
CANADA / JUDGMENT

R. v. Awasis

2020 BCCA 23

COURT

British Columbia Court of Appeal

DECIDED

24 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 23 R. v. Awasis

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Awasis,

2020 BCCA 23

Date: 20200124

Docket: CA44011

Between:

Regina

Respondent

And

Johnny Wilfred Troy Awasis

Appellant

Restriction on publication: A publication ban has been imposed under ss. 486.4(1) and 486.4(2) of the Criminal Code restricting publication, broadcasting or transmission in any way of any information that could identify the complainants or a witness. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated
June 30, 2016 (R. v. Awasis, Vancouver Docket 221359).

Counsel for the Appellant:

H. Patey

Counsel for the Respondent:

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

October 2, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 24, 2020

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Abrioux

Table of Contents

Paragraph

The index offences

[4]

The appellant's background

[7]

Family and social history

[7]

Criminal history

[14]

Psychological assessments and treatment history

[23]

Current psychological assessments

[29]

Dr. Rakesh Lamba

[29]

Dr. Todd Tomita

[44]

Gladue report

[57]

The dangerous offender proceedings

[61]

The dangerous offender statutory regime

[65]

Designation

[67]

Sentencing

[71]

Standard of review

[74]

Grounds of Appeal

[77]

Application to admit fresh evidence

[79]

The test

[82]

The fresh evidence

[84]

Discussion

[87]

The decision below

[92]

Analysis

[104]

1. Did the judge fail to take into account evidence of the appellant's treatability?

[104]

Designation

[107]

Sentencing

[113]

2. Did the judge fail to give tangible effect to Gladue factors in determining sentence?

[120]

3. Is the indeterminate sentence manifestly unfit?

[136]

Disposition

[137]

Summary:

The appellant was designated a dangerous offender and sentenced to an indeterminate term of imprisonment after convictions for two sexual offences. He appeals his designation and sentence on the basis that the judge (1) failed to take into account evidence of his treatability at both the designation and sentencing stages of the dangerous offender proceedings, and (2) failed to give tangible effect to his Gladue factors in determining his sentence. He contends that these failures resulted in an erroneous elevation of his moral culpability and a disproportionate sentence. He seeks to adduce fresh evidence to support his grounds of appeal.

Held: Appeal dismissed. While it is not clear that the appellant's treatability was considered at the designation stage, a finding of dangerousness was inevitable. In determining sentence, it was open to the judge to conclude that the appellant's risk could not be managed in the community so as to adequately protect the public. Similarly, her determination that public protection was paramount despite the appellant's Gladue factors, which reduced his moral blameworthiness,

was supported by the evidence. The fresh evidence cannot reasonably be expected to have affected the result and is inadmissible.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] The appellant, Johnny Awasis, was designated a dangerous offender and sentenced to an indeterminate term of imprisonment after convictions for two sexual offences. In this appeal, he seeks to set aside this designation and sentence and replace the indeterminate term with a fixed term of ten years, or alternatively, a fixed term of ten years to be followed by a period of long-term supervision. He submits that an indeterminate sentence is grossly disproportionate to his moral culpability and manifestly unfit.
- [2] The appellant is a 38-year-old Aboriginal offender with an unfortunate, tragic background. His involvement with the criminal justice system began at age 13 and has continued unabated, with repetitive violent and sexual reoffending while in the community. He has severe addictions to alcohol and drugs, has suffered trauma that includes sexual abuse, and has been diagnosed with severe personality disorder, all of which have contributed to the risk he poses to public safety.
- [3] Despite the tragedy of the appellant's circumstances, it is my view that the sentencing judge's determinations in this case were reasonable, and for the reasons that follow, I would dismiss the appeal.

The index offences

- [4] The appellant was charged with two sexual offences that took place within a short period of time in August 2011. He was convicted of both offences on December 20, 2012 after a trial in Provincial Court.
- [5] The first charge was sexual assault arising from an incident in the early morning hours of August 9, 2011 involving a sex trade worker, T.L. The appellant hired T.L. to perform a sexual service for him and they went into an alley. When T.L. asked for money, the appellant put one hand over her mouth, the other on the back of her head, and threatened to kill her if she made any noise. He told her to lie down in the alley but T.L. convinced him to allow her to fellate him, which she did. The appellant stopped before he ejaculated and walked away.
- [6] The second charge was sexual assault with a weapon arising from an incident on August 31, 2011. The victim, D.B., was also a sex trade worker but she was not working on the night of the incident. At about 2:00 a.m., D.B. went into an alley to urinate. She stood up to find the appellant in front of her with his penis exposed, sheathed in a condom. He called her names and demanded that she fellate him. As she was about to comply, the appellant said, "I'm going to turn you around, pull your pants down and fuck you up the ass, then I'm going to cut your throat". He produced a 10-inch knife and held it against her throat. D.B. saw the lights of a van in the lane and tried to wave and yell for help but the appellant attacked her with the knife. Fortunately, she managed to escape to the van and was assisted by its

occupants.

The appellant's background

Family and social history

- [7] The appellant's background can be gleaned from the reasons for sentence and various reports, including a Gladue report, which were before the sentencing judge.
- [8] The appellant is an Indigenous man with a very unfortunate background. He was 35 years old when he was sentenced in June 2016, and is now 38 years old. His parents and grandparents were survivors of the residential school system.
- [9] His mother, Bertha Johnny, is a member of the Anaham First Nation. She was sexually assaulted by a priest at residential school and became pregnant, giving birth to a child at the age of 13. The child was eventually surrendered to social services and Ms. Johnny left her community for Vancouver. There, she had two more children, each with different fathers. Ms. Johnny was addicted to alcohol and lived on the street. In that context she met Wilfred Awasis, who she described as "a violent alcoholic", and had four children with him. The appellant is the second born of those children. Wilfred Awasis was a member of the Thunderchild Cree First Nation in Saskatchewan.
- [10] The appellant's childhood was marked by terrible instability as a result of his parents' substance abuse, neglect and violence. The family lived for a time in British Columbia on the Anaham Reserve and then in Saskatchewan on the Thunderchild Reserve, but the appellant grew up primarily in the Downtown Eastside of Vancouver with little awareness of his Indigenous culture. Due to his parents' alcoholism, he and his siblings were often left alone for days or weeks at a time. When the appellant was six years old, his father was incarcerated and his mother decided to return to British Columbia from Saskatchewan, leaving the appellant in the care of an aunt. When his mother did not return to retrieve him after about a month, the aunt took the appellant to a residential school where he stayed for approximately seven months. While the appellant was at the school, he was emotionally, physically and sexually abused.
- [11] The appellant would have been seven years old when his mother took him out of the residential school and back to Vancouver. Unfortunately, the pattern of neglect continued. The appellant and his siblings were repeatedly apprehended by the Ministry of Children and Family Development of the time. The appellant was returned to his mother on numerous occasions but finally left on his own at age 18. He had difficulties in school due to this instability as well as some learning disabilities, but he did manage to advance in alternative programs until approximately grade eight.

