and was forced to leave his job as a policeman. For some time thereafter, his father became dependant on drugs and alcohol and had repeated scrapes with the law. His parents separated when he was 13, after which point his life on all levels began to spiral out of control. He blamed his mother for leaving her sick, unemployed husband.

19 Now, as an adult, R.L. opines that his father probably had some form of stroke and his mother likely left him because he was having affairs with many other women.

20 R.L. recalls that at the age of 13 his father took him hostage at gunpoint in an effort to convince his mother to return to the relationship. He eventually escaped and called the police. He believes, however, that no charges were laid because his father was a former police officer and his grandfather was a Chief of Police. He recalls the police treating the incident as if nothing happened. He was, however, "...left as a teenager with a dysfunctional/split family and practically no resources to survive".[9]

21 He soon began committing break and enters, associating with an anti-social peer group, experiencing difficulties in school, which he apparently quit, and started using and abusing different substances. R.L. entered various youth detention facilities as a result of his early criminal conduct. At the age of 18 he suffered a gun shot wound to his abdomen while trying to escape lawful custody. R.L. has resided in or around the Montréal area for all of his adult life in which he was not incarcerated; in his case, however, he has been incarcerated more often than not.

22 R.L. married in 1977 and had two children. In 1978, while his wife was pregnant with their second child, R.L. raped five women. After being arrested for the five rapes his wife divorced him. The marriage lasted, in total, approximately 18 months. He had little or no contact with either of his children until the summer of 1995 while in a minimum security prison, when he was 'reunited' with his daughter, a fact which he suggests lead him to go unlawfully at large ("UAL") in December. It was while UAL that he committed the predicate offenses.

R.L.'s Past Violent Sexual Offenses

23 R.L.'s first sexual assault convictions occurred in July 1979 after he entered a guilty plea to five charges of rape and four charges of armed robbery. All of the convictions stemmed from events between March and November 1978 when R.L. was 22 and 23 years old. He perpetrated these crimes by going to his victims' homes and either passing himself off as some sort of professional who was there to take measurements of the entryway or to use the phone. During these visits he coerced each woman into various sexual acts by threatening them with a knife or by striking them.

24 The victims of the sexual assaults ranged between 23 and 54 years of age. R.L. perceived all of the victims, including the 23 year old, to be older than he. Upon arrest, R.L. confessed to the offenses and then tried to commit suicide at the police station. He was convicted of the rapes, as well as the armed robberies, and received a global sentence of 16 years imprisonment, which was

made up of 12 years concurrent for each of the rapes and four years consecutive for the robberies.

25 In May 1982, R.L. entered a guilty plea for his sixth rape and his fifth armed robbery, as well as to the charges of break and enter, buggery, assault causing bodily harm, forcible confinement and possession of a weapon. He had committed these offenses the previous November after he escaped lawful custody while on an escorted medical absence from the Philippe Pinel Institute ("Pinel") in Montréal. The rape victim was 66 years old.

26 It was reported, and R.L. acknowledged, that he sodomized this victim, inserted objects into her vagina, and otherwise humiliated and invoked substantial fear in her through the use of threats, violence, and weapons. Upon his conviction for these offenses, R.L. received a 10-year sentence in addition to the 16 years he was already serving, for a total sentence of 26 years. He also received a 1-year consecutive sentence for the Escape Lawful Custody charge.

R.L.'s Sex Therapy Treatment

27 As I will discuss later in this judgment, R.L. was seen, assessed and treated by countless Corrections Services Canada psychologists/psychiatrists from 1979 to date.

28 R.L.'s first reported sex therapy treatment was at Pinel in 1981. He candidly admitted before me that he opted to go to Pinel because he learned early in his 'institutional education' that the time spent there was 'easier' than in any other standard penitentiary. He was treated at Pinel for four to five months before he escaped that institution to commit his sixth sexual assault described above.

29 From 1984 to 1988 R.L. received 249 sessions of individual therapy from a female psychologist while in prison. He developed "issues related to transference"[10] and acted out aggressively when he perceived his therapist to be abandoning him for another inmate. This behaviour resulted in the termination of his sessions with this therapist, who apparently was the object of his unrequited affection.

30 In the early portion of the 1990s, R.L. "completed" two additional sex therapy programs, one at the Cowansville Institution, a medium security federal penitentiary in the Montréal region, and the other at La Macaza Institution, a medium security federal penitentiary in the Laurentians.

31 During these last two programs R.L. was supposed to have developed relapse prevention skills and knowledge, participated in laboratory arousal reconditioning programs, as well as other program modules that included victim awareness and cognitive restructuring. Interestingly, he was described by his then counsellors as being a good participant in the programs although he seemed to have had some difficulty integrating the victim awareness component of the program. His laboratory results, which I took to mean certain actuarial assessments and phallometric testing, however, indicated he had reduced his arousal for deviant coercive behaviour to a level equal to consenting situations with adult females.

32 In early 1997 Dr. Louis-Marc Lauzon, a Regional Treatment Centre (Ontario) psychologist, after a three week assessment, noted that R.L. should, among other things, have more individual therapy sessions, possibly with a female psychologist, but that a "... low maintenance relapse prevention group would probably suit his needs for now". Dr. Lauzon did observe however that upon release, R.L. would need "very close monitoring and a structured reintegration plan".[11]

33 Later that year, R.L. was evaluated by Dr. William Marshall, who is a pioneer in the treatment of sex offenders and at that time was the Director of the Sex Offenders Program at the Bath Institution. Dr. Marshall concluded that there was no value in R.L. completing another sex offender program.

34 As Ms. Humphrey repeatedly argued, neither of these two well respected therapists was aware that R.L. had in fact committed the predicate offenses when their observations and recommendations were made. While I appreciate Ms. Humphrey's point, the fact is that each of them did have repeated sessions with the offender and access to his well documented file with other health care professionals while under the control of Corrections Services Canada.

35 Again, as I will discuss later in this judgment, in 1999, R.L., on his own accord and at his request, completed a 14 month high-intensity sex offender treatment program at Pinel. Thereafter, between 2003 and 2005, while he was on day and full parole, R.L. received individual treatment from Mr. Patrick Grisé, a psychologist practicing in Montréal. Initially these sessions took place every two weeks, but eventually were reduced to every six weeks on the recommendation of Mr. Grisé and with the concurrence of the National Parole Board (NPB).

36 Since 2005 R.L. has, as I previously indicated, been detained, for the most part at Warkworth. While at Warkworth he has been seen by Mr. Stephen Losztyn, the head of the psychological counselling program at that penitentiary, on roughly a bi-weekly basis. Mr. Losztyn testified that he had seen R.L. approximately 40 times over two plus years; I will have more to say about this treatment and Mr. Losztyn's assessment later in these reasons.

Predicate Offenses underlying the DO Application

37 On 20 December 1995, R.L. escaped lawful custody in Québec and travelled to Toronto. One day later, on December 21st, he committed another sexual assault by unlawfully entering the house of a 51 year old woman. While I do not intend to minimize the brutality and intensity of the assault that then transpired, I am not inclined to repeat all the sordid details in these reasons. These details are laid out in the Agreed Statement of Facts, filed as Exhibit 1 to these proceedings.

38 Suffice it to say, that R.L. entered the victim's home when she was alone, grabbed her from behind, placed a knife to her head and neck and demanded that she give over the keys to her car, threatening all the while to kill her. As she was searching for her keys, R.L. struck her with such force that he knocked off her glasses. He then demanded that she undress, which she initially refused to do. Fearing for her life and not wishing to agitate him any more, she partially unclothed.

He then attempted to penetrate her, unsuccessfully, demanded that she felate him, which she refused to do. A scuffle ensued, with the victim grabbing for and holding on to the knife, from which action she sustained lacerations to her hands that required sutures and bandaging. The offender ultimately gave up the struggle, left the house and proceeded to steal the victim's car.

39 Although R.L. was arrested on December 31st, for an attempted break and enter, four blocks away from the house in which he had committed the aggravated sexual assault ten days earlier, the police did not, at that time, connect him with the earlier assault. At the time of his December 31st arrest, he was in possession of a flashlight, a screwdriver, a pair of gloves, and a balaclava. He also had concealed on his person a steak knife and a realistic appearing semi-automatic handgun.

40 It was in 2005 that R.L. was charged with the December 21st crimes. The charges were laid after his DNA was matched with DNA found in the victim's car and his thumbprint along with a partial palm print were found on the glass of the basement window where it was alleged that he entered the victim's house.

41 R.L. claimed not to recall any of the details associated with the sexual assault but nonetheless pled guilty to the December 21st aggravated sexual assault and related charges conceding that it matched his *modus operandi*. As I mentioned earlier, and will discuss later in this judgment, Ms. Humphrey argued that this supposed lack of recall was but another example of how R.L. had manipulated the situation in an effort to minimize his actions and avoid the consequences that she now seeks to visit on him.