- [12] The appellant began using alcohol and other drugs at an early age, consuming marijuana at age 10 and alcohol and cocaine at age 12. He entered the youth criminal justice system at age 13. By age 18, he was living in a drug house and supporting his cocaine consumption by dealing drugs and breaking and entering vehicles. This pattern continued into adulthood and he had almost no legitimate employment history. As an adult, his drug use also included heroin, crystal methamphetamine and psilocybin mushrooms.
- [13] The appellant fathered a child in 2005 with a partner who also struggled with addiction, and the child was taken into care at a very early age. The appellant was convicted of assaulting his partner in 2005.

Criminal history

- [14] The appellant has a serious, long-term criminal history.
- [15] His youth record began in 1994 at age 13, as indicated above, with convictions for serious offences: assault and extortion (1994); robbery and theft under \$5,000 (1995); escape lawful custody (1996); break and enter, attempted theft over \$5,000, unlawfully at large and theft under \$5,000 (1997); and mischief and assaulting a peace officer (1998). During this time, the appellant was offered numerous opportunities to participate in community-based programs, wilderness camps and group homes, some Aboriginal-based, but in each case he either failed to show up or simply left after a short period of time.
- [16] His adult record began in 2001 and continued into 2011, interrupted by periods of incarceration. His offences include: possession of a scheduled substance, theft under \$5,000, robbery and possession of a scheduled substance for the purpose of trafficking (2001); robbery, possession of a weapon and failure to attend court (2003); assault (x3), mischief, breach of probation (x2), possession of a scheduled substance and theft under \$5,000 (2005); theft under \$5,000 and sexual assault (2006); breaches of probation and theft under \$5,000 (2007); breach of probation and robbery (2009); and unlawfully at large and uttering threats (2011).
- [17] The sexual assault conviction in 2006 was a serious offence. The appellant, then 24 years old, met the 15-year-old victim with a group of friends. Both were intoxicated. The appellant followed the victim home, eventually taking her into an alley and dragging her into a carport. He told her he had a knife (but did not produce one), covered her face with his hand and choked her. He threatened "I'm going to fuck you in the ass" and as she struggled, he punched her several times. The attack ended when police arrived, having responded to a 911 call from a neighbour. The victim was physically injured and the event was terrifying.
- [18] The appellant pleaded guilty to this offence and in December 2006 received a sentence of 19 months (which amounted to time served plus one day at the time of sentence) and two years probation. By this time, he had accrued 16 convictions as an adult, and his criminal conduct continued. In two years of probation, he breached the probation order seven times by either consuming intoxicants or failing to report. He was also convicted of theft under \$5,000 and

of breaching court orders. His pattern throughout this period involved days or weeks in custody between committing new offences.

- [19] The robbery offence, for which the appellant received his first federal sentence, was committed in April 2009 after he had been out of jail for only a week and subject to a probation order. He was sentenced in July 2009 to two years (in addition to pre-sentence custody of 3.5 months). The judge acknowledged the appellant's stated wish to address his criminality and attend a First Nations facility but noted that he had expressed the same wishes after his 2006 conviction and taken no treatment or counselling. His appeal from that sentence was dismissed (indexed as 2010 BCCA 213), with this court observing (at para. 11) that the appellant had never made any genuine attempt at treatment for his substance abuse problems and his actions in committing this offence showed a high degree of awareness and deliberateness that could not be attributed solely to drunkenness.
- [20] In November 2010, the appellant was released on parole to the Circle of Eagles, a halfway house in Vancouver that focuses on Indigenous culture and provides spiritual counselling by Elders. However, his parole was almost immediately revoked when he left the halfway house within an hour of his arrival. His parole was revoked or suspended again after a second release to Belkin House in May 2011 and a third release back to Circle of Eagles in June 2011. In the latter two suspensions, the appellant was found intoxicated at the time of his arrest. He was finally released at the end of July 2011 at his warrant expiry.
- [21] On August 8, 2011, within ten days of this release, the appellant threatened a female employee at a social services office after being told that he would not be able to complete a full intake meeting.
- [22] The first index offence was committed the following day, August 9, 2011, and the second on August 31, 2011. The appellant was arrested for these offences on September 3, 2011 and has remained in custody since.

Psychological assessments and treatment history

- [23] The appellant was first assessed by a psychologist in October 1994 after his initial entry into the youth system at age 13. In a November 1994 report, Dr. Louise Sturgess described the appellant as presenting with borderline intellectual functioning, poor reading skills, moderate to severe conduct disorder, a severe problem with substance abuse, and an entrenched pattern of antisocial behaviours. She stated a concern that the appellant's "aggressivity" seemed to be escalating, he was "out of control" and gave no indication that he was "able to experience empathy for his victims". She described the appellant as a child "who never had a chance".
- [24] Attempts to supervise and assist the appellant in the community over the following five years were unsuccessful. His pattern was to express interest in taking advantage of programming offered but would fail to attend on any regular basis. As described by his youth probation officer during this period, "he just couldn't follow through with anything".

By 2006, despite what appeared to have been earnest intentions to address his substance abuse and attend sex offender treatment, the appellant did not do well while under supervision following his sexual assault conviction, as I have described above.

- [25] The appellant was next assessed in 2009 while serving his first federal sentence for robbery. By this time, he was 28 years old. Caroline Buckshot, an Aboriginal Elder employed by Corrections Canada, developed a "healing plan", and Dr. Heather Burke, a psychologist, conducted a sex offender risk assessment.
- [26] Ms. Buckshot's healing plan included commitments by the appellant to abstain from the use of intoxicants, participate in counselling to address his substance abuse and dysfunctional childhood, maintain a connection with his Indigenous heritage, upgrade his education, accept responsibility for his criminal behaviour, and be honest with his case management team. Before the appellant committed to this healing plan, Ms. Buckshot warned him of the potential negative consequences for his parole if he failed to follow it.
- [27] Dr. Burke assessed the appellant at a high risk for sexual and violent recidivism, including spousal violence, and recommended high intensity sex offender programming as well as programming for violence and substance abuse.
- [28] During his time in federal custody, the appellant did not participate in any treatment, including sex offender treatment, but he did pursue education and skills training. He was out of custody for only a month before he was arrested on September 3, 2011 for the index offences.

Current psychological assessments

Dr. Rakesh Lamba

- [29] In August and September 2013, Dr. Rakesh Lamba conducted a court ordered assessment of the appellant pursuant to s. 752.1(1) of the Criminal Code.
- [30] In conducting his assessment, Dr. Lamba reviewed a voluminous amount of material, interviewed the appellant extensively, and administered various risk assessment instruments.
- [31] Dr. Lamba did not find that the appellant met the full criteria for any major mental disorder but recognized by the appellant's self report that he had some features of post-traumatic stress disorder (PTSD) related to traumatic events in his life. The self report included disclosure, apparently for the first time, that the appellant had been sexually victimized as a child while at residential school.
- [32] Dr. Lamba did find that the appellant met the criteria for poly-substance abuse and dependence that included the use of cocaine, crystal methamphetamine and alcohol.

[33] With respect to the appellant's intellectual functioning, Dr. Lamba noted in his report that tests done in the appellant's youth estimated his intelligence at a borderline functioning level, with a mid-school or lower level of achievement at different times. At the onset of his sentence, the appellant was noted to have a possible learning disability as well, but was nonetheless able to successfully complete without much difficulty a GED with one course short of a Dogwood high school diploma. As to the source of these cognitive difficulties, Dr. Lamba stated:

He also has a self-reported problem with attention deficit hyperactivity both as a child and as an adult. It is not clear whether the borderline intellectual development, possible learning disorder and attention deficit hyperactivity problems are all features encompassing the complex behavioral/cognitive syndrome associated with in-utero exposure to alcohol. Such a cluster of problems however is not uncommon simply with severe anti-social personality disorder. His reports of his mother having consumed alcohol in her pregnancy for him are unconfirmed. A diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effect can be considered by [sic] not made confidently (due to overlapping manifestations with other conditions and similar co-morbidities as well as secondary effects).

[34] His primary diagnosis for the appellant was severe anti-social personality disorder, which began with his persistent conduct disorder from an early age of development. In his testimony, he explained why he preferred a diagnosis of anti-social personality disorder over fetal alcohol spectrum disorder or effect syndrome (FASD) as follows:

In some ways it's quite academic. What we have is - what we have is a - not all situations but this is - well, we can call it fetal alcohol effect syndrome and note that this person is impulsive, prone to boredom, needs stimulation, involved with the law and et [sic] cetera. Or we can say this - by the time these individuals have grown up and shown this pattern for [sic] lifetime or substantial portions of their life, that this is now a personality disorder

Fifty, 60, 70 percent of fetal alcohol syndrome children will have been diagnosed as conduct disorder which is a precursor to the antisocial personality disorder.

[35] Dr. Lamba acknowledged that the appellant had a probable FASD diagnosis, but maintained his view that there were significant overlapping manifestations between FASD and anti-social personality disorder.

[36] Dr. Lamba assessed the appellant at a moderate to high risk for violent and sexual recidivism. He noted that psychopathy is strongly related to future violent behaviour, and that the appellant possessed a significantly high number of psychopathic traits. His opinion was that the appellant's risk was strongly tied in with his anti-social personality, anti-social lifestyle and associates, and drug and alcohol use. It was not clear to him that the appellant suffered from a deviant sexual arousal pattern, and he saw the appellant's sexual violence as part of a general pattern of anti-sociality and violence that was "so characteristic of him, in all spheres of his interpersonal interactions".

[37] Regarding future risk, Dr. Lamba opined:

In terms of future risk, I would suggest that the risk scenarios are likely to be similar to the past; he is likely to very quickly return to his life style of being on the streets, downtown Vancouver, using drugs and selling/steering drugs. In this context he is likely at high risk for physical violence, both because of the direct result of the stimulant drugs he tends to abuse, and the context, activities as well as the associates he is likely to be involved with. Also under such circumstances, he is likely to target a vulnerable woman, sex trade worker or otherwise, in an opportunistic manner, for sexual gratification.

[38] Dr. Lamba also opined that the appellant's anti-social personality and drug abuse/dependence were the primary criminogenic factors for both non-sexual and sexual violent recidivism and that he may have other "as yet unknown/unexplored cognitive distortions that promote sexual offending in the way of non-consensual sex". He did not believe that mood fluctuations, day to day stressors and anxiety symptoms, including PTSD symptoms, were criminogenic factors but were indirectly relevant to the extent that they may contribute to substance abuse. Similarly, he did not believe that a history of sexual abuse was a criminogenic factor, insofar as it related to sexual recidivism.

[39] Regarding treatment, Dr. Lamba was of the view that the appellant needed treatment in the areas of substance abuse, violent offending and sexual offending. He did not think the appellant had learning or attention problems that could impede his ability to learn and participate but was uncertain if he could apply the teachings to his life and overcome his entrenched anti-social personality traits and drug abuse behaviours. He stated that treatment programs for personality disorder are "at best modestly helpful in certain individuals to diminish and contain their behaviours" and "[t]he best that can be said after decades of research on sex offender treatment programs" is that they may have "a modest trend in the positive direction", noting that "[t]here is no good evidence to show clear effectiveness of cognitive-behavioral/ relapse prevention based treatment".

[40] Dr. Lamba was asked about the appellant's treatment prognosis and ability to manage his risk to reoffend if he were to complete the Integrated Correctional Program Modules offered in federal custody. He said the appellant's personality disorder was "quite entrenched, quite longstanding", adding:

In fact, he hasn't had a significant period of pro-social functioning in his life He hasn't shown a high degree of cooperation with treatment programs in the past. He hasn't shown motivation to participate in the programs in the past. Now he says he is motivated and wants to complete. He has, in the past, said so as well but not followed up. So it really remains to be seen if he does participate, does complete, participate in a way that is conducive to his learning, and then to see whether these - what changes he does make are enduring.