42 R.L. also pled guilty to break & enter, uttering a threat, and robbery, which were all crimes that arose in conjunction with the commission of the 21 December 1995 aggravated sexual assault.

Risk Assessment

43 In the final analysis, my decision, as counsel have agreed, comes down to my conclusion as to whether or not there is a reasonable possibility that R.L. can eventually be controlled in the community. In that respect, I intend to analyze the institutional dossier collected over the past 30 years plus, the assessment evidence of Drs. Pallandi and Wilson and Mr. Losztyn; the evidence of community resources, including the testimony of Madam Hébert and the evidence of R.L., himself.

Institutional Dossiers

44 Unlike the situation found in most of the reported cases, which I have had occasion to read over the past half year, my decision does not boil down to simply an evaluation of the evidence of competing experts. In the instant case, in marked distinction to most others, R.L. was assessed, evaluated or treated by no less than 21 psychologists or psychiatrists in at least half a dozen institutional settings from 1979 to 1997. He was seen thereafter and assessed, if not treated by Drs. Lauzon and Marshall, as previously observed, two very well respected therapists and "assessors", attended an in-depth program for over a year at Pinel from 1999-2000, was seen thereafter in the

community and most recently, was being treated by Mr. Losztyn at Warkworth.

45 As Dr. Lauzon observed in 1997, after reviewing the dossier maintained by Corrections Services Canada, it would be an almost impossible task to summarize "every one of these reports"[12]. He attempted, however, to distil the almost 20 years of reports by providing some insight into the root cause of R.L.'s paraphilia by noting that:

> ... his hatred of and dependency on his mother became a major theme in his development along with the consumption of pornographic material depicting scenes of violence towards females. Eventually his fantasy life revolved around older women, violence and revenge[13].

> ... (H)is first sexual experiences at the age of 14 were disappointing and somewhat humiliating as he was made fun of. He developed masturbation practices using pornographic material. His sexual deviancy for violence and older women crystallized as the symbols of his conflicts.[14]

46 That said, and as I observed above, neither he nor Dr. Marshall was of the opinion, at least in 1997, that R.L. was in need of any further institutional treatment or would benefit simply from some form of "low maintenance relapse prevention group" therapy[15].

47 Ms. Humphrey was quick to suggest that the "historic assessments" were of limited value because none of the assessors or therapists, with whom R.L. came in contact from 1997-2005, was aware that he had committed the subject predicate offenses in 1995. She also pointed out that his limited recollection of the events that took place while UAL in Toronto was suspect. She further argued that had R.L. been caught in 1995, or shortly thereafter, for theses offenses, rather than simply for the break and enter for which he was initially apprehended, he would have undoubtedly been the subject of a DO application from which an order would most assuredly have been made.

48 In my view, her logic on this proposition is unassailable and her suggested conclusion is almost inescapable. Indeed, had I been faced with the facts that she now urges upon me, I would have been inclined to the view that this man was incorrigible and that there was but a fond hope of his eventual control in the community. But ironically, he was not found out at the time, when he was 40 years of age and in more robust health than he is in today. At that time he had not, as yet, voluntarily undertaken further intensive treatment at Pinel and had not lived in the community for some time thereafter evidently dealing with his demons. In other words, the evidence of what R.L. did from 1997 to 2005, coupled with the mere passage of time and how that impacts one's behaviour or predilections, places this matter on another footing from that which would have existed in 1995.

49 Furthermore, I do not agree with Ms. Humphrey that the assessments performed by the health care professionals or even his parole officers in their reports filed up to R.L.'s arrest in January 2005 are of limited value in assisting me on the question of risk assessment. I think it is reasonable to

infer that these people are trained observers of the human psyche with a finely tuned radar to determining when and to what extent the offenders might be manipulating them and the system. I do not believe that they were oblivious to the fact that R.L.'s condition was serious, life long, and made him a moderate to high risk to re-offend if left unattended in the community. The reports belie that suggestion.

50 While there is no doubt that R.L. has a severe antisocial personality disorder, which makes him a risk to re-offend, if not a high risk, there is nothing to warrant Ms. Humphrey's additional argument that he should be diagnosed as a psychopath. The repeated actuarial and laboratory assessments done historically and as most recently as the spring of 2007 do not support such a conclusion.[16]

Risk Assessments - Assessments of Drs. Pallandi and Wilson and Mr. Losztyn

51 The Crown's forensic psychiatrist was Dr. Derek Pallandi, a psychiatrist associated with, among other institutions, CAMH, and a witness with whom I am familiar and for whom I have great respect. At no time in his testimony before me did Dr. Pallandi attempt to advocate the Crown's position, and conceded acknowledged contrary positions appropriately. His report was predicated upon certain standard actuarial tests, which he administered, and his few sessions with R.L. at CAMH, totalling some 8 hours.

52 He was of the opinion, based upon R.L.'s "long standing and ingrained pattern of sexual deviancy involving coercive activities" that the appropriate diagnosis for him was Sexual Sadism and Paraphilia Not Otherwise Specified (rape)[17]. It was Dr. Pallandi's opinion that given a "particular constellation of circumstances, R.L. might once again, elaborate his sadistically-motivated behaviours"[18].

53 It seems to me that Dr. Pallandi's conclusions were arrived at in part because he was of the view that R.L.'s lack of recall of the events of the predicate offenses was suspect, which meant his insight into his behaviour and its effects on his victims were wanting, and because his relapse prevention strategy was markedly deficient. In this respect, I am not certain that Dr. Pallandi had the benefit of speaking with Mr. Losztyn, who had a different take on both issues, or even reviewing his reports.

54 That said, Dr. Pallandi did observe that R.L. "... did not appear to engage in substantial impression management ...", and that his insight and judgment "... was certainly adequate for the circumstances ..."[19] Indeed, he did remark that even though he was of the view that R.L. remained a high risk for sexual re-offending, he could not rule out the possibility of his eventual control in the community assuming certain risk management strategies were implemented.

55 Dr. Robin Wilson, a Ph.d. in psychology, has equally impressive credentials to those of Dr. Pallandi. Indeed, his knowledge of the Canadian penal system and the treatment modalities offered in and out of the institutions by Corrections Canada and the NPB is unparalleled owing to his long

career in the system.

56 Beyond both classifying R.L. as one who suffers from antisocial behaviourial disorders and as a paraphiliac with polysubstance abuse tendencies, Drs. Wilson and Pallandi part company in respect of their overall diagnoses. Dr. Wilson would not go so far as to classify R.L. as a sexual sadist, as that term is used and defined in the DSM-IV-TR Manual. He did acknowledge, however, that R.L. has certain sadistic characteristics. Again, he would only go so far as to opine that R.L. engaged in deviant behaviour and was likely to also suffer from depression, which manifested itself as paraphilia with rape proneness.

57 In the final analysis, Dr. Wilson was of the opinion, that if R.L. were to undergo further intensive sexual therapy, which he was of the view would take a minimum of 3 years within the correctional institutions, and were thereafter released under a strict supervisory regime, much like the conditions under which he was released after 2000, there would be a real possibility that his predilections could be controlled in the community. It was his view, as it was Dr. Pallandi's to some extent, that the potential for control would not only be augmented because of the apparent support network that R.L. developed over the last 10 years but also because of his aging and its concomitant diminishment on deviant sexual behaviour would play a more prominent role. This age-based diminishment is a concept referred to as the "burn out" factor.

58 I cannot pass over Dr. Wilson's testimony without referencing his rough interview notes, which formed part of the focus of attention during his evidence. While his notes are, for the most part, consonant with his report and testimony, there is a reference on page 8 of the notes to the following, which I have attempted to quote verbatim:

> ... off record says he broke into a house and tried to rape but could not get erect
>
> - stole her car.
>
> Says he doesn't drive
>
> - seems unconvinced that it was really him, but, seems ready to admit it was him
>
> - does not want to go to trial and fight it

59 These notes provided Ms. Humphrey with a sufficient degree of fodder for her cross examination and had the effect of forcing Dr. Wilson to speculate on what might have been said by R.L. at the time of the interview. What was in issue as it related to the purported comment attributed to R.L. is whether or not he has a recollection of the events leading up to the commission of the

predicate offenses. He has categorically denied any complete and concise recollection since his arrest. The consequence of establishing this point, which Ms. Humphrey candidly acknowledged she must prove beyond a reasonable doubt[20], would not only give lie to R.L.'s conduct since his incarceration in 1996, after the break and enter, but also prove that he has been engaged in the highest form of impression management, fooling and manipulating untold numbers of assessors and therapists. Having regard to the fact that I have a reasonable doubt not only on what Dr. Wilson may or may not have heard during the interview, reproduced above, I do not intend to weigh in on the debate. But more to the point, I have a reasonable doubt as to whether or not R.L. has a recollection of the events to which he has pled guilty and assumed responsibility. I will comment in more detail about this issue of recall when I review R.L.'s evidence.