- [41] He agreed that the appellant's treatment prognosis was not very good considering his historical case-specific factors and the general ineffectiveness of treating severe personality disorders.
- [42] Given the appellant's dismal record on community supervision, Dr. Lamba was of the view that it was unlikely his entrenched lifelong pattern would change in the foreseeable future. He found the number of times the appellant had not taken treatment that was offered or required to be significant as a repeated pattern that showed a lack of motivation. That said, he found that the appellant had some insight and may have honestly wanted to change his lifestyle but concluded that it would be very hard for him to actually do it in light of the fact that he was so entrenched in the opposite pattern.
- [43] Dr. Lamba was not confident that the appellant's risk could be mitigated by a "geographical transplant". He agreed that releasing the appellant to the Downtown Eastside in Vancouver, where he had a pre-existing antisocial peer group, made him more readily a risk. However, his view was that it would not be "an easy, direct, simple correlation" to move the appellant somewhere else and expect a reduction in his risk of reoffending given his personality and the extent of his substance abuse problems:

It might be a question of time, that he is drawn to the antisocial peer group in a new community. It may just be a question of time. It may not be the matter of less or more likelihood. It may be a matter of sooner or later.

Dr. Todd Tomita

- [44] In June 2014, Dr. Todd Tomita assessed the appellant at the request of the defence. His opinion differed little from that of Dr. Lamba, save for his opinion about the appellant's motivation to take and complete treatment programs.
- [45] Dr. Tomita was of the view that the appellant's primary risk-relevant psychiatric problems related to an anti-social personality disorder (with a high level of psychopathic features) and addiction to alcohol, cocaine and methamphetamine. While the appellant also had difficulties as a result of his past traumatic history that included sexual victimization, it was unclear how these experiences were relevant to his risk. He agreed with Dr. Lamba that the appellant's anti-social personality, rather than sexual deviance, appeared to be the main driver of his sexual offending.
- [46] Dr. Tomita noted that the appellant may have problems related to "fetal alcohol effects" that include attention deficit and other cognitive difficulties but thought that they were likely mild in degree given his successful completion of his GED. Assuming this was accurate, he thought that the appellant would be able to participate in regular correctional programming even if fetal alcohol effects were present. However, Dr. Tomita described a two-fold challenge for the appellant:

He needs to learn how to contain the maladaptive aspects of his personality disorder and how to control his alcohol and drug addiction. This is likely to be challenging as he has experienced problems related to both conditions across developmental periods beginning in childhood and adolescence and continuing into adulthood up to the present. Rather than a need for rehabilitation back to a stable baseline, Mr. Awasis needs to create and maintain a new prosocial baseline. Given his history to date, it is unlikely he will be able [sic] achieve this absent professional supports and legal supervision. The difficult question is forecasting the likelihood of achieving this with the realistically available professional supports and legal supervision that is likely to be available.

[47] Dr. Tomita assessed the appellant at a high risk for future non-sexual and sexual violence. He thought both forms of violence would most likely occur in a similar scenario as the appellant's past offending, in the midst of an unstable lifestyle marked by alcohol and drug use, involvement in the drug trade, and contact with other substance users.

[48] Regarding treatability, Dr. Tomita was somewhat more optimistic than Dr. Lamba. It was his impression that the appellant had become more accepting of his need to address his addictions and make changes to his lifestyle in order to avoid future crime. The challenge was trying to gauge the appellant's degree of internal motivation given his history of presenting in a similar fashion and failing to follow through. Dr. Tomita had some degree of confidence about the appellant's positive motivation, for the following reasons:

It appears that what is significantly different this time is the severity of possible sanctions. In the past, Mr. Awasis was sentenced to relatively short custodial sentences and now faces the prospect of an indeterminate sentence. While the [sic] a skeptic might conclude that Mr. Awasis is once again presenting with motivation for treatment to avoid the most severe sanctions, it also appears that the Dangerous Offender application has provided a clarity of purpose regarding what he needs to do to avoid spending his adulthood in the penitentiary. Because of this context, I would have a greater degree of confidence that his positive motivation will be durable beyond the sentencing stage.

[49] However, in his testimony, Dr. Tomita agreed that the appellant was not stopped by the many life-threatening situations he faced in his past. He also acknowledged that once the severity of the indeterminate sanction was removed, there would be a reasonable likelihood that the appellant would "go back to where he's always been". That stated, he recognized that the true measure of benefit would be changes in the appellant's behaviour that would reduce his risk, such as avoiding substance use and associating with peers who reinforce his antisocial attitudes, and that this would be a difficult task for him.

[50] Dr. Tomita recommended high intensity sex offender treatment as offered in the federal prison system, but was not able to forecast the potential impact of this on the appellant's future risk. He also recommended substance abuse treatment and engagement in building a durable recovery plan. He thought that successfully addressing the appellant's addiction problem would likely have a significant impact on reducing his risk since this was the "linchpin of the lifestyle that places him at the highest risk levels".

[51] Dr. Tomita described the appellant as presenting with a moderate level of treatability for his addiction problems and a lower level of treatability for his sex offending. He testified that a number of factors were to be considered regarding treatability for sex offending:

whether or not someone will entertain the idea and be motivated to enter, whether they can enter the program and actually finish it without being kicked out or evicted and then, finally, whether they're going to get benefit and benefit in a way that's going to generalize and be meaningful with respect to risk.

[52] Dr. Tomita thought that the appellant recognized that sex offender treatment was something he needed to do and that he would likely enter a program. He also thought that there was a reasonable possibility that the appellant would complete a program. However, he did not know whether it would "make a meaningful difference in terms of the impact generally" and for that reason he was "a bit cautious in saying high level of treatability in this case".

[53] According to Dr. Tomita, there would be no possibility of successful community supervision unless the appellant's positive motivation endured and he had at least some degree of success managing his addiction problems:

If he reverts back to his antisocial and addiction oriented attitudes and lifestyle in prison and then in the community, his risk will be unmanageable within the context of federal parole resources even with special conditions in place. If his positive motivation endures then one can assume some degree of positive treatment gain and have more optimism regarding community supervision.

[54] Dr. Tomita was realistic in describing how the appellant's ability to manage would likely fluctuate with relapses:

Even if he has some degree of success in managing his addiction problems, Mr. Awasis is still likely to have some degree of instability in the context of a federal parole release. Given the severity of his addiction problems, it is readily foreseeable that he is likely to shift between recovery and lapses back to alcohol and drug use. In the context of federal parole supervision, he is likely to repeat the pattern of community release followed by suspensions for drug and alcohol use. It is unlikely that such brief usage will lead to the demoralized state where he is most at risk of offending, particularly if he is making overall progress towards positive goals.

[55] This last comment was the subject of numerous questions in cross-examination. The essence of Dr. Tomita's opinion was that it was unlikely the appellant would be problem free if released but he could be managed in the community through supervision and inevitable

suspensions. He said, "with some back and forth on a very long-term order, there may be a reality to eventual stabilization because he will be supervised in a way where the sanction's immediate". However, he also agreed that the appellant's history suggested he would almost certainly breach a long-term supervision order by drinking alcohol, and that when he starts drinking, "he reoffends very quickly, violently and sexually".

- [56] Dr. Tomita described an "optimistic scenario" to be where "eventually the potential losses of gains" will outweigh the immediate benefits of consuming alcohol and drugs, and the "pessimistic scenario" to be simply another repeated series of unsuccessful parole releases due to alcohol and drug use. If release was considered, he opined that the best risk management approach would be a long-term supervision order of maximum duration. He considered this to be a necessary measure to maintain control of the appellant's risk in the community.

Gladue report

- [57] The sentencing judge had before her a Gladue report prepared by Stuart Cadwallader in February 2013, which was updated in a report dated February 14, 2015. The original report outlined the appellant's very unfortunate background, much of which I have referred to above. It also outlined "Gladue considerations" related to the people of the Tsilhqot'in National Government (of which his mother's First Nation, Anaham, is a part), including the legacy of the residential school system and its intergenerational effects.
- [58] The reports noted that the appellant, not having been raised within his First Nations culture, had little awareness of the language, culture or traditional values of either the Tsilhqot'in or the Thunderchild Cree First Nation, and had few community supports. They provided a list of community and institutional resources for the court to consider in addressing the appellant's needs and risk to the community, which included a community-based residential facility and residential treatment programs for alcohol and drug addiction, all based on Aboriginal principles.
- [59] Mr. Cadwallader suggested a type of release plan that would start with the appellant participating in a number of Aboriginal community-based residential treatment programs, first to connect him with Aboriginal values and spirituality, and then to address his addictions and trauma, and would continue with the appellant acquiring a trade. Mr. Cadwallader testified that it was his "profound hope" that the appellant had the opportunity to participate meaningfully with sex offender treatment offered both inside and outside the institutional setting before being reintegrated into a community. He considered the first step, in a camp situated north of Prince George, to be a "stepping stone" that would allow the appellant to either succeed or fail, and the last step to be a way to support himself in a meaningful way and to have some successes in his life.

[60] Mr. Cadwallader was aware that the appellant had not participated in sex offender treatment offered to him in the past, despite appearing to be initially motivated to do so, but he was not aware of the number of times the appellant had failed to take advantage of programs--many Aboriginal-focused--throughout his youth and early adult life. He agreed that the appellant was not someone who had "fallen through the cracks" in the system but had been offered many resources in efforts to assist him to embrace traditional Aboriginal practices and values.

The dangerous offender proceedings

- [61] Following the appellant's conviction of the index offences, the Crown applied under s. 753(1)(a)(i) and (ii) and s. 753(1)(b) of the Criminal Code to have him designated as a dangerous offender and sentenced to indeterminate incarceration.
- [62] The appellant opposed the application on several grounds. While he agreed that the index offences were "serious personal injury offences" within the meaning of s. 752, he submitted that the Crown did not prove a pattern of behaviour or a substantial degree of indifference as required by s. 753(1)(a)(i) and (ii) or a failure to control his sexual impulses as required by s. 753(1)(b).
- [63] The appellant sought a long-term offender declaration, a sentence of eight to nine years (less time served), and a ten-year long-term supervision order. His position was that the evidence demonstrated his treatability within that period of time.
- [64] The dangerous offender proceedings occupied 15 days between February 2, 2015 and June 1, 2016. The evidentiary record before the court was extensive and included testimony from 14 witnesses. The sentencing judge ultimately designated the appellant as a dangerous offender under both s. 753(1)(a) and (b), and sentenced him to indeterminate incarceration. Her assessment of the evidence is reviewed later in these reasons.

The dangerous offender statutory regime

- [65] Part XXIV of the Criminal Code deals with dangerous and long-term offenders. In order to be declared a dangerous offender, a person must be convicted of a "serious personal injury offence", defined in s. 752 as including:
- (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
 - (i) the use or attempted use of violence against another person, or
 - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
- and for which the offender may be sentenced to imprisonment for ten years or more, or

- (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[66] The dangerous offender scheme provides for a two-stage process. At the first stage, the sentencing judge determines if the statutory criteria for a dangerous offender designation have been satisfied. If they have, the judge must make the designation. At the second stage, the judge determines whether to impose an indeterminate sentence, a sentence of at least two years and a long-term supervision order, or a sentence for the offence. Here, the judge has discretion and must apply the principles of sentencing in ss. 753(4), (4.1) and 718-718.2 to impose a fit sentence: *R. v. Boutilier*, 2017 SCC 64 at para. 53.

Designation

[67] Section 753(1) contemplates dangerousness from either violent or sexual behaviour:

753 (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
 - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
 - (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 offences 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 behavioural restraint; or
- (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.

- [68] To obtain a designation of dangerousness resulting from violent behaviour, the Crown must establish that the offender (1) has been convicted of a serious personal injury offence, and (2) represents a threat to the life, safety or physical or mental well-being of other persons, based on evidence establishing one of the violent patterns of conduct enumerated in s. 753(1)(a)(i), (ii), or (iii): Boutilier at paras. 17-19; R. v. Malakpour, 2018 BCCA 254 at para. 39. Under s. 753(1)(a)(i) and (ii)--relied on by the Crown in this case--the Crown must establish a pattern of repetitive behaviour by the appellant, of which the index offences form a part, showing either (i) a failure to restrain his 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 behaviour, or (ii) a substantial degree of indifference by the appellant respecting the reasonably foreseeable consequences to other persons of his behaviour.
- [69] Similarly, to obtain a designation of dangerousness resulting from sexual behaviour under s. 753(1)(b), the Crown must establish that the offender (1) has been convicted of a serious personal injury offence, and (2) has shown a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through his failure in the future to control his sexual impulses: R. v. Currie, [1997] 2 S.C.R. 260 at para. 20.
- [70] Integral to the designation stage is an assessment of future risk. As the Supreme Court of Canada confirmed in Boutilier, an offender cannot be designated as dangerous unless he is shown to present a high likelihood of harmful recidivism and that his violent conduct is intractable. Accordingly, a judge must conduct a prospective assessment of dangerousness--which necessarily involves the consideration of future treatment prospects--before designating an offender as dangerous: Boutilier at paras. 45-46. This requirement applies with equal force to designations under both s. 753(1)(a) and (b): R. v. Skookum, 2018 YKCA 2 at para. 57.