60 Regardless of my assessment of the evidence of either Drs. Pallandi and Wilson, and the difficulty I might have in reconciling the evidence of the one with the other, I am of the opinion that the evidence of Mr. Losztyn is of more than modest assistance in resolving some of the psychological issues which might otherwise give me pause. I accept much of his analysis even though he was not called upon to provide a risk assessment, *per se.*

61 Mr. Losztyn is a Board Certified psychologist and a skilled and experienced therapist, who is charged with the responsibility of running the psychology services of a major penal institution. While he did not perform a risk assessment in the 'prescribed fashion', which routinely amounts to a one day assessment, he assessed and treated R.L. in a longitudinal manner that I found to be as compelling, if not more so, than the method undertaken by Drs. Pallandi and Wilson. He saw R.L. approximately 40 times in the last several years and dealt with him in situations that were not contrived and undertaken simply for assessment purposes. More often than not, Mr. Losztyn observed R.L. in stressful circumstances when the offender's condition was acute. He not only treated him for depression, but worked with him on his relapse prevention strategy, and his external and internal triggers. These are all skill sets that are critical to the matters in issue in this application.

62 I have attached as Appendix "B" to this judgment, excerpts of his testimony. I have, as well, attempted to summarize certain of Mr. Losztyn observations, which I found to be helpful in resolving the "risk assessment" conundrum.

1. R.L. never relied on the fact that he came from a dysfunctional maladaptive family as a convenient excuse for his anti-social disorder. He always took full "ownership and responsibility" for his actions;
2. R.L. understands his offence cycle, and has attempted to put in place a relapse prevention strategy to guard against the internal and external triggers that promote his antisocial behaviour;
3. He is presently aware of the consequences of his behaviour and its impact on his victims and society, all of which emotion and expression of concern Mr. Losztyn concluded was genuine;

4. Mr. Losztyn holds the view that R.L. was truthful when he said that he had no present recollection of having committed the predicate offenses. If he understated his recollection of events, Mr. Losztyn did not think that would be of any moment since the offender was, nevertheless, prepared to take full responsibility for the events in question. This type of acknowledgement he suggested was as much of a break through for R.L. as it would be for other sex offenders taking responsibility for their actions without minimizing their assaultative role;
5. R.L. realizes that he has wasted a good part of his life by not only being incarcerated for most of it, but by causing untold damage to others. For him, time is now of the essence;
6. Mr. Losztyn does not believe he is being manipulated by R.L. He was of the view that the results of the recent actuarial assessments, in particular the Paulhus Deception Scale, indicates that R.L. is not a psychopath and that his personality traits were not consistent with those of a liar, or one who was superficial, glib or lacking in shame and remorse;
7. The skill sets established from the relapse prevention strategy, focused upon while at Warkworth, are transferable and form part of the standard sex therapy programs as a subset of cognitive training that R.L. would take once assessed in the system.

Community Support Network

63 R.L. has created a modest network of community support in Montréal, which I would not have thought possible for a man who has spent more than half of his life in penal institutions. He not only has a stable, if not interesting, relationship with a mature woman, but has created a contingent of trained supporters who are prepared to go to bat for him when and if he is released from prison.

64 The woman in his life is Madam Suzanne Hébert who is in her early 60s. I was favourably impressed with Madam Hébert, not only for her candour but for her determination in coming to R.L.'s aid when she knows full well what his past behaviour entails and how he has inflicted pain and suffering on women of a certain age. She is not by any measure an *ingénue* and is still intent on maintaining her relationship with the offender even after all these years of continued separation.

65 What is troubling for me, however, is the fact that she is almost 10 years R.L.'s senior and is not in good health. Indeed, she suffers from a range of maladies, which may ultimately limit her ability and capacity to look after R.L. and ensure that his 'triggers' do not take over his life yet again. That said, she is not afraid to breach him for misconduct, as she did in 1999, and I dare say, from my observations of her, she would do so in the future. What is at the root of their relationship is not for me to speculate. In the final analysis, I am satisfied that if her health can be maintained when and if he is released from prison, she will furnish the necessary emotional stability that was lacking in his life prior to the establishment of their relationship.

66 I am also satisfied that there are resources in the Montréal community, which will continue to exist in close to their present incarnation, upon which Corrections Canada or the NPB can rely. These centres, which include *Café Chrétien de Montréal,* and *Fondation Carrefour Nouveau Monde,* to name two with which R.L. has been involved off and on over the past 9 years, together with the *Circles of Support and Accountability (COSA)* should provide the buttresses necessary to ensure that R.L. is monitored and supported in an appropriate manner. I was impressed by the fact that the first two named social service organizations do not only have a history with R.L., which remains reasonably firm notwithstanding the discovery of his commission of the predicate offenses, but are prepared to ensure that he can be accommodated either in residence or otherwise on a relatively seamless basis. Whether they will be around well into the next decade is not something I can guarantee, nor, however, upon which I should speculate.

R.L.

67 R.L. testified before me this past March for the better part of two days. To say that he is enigmatic is to state the obvious. To borrow liberally from Dr. Pallandi's report, I found him to be "... pleasant, cooperative, and forthcoming throughout ..." his testimony. At times he "... presented somewhat contradictory information, but was generally amenable to discuss these inconsistencies. He was generally non-defensive and did not engage in substantial impression management. His speech was normal and fluent and his thought form was coherent ..."[21]

68 What was really in issue during the course of his testimony was whether or not R.L. was working the system and those around him in stating, as he did over and over again, that he had but a limited "snap shot" recollection of the days leading up to and after the date of the predicate offenses, namely December 21st 1995.

69 Ms. Humphrey basically argued that R.L. was engaged in nothing more than impression management in an effort to minimize the impact of his horrific activities. She argues that for him to say that he remembered the planning of his escape to Toronto in the weeks leading up to December 20th, the 'purchase' of halcyon, the purchase at various Dollar Stores of certain accoutrements for the commission of bank robberies, his stays at hostels and similar such matters, even to the point of stealing and driving a car, but has no recollection of the aggravated sexual assault itself, stretches the limits of credulity. In other words, what he remembered, she suggested, gives lie to his assertion on the details about which he says he now has no recollection. Furthermore, it was her position that the 'big lie' all but evaporated when he wanted to engage Dr. Wilson in an "off record" discussion and then proceeded to provide 'his expert' with some pertinent information surrounding the offence.

70 There is no doubt that this argument, considered in isolation, is more than a little compelling. However, I cannot consider this argument woven very carefully by Ms. Humphrey, without considering the larger matrix of facts that contextualize the factual items upon which she focused. In that respect, I am not persuaded that the evidence of the victim, about R.L.'s relative state of sobriety, contradicts his statement that he consumed alcohol and ingested handfuls of an amnesic

drug on the day of and the day prior to the assault, which he washed down with alcohol. While no doubt his story of the extent of his memory changed from time to time, i.e. he recalled some particulars and not others at various times, it is perfectly consistent with his having to tell the story several times after reading the Disclosure. I am not persuaded that he did not confuse his recollection with what he had read.

71 Furthermore, I am not persuaded that Dr. Wilson's note of the "off record" discussion was accurate in all respects. While admittedly, R.L.'s English is very good, there were certain turns of phrase that he used during his testimony that sounded more literal than idiomatic, this, perhaps, being one of them. In addition, I accept R.L.'s statement that he was well aware of the fact that there are no 'off the record' discussions with therapists at any time in an institutional setting. Indeed, his dossier is replete with executed versions of this and similar such standard disclaimer forms. He is not by any observations a stupid man and would not have made so basic an error in his discussions with Dr. Wilson as to believe that he could tell a therapist something he is not willing to tell this Court.

72 Finally, as was observed by Mr. Losztyn, and to some extent by each of Drs. Pallandi and Wilson, the fact that R.L. says that he has had no recollection of the assault, but is prepared to take full responsibility for the assault and its consequences does not constitute impression management in circumstances where the offender is attempting to minimize his involvement. To the contrary, he is prepared to step up to the plate in all respects and accept full responsibility for the predicate offenses.

73 While I have attempted to peer into the soul of the offender in an effort to come to grips with this most troubling of issues, my decision is more than merely visceral, it is rooted in all the evidence which I do accept as credible and reliable. In the final analysis, I am left with a reasonable doubt as to whether or not R.L. has a recollection of the events in question, notwithstanding his plea. I should add that even if the Crown were wrong in her concession that it was her burden to prove beyond a reasonable doubt that he does recall the 1995 sexual assault, I am nonetheless satisfied, on a balance of probabilities on all the evidence, that R.L. cannot recall the 1995 sexual assault.

74 I cannot leave R.L.'s evidence without making observation on some other issues which featured prominently in the proceedings:

1. While no doubt R.L. has participated in several sexual therapy programs prior to 1995, with obvious limited success, I am satisfied that he is, or at least appears to be, committed to this form of therapy at present and understands that there is basically no tomorrow if he is not successful this time around;
2. I am of the view that the best predictor of his future behaviour are the years ramping up to his arrest in 2005 and not the time before 1995 when he

transgressed repeatedly. He was on day and full parole during the two years immediately preceding his last arrest, apparently without incident, and by all accounts functioned well in the community on multiple levels;

3. Finally, I agree with Drs. Pallandi and Wilson that there exist certain protective factors which "may serve to attenuate the otherwise worrisome actuarial assessment of risk..."[22] , in addition to the community support network discussed above and his apparent understanding of his own substance abuse issues. While not, jurisprudentially, a well received notion, I am lead to believe that there is sufficient psychological/medical evidence to suggest that the burn out factor may have more than a modest positive prophylactic effect on R.L.'s historic behaviour. His advancing age should factor into the calculus, particularly if he is not released for some considerable period of time. The Crown expert, Dr. Pallandi, made the same observation "[g]iven R.L.'s current page [sic], one might expect to observe this type of age-related decline in recidivism. In effect, his age, as it has evolved *may* well be a protective factor against sexual recidivism."[23]
4. Furthermore, I am of the view that any concerns that might exist in respect of his taking medication that can remedy any prospective penile dysfunction issues can be met either by an order prohibiting the taking of such medication or a further consideration of other forms of pharmaceutical intervention about which R.L. might be amenable in the future.

Disposition

75 I have weighed all the evidence and issues that I have attempted to describe in the preceding portions of this judgment. I repeat as a precursor to my disposition the instructions of Cronk J.A. recently expressed in *R v. G.L.* at paragraphs 42 and 70, respectively[24]:

> I do not read Johnson as displacing the principle that, to achieve the goal of protection of the public under the dangerous offender and long-term offender provisions in the *Code*, evidence of treatability that (i) is more than mere speculative hope, and (ii) indicates that the specific offender in question can be treated within an ascertainable time frame, is required. The requisite judicial inquiry on a dangerous offender application, mandated by Johnson, is concerned with whether the sentencing sanctions available under the long-term offender provisions of the *Code* are "sufficient to reduce [the offender's] threat to an *acceptable* level." [Emphasis added.] The determination of whether an offender's risk can be reduced to an "acceptable" level requires consideration of all factors, including treatability, that can bring about sufficient risk reduction to ensure protection of the public. This does not require a showing that an offender will be "cured" through treatment or that his or her rehabilitation may be assured. What

> it does require, however, is proof that the nature and severity of an offender's identified risk can be sufficiently contained in the community, a non-custodial setting, so as to protect the public.
>
> As I have indicated, the overriding purpose of the dangerous and long-term offender regimes is the protection of the public. Thus, 'real world' resourcing limitations cannot be ignored or minimized where to do so would endanger public safety. The court is required on a dangerous offender application to balance the liberty interests of an accused with the risk to public safety that will arise on the release of the accused into the community. That balancing exercise is informed by this fundamental principle: in a contest between an individual offender's interest in invoking the long-term offender provisions of the *Code* and the protection of the public, the latter must prevail. This accords, in my opinion, with the intention of Parliament as expressed in the dangerous and long-term offender provisions of the *Code*, and in the *Corrections and Conditional Release Act*.

76 I am satisfied that the public interest safety concerns can be met by the imposition of a long determinate sentence followed by a long term supervision order, with recommendations. In the circumstances, I have decided to exercise my discretion against the imposition of a DO order and to dismiss the Crown's application accordingly.

77 The appropriate length of sentence under the circumstances is first to be informed by the application of the principles of sentencing set out in s. 718 and following of the *Code*, as interpreted by the case law. In that respect, I find the comments of former Chief Justice Lamer in *R. v. M.(C.A.)*[25] to be most instructive:

> The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, *while at all times taking into account the needs and current conditions of and in the community.* (emphasis added)

78 In my view, the principles of denunciation, separation and rehabilitation are paramount in determining the appropriate sentence in the instant case. I am not persuaded that the principles of deterrence, both general and specific, should play as prominent a role in the instant case, if at all, having regard to the fact that R.L. suffers from a life long psychological disorder which might be controlled but not deterred by the threat of imprisonment.[26]

79 The aggravating circumstances of the offenses before the court are manifest:

1. The aggravated assault, including the elements of degradation and

violence, was severe;
2. the victim has suffered long lasting trauma from the nature and terror of the assault;
3. a weapon was employed to dominate the victim;
4. the accused by his own admission was high on halcyon;
5. the offender was UAL at the time the offence was committed;
6. the offender had previously been sentenced on two separate occasions for similar such crimes for 12 and 10 years, respectively.

80 I have also considered the following factors in mitigation of penalty:

1. R.L. pleaded guilty;
2. he consented to a s. 752.1 *Code* remand;
3. he has assumed full responsibility for his behaviour and has demonstrated remorse;
4. he has indicated a willingness to take continuing treatment and has undertaken therapy for the better part of the past two years;

Delay between Commission of Predicate Offenses and Sentencing

81 It was Ms. Page's opening position that the 'appropriate' sentence for the predicate offenses, which arise from a single predicate transaction, should be in the range of 10-12 years. This number was arrived at after paying particular attention to the aggravated sexual assault and, among other things, having regard to the principles of totality. She argued quite forcefully that this number should, however, be reduced significantly because of the time span between the date of the offence, namely December 1995, and the date of sentencing or at least the date that the plea was received. It was her position that the final number should, therefore, be ratcheted down to 6-8 years accordingly.

82 The essence of her argument was that some credit should be given to R.L. because he has lead a virtually crime free existence since the date of the predicate offenses until his arrest, which she suggested amounted to some 10 years. She relied on the decision of Hill J. in *R. v. Critton*[27]. The facts of that case are somewhat extraordinary and merit a quick mention for the purposes of context. In 1971 Mr. Critton hijacked an Air Canada flight headed from Thunder Bay to Toronto and ordered it to take him to Cuba after a brief stopover in Toronto to permit the other passengers, who remained unaware of the hijacking, to deplane. Mr. Critton was only arrested by Canadian authorities in 2002 for this hijacking. In the intervening years he had led an entirely crime free and, in fact, exemplary life of volunteer work and teaching, mostly in Tanzania. In determining how to account for the 31 years between the time he committed the offence and when he was charged, Justice Hill distilled the then prevailing jurisprudence in the following manner:

1. the effect of delay on sentencing is a case-specific inquiry;

2. deliberate acts to evade detection by the authorities, whether flight or contribution to delayed complaint tend to weigh against assigning mitigating impact to the fact of delay;
3. reform and rehabilitation during the intervening period tend to eliminate the prospect of recidivism and to nullify the need for specific deterrence to be reflected in the court's disposition;
4. certain very serious crimes require sentences with measures of general deterrence and denunciation regardless of the offender's lengthy crime-free existence subsequent to the crime(s);
5. objectively speaking, taking into account delay, the court's disposition should not be seen as a reward or benefit eliminating or depreciating the concept of proportionate punishment.

83 The Court of Appeal of Nova Scotia has recently considered the application of the above constructs and has provided the following additional comments, which in my view are of some moment to the matter now before me:

> Where a crime is one which requires a sentence emphasizing denunciation and general deterrence, as is spousal assault (*R.* v. *MacDonald* (2003), 173 C.C.C. (3d) 235, [2003] N.S.J. No. 99 (QL) sub nom. *R.* v. *C.V.M.* (N.S.C.A.)), a long passage of time between the commission of the offence and detection or between conviction and sentence does not lessen the need for such emphasis notwithstanding that the offender has unblemished conduct during that time (*R.* v. *Spence* (1992), 78 C.C.C. (3d) 451 at pp. 454-55, [1992] A.J. No. 1129 (QL) (C.A.)).[28]

84 In my opinion, Ms. Page's argument fails on several fronts. In the first place, it cannot be said that the period of his crime free existence is 10 years. Indeed, R.L. spent at least 8 of those years incarcerated, and did not have an opportunity to commit assaults or robberies of any form against women of a certain age or even any women whatsoever. To say that he did not commit crimes while in custody misses the point of this entire inquiry, which focused on R.L.'s paraphiliac behaviour and not on his ability to conform with or survive in an institution.

85 Even assuming for purposes of this argument that R.L. undertook and benefited from the sexual therapy treatment he received at Pinel in 1999-2000 and in the community thereafter, and otherwise lived a 'model life' when released into the community from July 2003 to January 2005, the offenses for which he is now being sentenced fall into the 4th and 5th categories to which Hill J. says this notion of 'mitigation' specifically does not apply.

86 Indeed, this case is markedly different from *Critton* and any others where the offence was a "one-off". In other words, I am of the opinion that the principle expressed above has no application to a situation where a person who, all other things being considered equal, would meet the criteria

for a DO designation, but would at the same time seek to have the determinate portion of his sentence reduced because of recent behaviour. The two propositions, in my view, cannot co-exist or at least cannot co-exist on the facts before me.