Sentencing

- [71] Once an offender is designated a dangerous offender, the proceedings move to the sentencing stage. The relevant provisions are ss. 753(4) and (4.1):

753 (4) If the court finds an offender to be a dangerous offender, it shall

- (a) impose a sentence of detention in a penitentiary for an indeterminate period;
- (b) impose a sentence for the offence for which the offender has been convicted - which must be a minimum punishment of imprisonment for a term of two years - and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
- (c) impose a sentence for the offence for which the offender has been convicted.

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

- [72] Section 753(4.1) does not impose an onus, a rebuttable presumption, or mandatory sentencing. Rather, indeterminate detention is one sentencing option among others available under s. 753(4), limited to "habitual criminals who pose a tremendous risk to public safety": Boutilier at paras. 34, 58, 71 and 77. To properly exercise discretion under s. 753(4), the judge must impose the least intrusive sentence required to reduce the public threat posed by the offender to an acceptable level: Boutilier at paras. 60 and 70. In doing so, the judge must conduct an individualized assessment of all relevant circumstances, and consider the sentencing objectives and principles set out in ss. 753(4), (4.1) and 718-718.2, which include those developed for Indigenous offenders: Boutilier at paras. 53, 63 and 71; Malakpour at para. 37; R. v. Shanoss, 2019 BCCA 249 at para. 30 [Shanoss BCCA].
- [73] At this stage, prospective evidence of treatability is highly relevant. Evidence of treatability must be more than "speculative hope" and must indicate that the offender can be treated within an ascertainable period of time: R. v. Little, 2007 ONCA 548 at para. 42, leave to appeal ref'd, [2008] S.C.C.A. No. 39. In the current scheme, the judge must be satisfied that there is a reasonable expectation that the offender's risk can be managed to an acceptable level in the community so as to protect the public. "Reasonable expectation" refers to a belief that risk will be managed to an acceptable level, as opposed to the mere possibility: R. v. D.J.S., 2015 BCCA 111 at para. 30.

Standard of review

- [74] An offender who is found to be a dangerous offender has the right to appeal his designation and sentence "on any ground of law or fact or mixed law and fact": s. 759(1) of the Criminal Code; R. v. Bragg, 2015 BCCA 498 at para. 21. Absent any material error of law, a dangerous offender designation is a question of fact and an appellate court is to determine whether the designation was reasonable: Boutilier at para. 85. Similarly, a determination as to risk and manageability in the community is a question of fact to which deference is owed: Boutilier at paras. 86-88; R. v. R.M., 2007 ONCA 872 at para. 53, leave to appeal ref'd, [2008] S.C.C.A. No. 91.
- [75] The standard of review was summarized by this court in Malakpour:
- [47] Appellate review in this context is concerned with legal errors and whether the dangerous offender designation was reasonable: R. v. Currie, [1997] 2 S.C.R. 260 at para. 33; R. v. Sipos, 2014 SCC 47 at para. 23; Boutilier at para. 85. Appellate review of a dangerous offender designation is somewhat more robust than "regular" appellate review of a sentence, but the appellate court must still give deference to the sentencing judge's findings of fact and

credibility. Thus, the standard of review for errors of law is correctness and for errors of fact, reasonableness: Sipos at para. 26; Boutilier at para. 81; Bragg at para. 22; R. v. Walsh, 2017 BCCA 195 at para. 23.

[76] See also R. v. Garnot, 2019 BCCA 404 at para. 47.

Grounds of Appeal

[77] The appellant contends that the sentencing judge erred by (1) failing to take into account evidence of a reasonable expectation of treatability at either the designation or sentencing stage of the proceedings; (2) failing to give any tangible effect to Gladue factors in determining sentence; and (3) imposing a sentence that was manifestly unfit, being disproportionate to the gravity of the offences and the moral culpability of the appellant.

[78] In his factum, the appellant challenges only the imposition of an indeterminate sentence, and while he focused on this in his oral submissions, he submits that the issue of treatability is relevant to both the designation of dangerous offender and the indeterminate sentence.

Application to admit fresh evidence

[79] In support of his appeal, the appellant applies to adduce fresh evidence in the form of expert opinion from Dr. Roderick James Densmore. Dr. Densmore's report relates to the effect of a possible diagnosis of FASD on the appellant's ability to participate in treatment programs. The report attaches documents reviewed by Dr. Densmore that include a decision pertaining to the appellant under the Independent Assessment Process of the Indian Residential Schools Adjudication Secretariat (IRSAS), a psychological assessment of the appellant provided for the IRSAS Process, and a program performance report pertaining to Mr. Awasis' participation in federal Corrections programming in recent years.

[80] The appellant seeks to admit only Dr. Densmore's report and the IRSAS decision. He submits that both Dr. Lamba and Dr. Tomita were misinformed about FASD and Dr. Densmore's report sheds more light on the issue of treatability. He also submits that the IRSAS decision is important because it is not clear if the sentencing judge accepted his residential school experiences.

[81] The Crown objects to the admission of this evidence on the basis that Dr. Densmore's report is inadmissible as expert opinion and that none of the criteria required for the admission of fresh evidence have been satisfied.

The test

[82] The test to admit fresh evidence on appeal is well-established and set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759 at 775:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [83] The overriding consideration is whether it is in the interests of justice to receive the fresh evidence.

The fresh evidence

- [84] Dr. Densmore conducted several tests on the appellant and diagnosed him with a number of conditions, including PTSD, polysubstance/alcohol abuse and dependence, depression and ADHD. He could not definitively diagnose the appellant with FASD because he found significant impairment in only two (of three required) domains of brain functioning. Despite the lack of a formal diagnosis of FASD, Dr. Densmore opines that FASD-specific educational adaptations would increase the appellant's ability to learn from various programs offered to him in prison. Using the acronym "NURMU" (non-compliant, uncooperative, resistant, manipulative, unmotivated) to describe how people with FASD are often viewed by others, he states that the appearance of such behaviours tends to diminish or go away when accommodations are made for issues such as impaired attention, suggestibility, sensory processing difficulties, learning disabilities and attachment problems.
- [85] Dr. Densmore also opines that treatment for the appellant's PTSD and other mental health conditions would improve his ability to benefit from institutional programs.
- [86] In the IRSAS decision, the adjudicator found that the appellant was sexually assaulted by two adult employees and two older male students while attending residential school and awarded compensation payable at a substantial level.

Discussion

- [87] I would not admit the fresh evidence. In my view, Dr. Densmore's report is not sufficiently credible and neither the report nor the IRSAS decision can reasonably be expected to have affected the result.
- [88] First, Dr. Densmore's report does not acknowledge, nor does it demonstrate, the author's duty to provide independent and impartial opinion. From my reading of the report, this problem stems primarily from the facts that form the basis for the opinion. I agree with the Crown's submission that Dr. Densmore's methodology was flawed. His opinion is based on representations of the appellant, some that are inconsistent with the evidence at sentencing,

as well as a selective review of the documentary record. He also provides no references to support a general scientific acceptance of the concept of "NURMU" and his reliance on it.