87 Finally, while not dispositive of the issue, I dare say I would not have been persuaded that there is a reasonable possibility of eventual control in the community but for R.L.'s conduct and behaviour from and after 1999, in and out of the institutions, for which he has already received significant if not sufficient recognition and credit.

Appropriate Sentence

88 Meting out the appropriate sentence, and one which is tied to a long term supervision order, is not, in and of itself, an easy proposition. This is made all the more difficult since counsel provided only aggregate ranges and not individual sentences measured against the four counts. Hence, I am left to my own devices. That said, and subject to any credit to be given for pre-sentence custody, I am of the opinion that a global sentence of imprisonment of 14 years, together with a 10 year long term supervision order, would serve the interests of justice in the circumstances of this case. The breakdown in respect of which is as follows:

* Count 1 - Break and Enter with intent -- 5 years (Concurrent);
* Count 2 - Utter death threat - 18 months (Concurrent);
* Count 5 - Aggravated Sexual Assault - 12 years (Concurrent);
* Count 7 - Robbery - 2 Years (Consecutive)

Pre-Sentence Custody

89 As indicated, the offender was apprehended, pursuant to a warrant on January 28th 2005 in Montréal and transported in early February to the Toronto West Detention Centre (the "West"). At the time of his arrest, he had been on full parole in respect of his past convictions. The Warrant Expiration Date was August 10th 2007. In other words, he was under the supervision, if not the watchful eye, of the NPB during the period starting with his Day Parole in mid July 2003 to the expiration of his cumulative sentence on August 10th 2007(collectively referred to as the "Initial Period"). For most of the two and half years of the Initial Period, he was incarcerated at Warkworth although he spent significant chunks of time at or travelling to and from the West or KP.

90 As best as I can make out from the documentation filed at this hearing - two Assessment for Decision forms filed by certain parole officers, and the summary prepared by his current Warkworth parole officer, Kim Herrington - his parole was suspended. I presume, although I was not specifically told, that the suspension was undertaken pursuant to s. 135(1) of the *Corrections and Conditional Release Act*[29] in order "to protect society". I draw this conclusion because the predicate offenses were committed prior to R.L.'s release on parole and did not constitute a breach of his parole conditions.

91 Ms. Page argued that the time logged in the various institutions in respect of the Initial Period should be accounted for in the 'normal course' as pre-trial custody on a 2- for 1 basis for all time spent in non-Warkworth facilities and on a 1-for-1 basis for the time spent in Warkworth. This argument is made pursuant to the discretion accorded to sentencing judges under s. 719(3) of the *Criminal Code.* It was her position that R.L.'s incarceration during the Initial Period arose "...as a result of the offence" and not as a result of any breach of parole; this latter situation has been judicially excluded from any pre-trial reckoning[30]. Having regard to my conclusion about the operation of the *C.C.R.A* and applicable *Regulations,* I need not parse the time spent to determine what credit if any should be given in the circumstances.

92 In my opinion, subsection 135(10) of the *CCRA,* to which my attention was not directed during argument, is a complete answer to the suggestion made by Ms. Page. That subsection provides that where an offender is in custody "by virtue of this section", he "continues to serve" his originating sentence. There is no doubt from the record before me that R.L. was incarcerated at Warkworth pursuant to a transfer warrant issued in early February 2005 at which time his parole was officially and formally suspended pursuant to s. 135(1) of the *CCRA.* As they were obliged to do, the assigned parole officers performed an assessment as a precursor to a decision of the NPB.

93 R.L. was formally advised of his rights to a hearing before the NPB on at least 4 separate occasions, starting as early as the latter part of February 2005. On each occasion, after being informed of his rights, as the documentation that forms part of Exhibit 30 discloses, he specifically chose to postpone the mandated hearing before the NPB, which he is statutorily permitted to do, for reasons about which I can only speculate.

94 At that stage, in my opinion, he was then deemed to be serving out the balance of his sentence by operation of the subsection paraphrased above. Hence, he cannot now claim to have that time credited to 'standard' pre-trial custodial time, which arguably can be taken as a credit against his global sentence.

95 If I am wrong in my interpretation of s. 135, I would nevertheless decline to exercise my discretion in favour of providing any credit for the time served in the Initial Period for reasons that should be apparent in respect of the ultimate disposition of this matter. That being said, I do not have to comment upon the statements made to me by Ms. Humphrey, which I accept unqualifiedly, that R.L.'s prior counsel made it clear on the record at various times that R.L. was serving out the balance of his sentence during the Initial Period and that the time to get this matter on for hearing was not really of the essence.

96 The time, however, from August 10th 2007 to today (the "Second Period") falls to be considered differently. R.L. plead guilty to four counts in the middle of April 2007. The matter then underwent the normal multiple adjournments until the actual hearing was commenced in the middle of October. During most, if not all, of his attendances in the Superior Court, at least those attendances before me, it became a matter of some importance that I make a judge's order to have

him returned to Warkworth. The purpose of these orders were to allow him to resume his therapy sessions with Mr. Losztyn prior to the actual sentencing decision.

97 When it became apparent that the DO application would not be heard prior to the Warrant Expiry Date, Ms. Page, in a very creative manner, arranged with Ms. Humphrey to have R.L. plead guilty to another charge arising from the events of the predicate offenses, namely a charge of theft under (Count 10) and be sentenced on that one offence. This sentencing hearing took place at the beginning of August 2007, whereupon I sentenced R.L. to a term of 10 months consecutive to the completion of his then 'current sentence'. As I was later reminded by Ms. Humphrey in argument, this new sentence was imposed without prejudice to Ms. Page being able to argue the manner in which I was to account for it in relation to the Second Period of pre-sentence custody, either as part of a concurrent sentence to one that I might ultimately fashion on the determinate portion of the LTO or otherwise, including providing credit for time served, if I so decided.

98 Most of the time attributable to the Second Period was served at Warkworth although some 80 plus days was served at the West or at KP or in transit, in less than ideal conditions. I was told, as well, that Mr. Losztyn, did intervene on R.L.'s behalf from time to time to assist in his accommodation while out of Warkworth.

99 For reasons that escape me, DO applications, at least in this jurisdiction, take on a life of their own. It remains somewhat unfortunate, if not mysterious, how and why expert reports cannot be prepared and exchanged on a timely basis; that the schedules of experts and counsel seem always to be irreconcilable; and that when the schedule for hearing is ultimately set by counsel, not enough time is allotted for the receipt of the oral evidence even though much of the background material, as in this case, was collected, exchanged and filed on consent. Hence, the hearing had to be adjourned repeatedly and additional days had to be, literally, stolen from other matters in which the Court and counsel were involved over a period of roughly five months.

100 That said, I do not intend to, nor can I with certainty, assign blame to either side for this situation. And while I do not ascribe to Molloy J.'s view that there is something illogical about giving double credit for pre-sentence time served by a "violent repeat offender who is dangerous to the public"[31], I am not convinced in this case that 2-for-1 credit is warranted in the circumstances of this case. Unlike the 'standard situation' where an accused or offender is denied the services associated with a penitentiary for the duration of the pre-trial period, and is stuck in a detention center, this was clearly not the instant case as Ms. Page and I, with Ms. Humphrey's concurrence made every effort to ensure that R.L.'s time away from Warkworth was minimized and that while there, he was in treatment, a factor which I found to be critical to the outcome of this application.

101 But for the "time-served" in respect of the 10 month sentence imposed last August, I would, have given R.L. almost 'automatic' credit for the time attributable to the Second Period, which amounts to a period of under ten weeks, on a 1-for-1 basis. I am still inclined to give him that credit because it is my view that his plea of guilty last August was entered into to insure that his "dead

time" could, effectively, be put to some good use, namely to insure that he receive therapy while at Warkworth. Otherwise, his pre-sentence custody would have been of little or no value. Therefore, in the final reckoning, he shall be sentenced to a global sentence of 13 years and 2 months, in addition to the time served as accounted for above.

102 It is my strong recommendation to the federal authorities that R.L. be re-assessed as soon as is reasonably practicable and thereafter be incarcerated in an institution that provides suitable therapy, preferably Pinel. If not Pinel then at least one in the Montréal area, which will ensure that he continues to receive sex offender treatment, substance abuse and anger management counselling and any further life skill and vocational training suitable for a man of his age and circumstances, while at this time permitting continued contact with his support network.

103 I had originally contemplated exercising my discretion and making a corollary order under section 743.6 of the *Code* delaying R.L.'s parole until he had served one half of the full sentence. While it is clear, and acknowledged that he must remain institutionalized for a minimum of 3 years after the commencement of the sentence to ensure that he completes the treatment program prescribed, I am not prescient enough to know whether or not that is the minimum period of incarceration necessary, having regard to all the circumstances of this case, this offender and the offenses to which he has pled guilty. That determination seems to me to be a decision for the authorities based on all the circumstances of the offender at the time that he first becomes eligible for parole.

Long Term Supervision Order

104 The dominant consideration in determining the term and duration of a long term supervision order, which I have fixed at 10 years, on consent, is the protection of society. It is now settled law that the terms and conditions to be attached to any order fall within the exclusive jurisdiction of the NPB[32], although a sentencing judge is permitted to make recommendations to assist the NPB with its determination. It is therefore strongly recommended that the NPB consider the following conditions as part of the long term supervision order:

* That R.L. be placed in a residential setting in Montréal with which he has had past experience and success, namely *Fondation Carrefour Nouveau Monde*, or a similar such facility in the Montréal area which is functioning upon the commencement of the supervisory portion of his sentence;
* That R.L. make reasonable efforts to seek and maintain gainful employment, failing which that he work as a volunteer at *Café Chrétien de Montréal* or similar such facility;
* That R.L. abstain absolutely from the consumption of alcohol and not have alcoholic beverages in his possession or under his control;
* That R.L. not possess or have in his possession or under his control any substance described in the *Controlled Drug and Substances Act* except

under the authority of a medical prescription;

* That R.L. be subject to random drug testing on a schedule to be set by the NPB and that he co-operates fully with his LTSO supervisor or designate in this regard;
* That R.L. attend for such counselling and treatment for his paraphilia, depression and/or substance abuse as may be identified and mandated by the NPB or his supervisor or designate and provide whatever consents are necessary to ensure compliance;
* That R.L. shall take whatever medication may be prescribed for him by qualified medical doctors treating him for sexual deviance and or substance abuse;
* That R.L. be prohibited from consuming or having in possession any penile dysfunction medication, and without limiting the generality of the foregoing, Viagra or any similar such medication;
* That R.L. enroll and participate in a program designed and operated by COSA in Montréal or such similar program as may be in operation from time to time in that city;
* That R.L. reside with Madame Hébert, if she is willing and able, if and when admitted into Full Parole;
* That R.L. forward an annual report, containing a brief summary of his personal circumstances and progress, by December 1st of each year while under the LTSO, co-signed by him and his supervisor addressed to:

The Honourable Arthur Gans

Judge's Administration
361 University Avenue
Room 170
Toronto, M5G 1T3

Corollary Orders

105 The offender is sentenced to a lifetime weapons prohibition order pursuant to s. 109(3) of the *Code.*

106 The offender has already submitted to a DNA order, previously obtained. He will provide a further sample if required by the authorities. (See s. 487.051(1))

107 The application to have R.L. declared a dangerous offender is dismissed. He is, however, found to be a long term offender and sentenced to imprisonment and an LTSO as above.

A.M. GANS J.

* * * * *

APPENDIX "A"

TimeLine
R v. R.L.
RE: Dangerous Offender Proceeding

Date	Event	Reference
September 7, 1955	Mr. R.L.'s date of birth.	Binder 1, Tab 2 Indictment - Oct 24, 2005 Page 1
Sometime in 1970/71	At age 13 Mr. R.L. becomes involved with the criminal justice system.	Binder 1, Tab 21 Dr. Wilson's Report - Mar 26, 2007 Page 4, Para 1 under *Criminal History*
December 11, 1973	First criminal offense: Failure to Comply for breaching conditions of recognizance. Sentenced 1 day and fined $100	Binder 1, Tab 11 Pre-Sentence Report – May 9, 1979 Page 8, Para 1
Sometime in 1974/75	Mr. R.L. admitted to Dr. Wilson that he "forced an older woman to engage in sexual activity with him when he was 17 or 18" but he was never charged for it.	Binder 1, Tab 21 Dr. Wilson's Report - Mar 26, 2007 Page 6, Para 2
Sometime in 1975/76	At the age of 18, Mr. R.L. suffered a gunshot wound to his abdomen while attempting to escape lawful custody. He tells Dr. Wilson that his left arm was shot.	Binder 1, Tab 22 Dr. Pallandi's Report – Jul 22, 2007 Page 8, Para 8

		Dr. Wilson's handwritten notes, page 15
April 19, 1974	Mr. R.L. received a sentence of 30 days jail and 2 years probation for the following charges: Failure to Comply with Recognizance, Fail to Attend Court, 2 x B/E & Theft, 5 x B/E & Commit, 1 x B/E with Intent, 1 x Attempted B/E. In regard to Mr. R.L.'s probationary term, the Probation Services file indicates that Mr. R.L. showed a lack of cooperation in fulfilling the condition that he report to a probation officer.	Binder 1, Tab 5 Criminal Record for Mr. R.L. Page 1 Binder 1, Tab 11 Pre-Sentence Report – May 9, 1979 Page 8, Para 1
February 20, 1975	Mr. R.L. received a sentence of 1 day imprisonment for Failure to Comply with Recognizance.	Binder 1, Tab 5 Criminal Record for Mr. R.L. Page 1 Binder 1, Tab 11 Pre-Sentence Report – May 9, 1979 Page 8, Para 2
November 28, 1975	Mr. R.L. received a sentence of 26 months imprisonment for the following 5 convictions: Fail to Comply with Recognizance, Attempt Theft from Mail, B/E & Theft, 2 x Theft over $200.	Binder 1, Tab 5 Criminal Record for Mr. R.L. Page 2 Binder 1, Tab 11 Pre-Sentence Report – May 9, 1979 Page 8, Para 2
March 22, 1977	Mr. R.L. is convicted of escaping lawful custody. He decided to stay at his girlfriend's instead of returning to	Binder 1, Tab 5 Criminal Record for Mr. R.L.

	the halfway house. For that conviction he received 5 months imprisonment.	Page 2 Binder 1, Tab 11 Pre-Sentence Report – May 9, 1979 Page 8, Para 2
July 31, 1979	Mr. R.L. is convicted of 5 counts of Rape and 4 counts of Armed Robbery. He received a sentence of 16 years imprisonment. His warrant expiry date is July 30, 1995. Mr. R.L. was just under 23 years of age when he committed the five rapes. The ages of the victims were 53, 23, 29, 54, 36, and 30 at the time of the offences.	Binder 1, Tab 5 Criminal Record for Mr. R.L. Page 2 Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 1 Binder 1, Tab 14 Request for Proceedings
May 9, 1979	A Pre-sentence Report is prepared for his sentencing hearing. Mr. R.L. indicates he occasionally had aggressive sexual fantasies towards older women. All the victims of his crimes were older than him but one. The Report indicates that Mr. R.L. *"while manifesting an attraction of older women, the subject harbors aggressive fantasies towards them. Acting out constitutes a release of suppressed aggression."*	Binder 1, Tab 11 Pre-Sentence Report – May 9, 1979 Page 8, Para 4 Page 9, 2nd full Para Page 12 , Para 2

	Mr. R.L. received his first recommendation for treatment. The Institut Philippe Pinel was asked to evaluate his case. The Report stated that, "Ideally he can be integrated into a specialized therapeutic program for sex offenders."	Page14, Para 2
November 4, 1981	Mr. R.L. is unlawfully at large while on a medical Escorted Temporary Absence (ETA) to Moisonneuve – Rosemont Hospital in Montreal, Quebec. This escape occurred while Mr. R.L. was receiving sex offender treatment at the Institut Philippe Pinel. Mr. R.L. informed Dr. Pallandi that he had completed 4 to 5 months of treatment at the time of the escape. According to Mr. R.L., his attitude towards treatment at Pinel was, "…not ready…I couldn't care less…I was not in a state of mind for treatment…wanted to protect my fantasy world."	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 2 Binder 1, Tab 21 Dr. Pallandi's Report Page 7, Para 5 Binder 1, Tab 21 Dr. Pallandi's Report Page 12, Para 4
November 5, 1981	Within 24 hours of being unlawfully at large, Mr. R.L. broke the into a woman's house in the evening when she is home alone watching television. During that incident he commits a series of offences including sexual assault and buggery.	Binder 1, Tab 10 Transcript of Preliminary Testimony from G.G.
November 6, 1981	Mr. R.L. is at large for 1 day and acquires a new warrant expiry date of July 31, 1995.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 3

December 14, 1981	Ms. G.G. testifies at preliminary hearing for the new charges.	Binder 1, Tab 10 Transcript of Preliminary Testimony from G.G.
May 10, 1982	Mr. R.L. is sentenced to 10 years imprisonment for charges of B/E with Intent, Buggery, Armed Robbery, Rape, Assault Causing Bodily Harm, Forcible Confinement, and Possession of a Weapon. His new warrant expiry date is July 31, 2005.	Binder 1, Tab 5 Criminal Record for Mr. R.L. Page 4 Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 3
May 19, 1982	He is convicted of Escape Lawful Custody and received a 1-year sentence consecutive to the sentence he was already serving. His warrant expiry date remains at July 31, 2005.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 4 Binder 1, Tab 5 Criminal Record for Mr. R.L. Page 2
1984-1988	He received 249 sessions of individual therapy from a female psychologist at CFF, Quebec. He told Dr. Pallandi that he fell in love with his therapist. The parole files indicate that several issues related to transference resulted in the termination of treatment.	Binder 1, Tab 22 Dr. Pallandi's Report – Jul 22, 2007 Page 12, Para 4 Binder 2, Tab 27 English Documents from the Correctional Service Canada Files (separate legal size documents) Page 20 of exhibit, page 6 of report, Paragraph 3