- [89] Second, Dr. Densmore's report does not add anything material to the evidence regarding a possible FASD diagnosis for the appellant. This information was before the court and considered by both Dr. Lamba and Dr. Tomita. Dr. Lamba acknowledged that the appellant had a probable FASD diagnosis but considered that there were significant overlapping manifestations between FASD and anti-social personality disorder. Dr. Tomita also acknowledged that the appellant may have had problems related to "fetal alcohol effects" but thought that they were likely mild in degree given his successful completion of his GED. The general information about FASD outlined in Dr. Densmore's report does not address in any meaningful way the question of the appellant's treatability or intractability as a result of his other significant problems, most notably his anti-social personality disorder and substance abuse.
- [90] The IRSAS decision similarly does not add anything material to the evidence, as the sentencing judge accepted that the appellant attended residential school and suffered the indignities and abuses that came with it. She also found that his experiences as an Aboriginal person contributed to his personality and tendencies, such that his moral blameworthiness for the criminal offences was diminished.
- [91] Accordingly, I am of the view that it is not in the interests of justice to admit the fresh evidence. I would dismiss the application.

The decision below

- [92] The reasons for sentence were issued June 30, 2016, before the Supreme Court of Canada released Boutilier. Thus, the sentencing judge applied the law as it stood at the time, as set out in this court's decisions in *R. v. Boutilier*, 2016 BCCA 235 and *R. v. Pike*, 2010 BCCA 401, and considered treatability to be relevant only at the sentencing stage. She reviewed the required elements to establish a designation of dangerousness under s. 753(1)(a)(i), (ii) and (b) and then turned to discuss what constitutes a "reasonable expectation" that a measure less than an indeterminate sentence will adequately protect the public:
- [161] A "reasonable expectation" is defined in *Regina v. Taylor*, 2012 ONSC 1025, at paragraph 356, as a "confident belief for good and sufficient reason based on the evidence". The Court must examine the offender's "treatability" in determining this issue, which requires consideration of both the offender's willingness to undertake treatment, and the prospects otherwise of the success of that treatment in reducing the risk posed by the offender to a manageable level.
- [162] Evidence of the treatability of the offender must be "more than an expression of hope and that indicates that the specific offender can be treated within a definite period of time" (*Regina v. McCallum*, 2005 O.J. No. 1178).

- [93] The judge referred to this court's decision in *Boutilier*, which discussed the 2008 amendments to the dangerous and long-term offender provisions, and referred (at para. 27) to the "2008 terminology of presumptively requiring the imposition of an indeterminate sentence unless there is a 'reasonable expectation' that a lesser measure would adequately protect the public". She also quoted rather extensively from *R. v. Haley*, 2016 BCSC 1144, which reviewed the principles then applicable to the designation and sentencing stages of the process.
- [94] Additionally, the sentencing judge held that the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13 apply to dangerous offender proceedings. She took guidance from the decision of Bruce J. in *R. v. Shanoss*, 2013 BCSC 2335 [*Shanoss BCSC*], (aff'd in *Shanoss BCCA*), which stated:
- [164] In my view, it would be an error to limit the application of the Gladue factors in a dangerous offender proceeding in order to prioritize protection of the public as a sentencing objective. The unique circumstances of the Aboriginal offender must be given careful consideration in every sentencing. The fundamental principles of sentencing in s. 718.1 and s. 718.2 apply with equal force to a dangerous offender proceeding. The moral blameworthiness of the offender is a fundamental consideration and the Aboriginal heritage of an offender often has a direct and substantial impact on their moral culpability for the offence. A person who grows up in a culture of alcohol and drug abuse is less blameworthy than a person who commits a crime despite a positive childhood and upbringing.
- [95] The judge recognized, however, that despite the influence of Gladue factors, the need to protect the public may be paramount in certain cases (as it was in *Shanoss BCSC*).
- [96] With respect to the evidence, the sentencing judge reviewed the extensive record before her in relation to the appellant's background, his youth and adult criminal history, his behaviour while in custody and his efforts to participate in treatment programs, his performance while on probation, a previous psychological assessment and Elder review, the Gladue reports and the evidence of Mr. Cadwallader, and the assessments of Dr. Lamba and Dr. Tomita, all of which is outlined to some extent above. The judge also reviewed written comments provided by the appellant, expressing remorse and a changed attitude.
- [97] The judge considered some of the community options and release plans outlined by Mr. Cadwallader to be unsuitable for the appellant, primarily due to the "complete unknown" regarding his motivation to take the steps necessary to live a crime-free life.
- [98] The judge referred to the appellant's dismal record of behaviour during his years of incarceration, describing him for the most part as "a problem inmate, disrespectful, disobedient, dishonest, aggressive, guilty of possession of contraband, including homemade alcohol, and so on". She also noted a recent improvement in his behaviour and his participation in programs, and agreed with Dr. Tomita's observation that the appellant was trying "a little bit harder to avoid problems and follow the rules". The judge was skeptical, however, that the appellant's written comments demonstrated real insight into his behaviour

due to the delayed timing of his expressions of remorse and the many inconsistencies in his evidence.

[99] The sentencing judge considered the 2006 sexual assault and the two index offences to be serious offences that involved attacks on vulnerable women in secluded places, using physical restraint and threats of death or other bodily harm, motivated by a desire for sexual gratification. She found that the evidence established beyond a reasonable doubt a pattern of repetitive behaviour by the appellant as enumerated in s. 753(1)(a)(i) and (ii), as well as a failure to control his sexual impulses as set out in s. 753(1)(b).

[100] The judge found the evidence that the appellant was likely in the future to repeat this behaviour to be "overwhelming". She considered that his history was the "best indicator of his likely future conduct" and she relied on the opinions of Dr. Lamba and Dr. Tomita. Finding that the appellant constitutes "a threat to the life, safety or physical or mental well-being of other persons", the judge designated him a dangerous offender.

[101] In assessing an appropriate sentence, the judge took into account the following evidence:

- some positive signs in the 18 months prior to sentencing, in that the appellant had recently been more compliant with expectations respecting his conduct while in custody and had provided written comments indicative of "some increased insight into the causes, the triggers, and the consequences for other persons, of his criminal acts";
- Dr. Tomita's evidence that it was a "reasonable likelihood" that once the sanction of an indeterminate sentence was removed, the appellant would return to his more familiar attitudes and patterns of behaviour; and
- the appellant's experiences as an Aboriginal person that had contributed to his present personality and tendencies "such that he must by law be considered to be less morally blameworthy for his criminal acts than if he did not have those antecedents".