April 1992	Mr. R.L. completed a sex offender treatment program at Cowansville.	Binder 2, Tab 31 Assessment for Decision – Jun 19, 2007 Page 3, Para 2
August 1994	He completed more sex offender treatment at La Macaza. Mr. R.L. told Dr. Pallandi that this treatment lasted for one year and he was subjected to aversion therapy for his sexual deviancy. Mr. R.L. described the treatment there as "on and off…not intense." Dr. Pallandi states in his report that it was from this facility that Mr. R.L. went unlawfully at large and re-offended with an attempt break and enter. However, the correctional summary by Kim Herrington state that Mr. R.L. escaped from St. Anne Des Plaines Institution.	Binder 2, Tab 31 Assessment for Decision – Jun 19, 2007 Page 3, Para 2 Binder 1, Tab 22 Dr. Pallandi's Report – Jul 22, 2007 Page 7, Para 6 Binder 1, Tab 22 Dr. Pallandi's Report – Jul 22, 2007 Page 7, Para 6 Kim Herrington's Chronology – (Correctional Service of Canada) Binder 2, Tab 34 Page 2, Para 5
December 20, 1995	He escaped from St. Anne des Plaines Institution located in Quebec. He was at large for 10 days. Unbeknownst to officials, he committed his 7th rape while he was at large.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 5
December 21, 1995	One day after he escapes, he goes to Toronto and commits the predicate offences.	Binder 1, Tab 6 Transcript of Preliminary Testimony from G.M.T.

December 31, 1995	He commits a Break and Enter outside 40 [text deleted by LexisNexis Canada] Avenue, four blocks away from Mr. G.M.T.'s house. As a result of this offence he received a new warrant expiry date of August 10, 2005.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 6
	The officers seized a steak knife, slotted screwdriver, a plastic black replica semi-automatic handgun, and a Swiss army style knife. At the scene Mr. R.L. dropped a "Garrity" flashlight and a pair of black leather gloves. The officer also seized a toque that had 2 eyeholes cut out of the material.	Binder 2, Tab 26 Anticipated Evidence of: P.C. Imants Karklins #6163 – 55 Division (Unnumbered 2nd page) Para 8 and 9
	The officers at the scene noted that the basement window was broken.	Binder 2, Tab 26 Anticipated Evidence of: P.C. Imants Karklins #6163 – 55 Division (Unnumbered 2nd page) Para 6
	The owner of the home was M.P. She was 69 years old at the time.	Binder 2, Tab 26 Transcript of Police Interview with M.P. (beginning at Unnumbered 7th page of Tab 26)
January 5, 1996	Mr. R.L. received a 2 -year sentence (on top of 5 days pre-trial custody) to be served consecutively for the Break and Enter on Dec. 31, 1995 and 1 year concurrent for Carry Concealed Weapon. His warrant of expiry date is now August 10, 2007. At this time he is transferred to Millhaven Assessment Unit and is placed to reside at Bath Institution.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 7
May 15, 1998	This date is his statutory release date for day parole	Binder 2, Tab 34

	however he requested to have a temporary accommodation at Bath Institute until May 29, 1998.	Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 9
May 29, 1998	He was statutorily released to Martineau Community Correctional Centre in Montreal, Quebec. During his statutory release he completed the program for sexual delinquents offered by CERUM. Dr. JL Rouleau found that the links between sexual violence and women of mature age was still present, despite over a year of therapy.	Binder 2, Tab 34, Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 9 Binder 1, Tab 16 NPB Pre-Release Decision Sheet – Jun 26, 2003 Page 3, Para 2
December 10, 1998	Parliament enacted the *DNA Identification Act* S.C. 1998, c. 37. This Act allows a judge to make a post conviction DNA data bank order, authorizing the taking of bodily samples.	http://laws.justice.gc.ca/en/showdoc/cs/D-3.8/bo-ga:s_1//en?noCookie
July 7, 1999	His statutory release date was suspended for not following his release conditions and he was returned to custody at Leclerc Institution (Quebec).	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 10
October 20, 1999	The National Parole Board revoked Mr. R.L.'s statutory release.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 11

	The release was revoked based on the following grounds: Mr. R.L. had in his possession pornographic magazines featuring women aged 50 and over; he had consumed alcohol; and he showed evidence of a great lack of transparence towards those supervising him. These factors illustrated important risk indicators that he would resume his criminal cycle.	Binder 1, Tab 16 NPB Pre-Release Decision Sheet – Jun 26, 2003 Page 3, Para 1
January 24, 2000	He transferred from Leclerc Institution to Archambault Institution to enable him to attend Pinel for a sexual behaviour program. The Pinel Institute is a stand-alone facility located approximately 20 minutes from Archambault. It is a secure facility and patients are secured in their living units and do not have the ability to walk away from the property.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 12 Binder 2, Tab 34 Kim Herrington's Fax Re: Response to Provide Clarification, October 1, 2007 Page 1
June 30, 2000	The National DNA Databank (NDDB) was established pursuant to the *DNA Identification Act* S.C. 1998, c. 37. As such, the NDDB began accepting DNA samples for its Crime Scene Index and Convicted Offenders Index. The amendment allowed for the retroactive collection of DNA samples from those who were convicted of certain designated offences before the enactment of the legislation.	http://victimsweek.gc.ca/en/cons/dna_adn/intro.html Binder 2, Tab 33 DNA Search Warrant for R. v. R.L. Page 7, Para 15 and Page 16, Para 55(i)
June 22, 2001 to July 16, 2002	Mr. R.L. is at the Institut Philippe Pinel for 12 ½ months, participating in internal treatment for sexual aggressors. In November 1997, Dr. Marshall suggests Mr. R.L. does	Binder 1, Tab 16 NPB Pre-Release Decision Sheet – Jun 26, 2003 Page 1, Para 5 and Page 3, Para 4

	not require sex offender treatment. In February 1997, Dr. Louis-Marc Lauzon stated that he does not believe Mr. R.L. would benefit from another sex offender treatment program at this point. During Mr. R.L.'s stay at Pinel he participated in two plethysmographic evaluations. During the second evaluation in June 2002, the indices of deviance were at 1.39 with the most important response during sexual assault axed on the humiliation of the woman.	Binder 1, Tab 21 Dr. Wilson's Report Page 7, Para 1 Binder 1, Tab 27 Report of Dr. Louis-Marc Lauzon, Psychologist. Page 24 of exhibit, page 9 of report, Para 1. Binder 1, Tab 16 NPB Pre-Release Decision Sheet – Jun 26, 2003 Page 3, Para 5
July 17, 2002	Mr. R.L. transferred from Pinel Institution to Drummond Institution (Quebec)	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 13
May 16, 2003	He is granted Day Parole, however, full parole is denied.	Binder 2, Tab 28 Translation of Sensational Incident Report – Feb 4, 2005 Page 2
June 26, 2003	He is granted Day Parole, however, full parole is denied.	Binder 2, Tab 28 Translation of Sensational Incident Report – Feb 4, 2005 Page 2

July 15, 2003	Mr. R.L. was released on Day Parole to Carrefour Nouveau-Monde in Montreal until January 14, 2004.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 14
December 31, 2003	Day Parole was extended.	Binder 2, Tab 28 Translation of Sensational Incident Report – Feb 4, 2005 Page 2
January 15, 2004	The National Parole Board vote for a continuation of his day parole at the same location for another six months until July 14, 2004.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 2, Para 15
July 12, 2004	Full Parole is granted.	Binder 2, Tab 28 Translation of Sensational Incident Report – Feb 4, 2005 Page 2
July 15, 2004	The National Parole Board graduate Mr. R.L. to full parole with an expiry date of August 10, 2007. He is under the supervision of the Lafontaine Area Parole Officer.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 3, Para 1
January 28, 2005	Mr. R.L.'s Full Parole was suspended and he returned to custody.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 3, Para 2

	At this point, he has a total aggregate sentence from July 31, 1979 up to and including his warrant expiry date of June 10, 2008. This includes the 11 days he was unlawfully at large.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 3, Para 3
February 2, 2005	He was transferred from Laval Quebec to the Toronto West Detention Centre to face the charges before the court. At the time of arrest, a request was made to the accused for a consent buccal swab. Mr. R.L. indicated he wished to speak to counsel about the request, however, a definitive answer was not received.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 3, Para 2 Binder 2, Tab 33 DNA Search Warrant for R. v. R.L. Page 27, Para 81
October 17, 2005	Counsel for Mr. R.L. faxed a letter to the Crown's office, indicating that Mr. R.L. would not be providing a consent sample. As a result of this, the OIC for the offences before the court applied for a DNA Search Warrant, found in Binder 2, Tab 33.	Binder 2, Tab 33 DNA Search Warrant for R. v. R.L. Page 27, Para 82
April 16, 2007	He pleads guilty to the following predicate offences: B/E, Uttering A Threat, Aggravated Sexual Assault and Robbery.	Binder 1, Tab 2 Indictment – Oct 24, 2005 (Unnumbered page 4) Binder 1, Tab 6 Transcript of Guilty Plea – April 16, 2007.

August 3, 2007	He pled guilty to theft and received 10 months consecutive to his current sentence. His new parole eligibility date is November 12, 2007.	Binder 2, Tab 34 Kim Herrington's Chronology – (Correctional Service of Canada) Page 3, Para 4

March 27, 2008 revision.

* * * * *

APPENDIX "B"

Excerpts - Losztyn Evidence

1. *Page 8*

Q: Can you comment on that any further?

Page 9

A: We talked about his early background. We talked about a dysfunctional maladaptive family with lots of abuse and abandonment and psychiatric problems but he never connected them and used that as a justification or sense of responsibility that that caused him to offend. He always took full ownership and responsibility for his actions. He never relied or utilized his history as a convenient excuse.

2.

Q. And can you give us your comments about how he dealt with that relapse prevention plan, success or lack thereof?

A: I was impressed with his knowledge of his relapse prevention plan, his offence cycle. He knew of internal triggers, external triggers. He certainly was genuine in his expression of empathy and victim awareness. He was aware of the consequences of his behaviour and the impact it had on society. For someone who hadn't been in treatment for a while, I thought he had the concepts and the theory of the relapse prevention model well in his mind.

3.

A: A relapse prevention plan is when a client has an addictive problem. In R.L.'s situation we consider that the sexual aggression and a sexual act is rarely committed on impulsivity. There are always what we call triggers or precursors, antecedents, so things that are happening in the environment. For example, losing a job, having financial pressures, experiencing a death of a close -- someone close to you. Those are triggers. Internal triggers are feeling depression, low self-esteem. So the more we being equip the client to be aware of what is going on in his life that can make him susceptible to act out in a deviant fashion, the better it is for the treatment. He can *(page 11)* then identify the trigger and then we provide, through the relapse prevention plan, certain skills, certain techniques, certain resources for which them to seek out and avoid what we call a relapse which is the re-offending.

THE COURT: Bear with me. Adaptive behaviour is undertaken to avoid addiction and in this case the addiction is sexual aggression?

The Witness: Correct. The model came originally from alcohol and drug abuse so the model has been applied to sexual aggressors.

4. *Page 24*

Q. Then the next part of the sentence continues that you concluded he was able to

take the perspective of his victims and expressed genuine remorse and empathy. Can you elaborate on that?

A. Sometimes we talked about the impact of his actions on the victim and in his expressions and his conveyance, his understanding of the psychological, emotional trauma and the long-term impact of his actions on the victim I felt were genuine. He articulated what she can be feeling, what she could be thinking, the impact it would have on future relationships, security of being at home, anniversary dates. He really was in touch in terms of empathy and victim awareness. In my opinion, it was genuine. Sometimes offenders can articulate those words but generally they don't show the accompanying emotion or it tends to be feigned.

5. *Page 26*

Q If in fact he had understated his level of memory of the events of 1995, does that affect your opinion about R.L.'s ability to take the perspective of the victim and express genuine remorse and empathy?

A. No it does not.

THE COURT: Bear with me. Some follow up to that. Why do you say it doesn't affect your conclusion, i.e., if he - if I accept the fact that he understated his recollection.

The Witness: I state that because he would follow up with saying "Whatever is written on the police report or whatever the victim stated or whatever the facts are, I accept full responsibility for it. I am accountable for those acts. Although I don't remember them, I do not deny, minimize or justify what I did". In my estimation, part of working with sex offenders is breaking through denial and getting them to accept full responsibility and accountability and *(pg. 27)* in that regard R.L. has hit on both counts.

THE COURT: He agrees that he is accountable for the acts as recorded?

The Witness: Yes.

THE COURT: This is not a denial?

The Witness: Correct.

THE COURT: What was your other point? I wasn't fast enough.

The Witness: That with sex offenders, a majority of sex offenders have difficulty accepting full responsibility for their actions and although R.L. could not recall them, he was prepared to accept every statement made by the police or what the victim says. He is taking full ownership for his actions where generally sex offenders tend to minimize or rationalize or excuse their behaviour. There was no evidence of that with R.L.

6. *Page 34*

The next statement you make is:

He painfully acknowledges that he has wasted a good portion of his life by *(page 35)* being incarcerated and causing irreparable harm to so many others.

Q. Can you elaborate on that for the Court, please?
A. That was a time in which R.L. was feeling very low and depressed and I think it was around Christmas. He had been lamenting that he couldn't be with Suzanne and during those sessions he was very reflective, self-reflected about his life, exactly what he had not accomplished, his incarcerations, his criminal acts, the impact it has had on so many victims and he was really looking back in reflection and not liking what he saw and there was a sense of shame, regret.

But at the same time he recognizes that that falls back into "Poor me. I am a victim. I am self-pitying" and he counters that with a sense of "I can still have some sense of integrity. I can still be altruistic. I can still give something back to society, to the community" and he talked about things like restorative justice, working at soup kitchens, doing volunteer work. So he was going through this emotional angst and trying to move on from this wasteful life. Even though he is entering the second half of his life, he wants to make good use of it but *(page 36)* the whole process I thought was illuminating for him that he still saw a light at the end of the tunnel, the glass wasn't half empty but half full. I just thought from analytical, insightful perspective, it was important to document.

Q. Did you feel R.L. was being genuine when he made those comments?
A. Yes, I did.

cp/qi/e/qlcct/qljxr/qlced

1 *R. v. Johnson* [2003] S.C.J. No. 45 (S.C.C.) at paras. 15-18 [*Johnson*].

2 *Ibid.* at para. 27.

3 *Ibid.* at para. 31.

4 *R. v. F.E.D.*, 2007 ONCA 246 at para. 50.

5 *R. v. R.M.* [2005] O.J. No. 4977 (Ont. S.C.J.) at para. 69 [*R.M.*]; *R. v. Higginbottom* (2001), 156 C.C.C. (3d) 178 (Ont. C.A.) at para. 26; *R. v. McCallum* [2005] O.J. No. 1178 (Ont. C.A.) at para. 47.[*McCallum*].

6 *R. v. Grayer* [2007] O.J. No. 123 at para. 70; *ibid. McCallum* at para. 47.

7 *R. v. R.L.*, Crown's Sentencing Submissions (Re: Dangerous Offender Proceeding), January 2008, at para. 4.

8 Dr. Lauzon Report, (13 February 1997), Exhibit 13ii at 15-24 [*Lauzon Report*].

9 *Ibid*. at 16.

10 *Ibid.* at 20.

11 *Ibid.* at 24.

12 *Ibid.* at 19.

13 *Ibid*. at 16.

14 *Ibid.* at 20.

15 *Ibid.* at 24.

16 Assessment Report of Dr. Pallandi (22 July 2007) Exhibit 8 at 14-16 [*Pallandi Report*]; Dr. Robin Wilson, Expert Report (26 March 2007) Exhibit 12, at 6-8.

17 *Ibid., Pallandi Report* at 15.

18 *Ibid.* at 15-16.

19 *Ibid. at* 14.

20 *R.v. Gardiner* [1982] 2 S.C.R. 368.

21 *Pallandi Report, supra* note at 14.

22 *Ibid*. at 16.

23 *Pallandi Report, supra* note 16 at 16.

24 [2007] O.J. No. 2935.

25 [1996] 1 S.C.R. 500 at 566.

26 I have arrived at that conclusion notwithstanding reference to the decisions of the Ontario Court of Appeal in *R. v. Stuckless* (1998), 41 O.R. (3d) 103, and *R. v. D.D.* (2002), 58 O.R. (3d) 788. I am not sure whether the comments of the S.C.C. in *R. v. Proulx* [2000] 1 S.C.R. 61 would not also be of some moment.

27 [2002] O.J. No. 2594 at para. 76.

28 *R. v. Partridge* (2005), 206 C.C.C. (3d) 87 (N.S. C.A.) at para. 14.

29 S.C. 1992, c. 20 at s. 135(1) [*CCRA*].

30 *R. c. Lachance* [1995] J.Q. no 857 (C.A. Qué) at paras. 16-17.

31 *R.M., supra* note at paras. 99-102.

32 *R .v. Payne* [2001] O.J. No. 146 (Ont. S.C.J.).