[102] However, she concluded that the appellant remains a threat to the life, safety, or physical or mental well-being of other persons "in spite of his slightly improved behaviour during the last 18 months, and in spite of what he said in his written comments to the Court". She also concluded that the appellant:

[181] is who he is now not only because of his antecedents, but because he has declined to deal in any focused, positive way with the issues that he has known of and recognized as contributors to his misconduct for almost two decades. He has been offered or required to engage in appropriate treatment for all of that time. He has almost never been both out of custody and not supervised by a youth worker, a probation officer or a parole officer. In spite of long stretches of time in custody, and all of those years of community supervision, he remains an untreated sex offender because he declined to engage in treatment. In spite of having taken some treatment to address his other violent offending, he has repeatedly very quickly reoffended after being released from custody.

[103] The judge found that an indeterminate sentence was necessary given the appellant's "severe antisocial personality disorder, psychopathic traits, and longstanding and severe addiction to alcohol and other drugs", questions about the sincerity of his motivation or capacity to change, and "the complete lack of any evidence" that his level of risk might be sufficiently reduced within a definite period of time regardless of any treatment he undertakes.

Analysis

1. Did the judge fail to take into account evidence of the appellant's treatability?

[104] As discussed above, Boutilier confirmed that a designation as dangerous cannot be made unless the offender is shown to present a high likelihood of harmful recidivism and that his violent conduct is intractable, and an indeterminate sentence cannot be imposed unless it is shown to be the only measure to adequately manage the offender's risk of harming the public. Therefore, consideration of an offender's treatability is relevant at both stages of the process but for different purposes:

[44] Given that a dangerous offender application is typically conducted in one hearing, it would be artificial to distinguish evidence that should be considered to designate an offender as dangerous from evidence that should be considered to determine the appropriate sentence. All of the evidence adduced during a dangerous offender hearing must be considered at both stages of the sentencing judge's analysis, though for the purpose of making different findings related to different legal criteria. During the application hearing, the Crown or the accused must present any prospective evidence concerning risk, intractability, or treatment programs, including the required assessment report addressing prospective treatment options. Many aspects of clinical evaluations provide evidence going to both the assessment of the offender's future risk and the sentence necessary to manage this risk:

Clinical evaluations identifying the presence of enduring mental illnesses and their treatability, presence of deeply ingrained personality traits or personality disorders that are likely to persist with time, sexual deviations, and substance-use disorders all become relevant in understanding the meaning of repetitive behaviours, persistent aggressive behaviours, and their relationship to the predicate offence/offences. The presence of impulsivity, lack of empathy, and need for immediate gratification at the expense of others will assist the court in examining whether the risk assessment and management of risk factors are related to the statutory tests concerned.

[Emphasis added; footnotes omitted.]

(Neuberger, at p. 2-37)

[45] The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process. At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat. Thus, offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful

recidivism or that their violent pattern is intractable: see Neuberger, at p. 7-1, by M. Henschel. However, even where the treatment prospects are not compelling enough to affect the judge's conclusion on dangerousness, they will still be relevant in choosing the sentence required to adequately protect the public.

[Emphasis added.]

- [105] The appellant submits that the sentencing judge failed to consider treatability at the designation stage, which constitutes a reversible error. He also submits that the judge failed to take into account the evidence of Dr. Tomita regarding his treatability at the sentencing stage, as she failed to address why his evidence did not demonstrate that a lesser measure than an indeterminate sentence would adequately protect the public.
- [106] The Crown submits that the judge did, in fact, consider treatability at the designation stage of her analysis, and carefully analyzed and accepted Dr. Tomita's evidence in assessing an appropriate sentence.

Designation

- [107] There is no question that a failure to consider treatability at the designation stage constitutes an error of law: Boutilier at para. 82; Skookum at paras. 57-58; Malakpour at paras. 92-93. However, where there is no reasonable possibility that the finding of dangerousness would have been different had the judge considered this question, the error will result in no substantial wrong or miscarriage of justice: Boutilier at paras. 82-83; Malakpour at paras. 94-98.
- [108] Given the uncertainty regarding the law pending the release of Boutilier in the Supreme Court of Canada, the Crown took the position before the sentencing judge that she should consider the appellant's treatability at the designation stage. The Crown says that the following remarks of the sentencing judge demonstrate that she took this issue into account:
- [177] The evidence is overwhelming that Mr. Awasis is likely in the future to repeat this behaviour. In this regard his history is perhaps the best indicator of his likely future conduct, but in addition, the Court has the opinions of Dr. Lamba and Dr. Tomita to consider.
- [109] By reference to the expert opinions, the Crown submits that the judge "would have taken into account intractability as both opinions were geared towards treatment options and their efficacy".
- [110] In my view, it is not at all clear that the sentencing judge considered treatability at the designation stage. The above paragraph in the reasons follows a brief analysis of the evidence establishing the violent patterns of conduct enumerated in s. 753(1)(a)(i) and (ii) and the failure to control sexual impulses in s. 753(1)(b). Subsections 753(1)(a)(i) and (b) require a failure in the future to restrain violent behaviour or sexual impulses. The judge's

language tracks these requirements, and is consistent with her summary of the applicable law, which did not include consideration of treatability.

- [111] That said, I agree with the Crown's alternative submission that the judge's factual findings on the appellant's treatment prospects would have made a finding of dangerousness inevitable. Dr. Lamba and Dr. Tomita each diagnosed the appellant with severe personality disorder and poly-substance abuse, both being primary criminogenic factors and neither being very amenable to treatment. Although Dr. Tomita considered that the appellant presented with a moderate level of treatability for his addiction problems and a lower level of treatability for his sex offending, he agreed that success would require an enduring, positive motivation to change and some degree of success managing the appellant's addiction problems. The judge was not satisfied, based on the appellant's history, that his motivation to change was sincere, or that he had the capacity to change, which were findings open to her on the evidence.
- [112] I would therefore not interfere with the judge's designation of the appellant as a dangerous offender.

Sentencing

- [113] The appellant submits that Dr. Tomita's evidence demonstrated that a lesser measure than indefinite incarceration would have sufficiently protected the public. He says that the judge's reference to a "complete lack of evidence" that his risk could be reduced to a manageable level shows that she did not take Dr. Tomita's evidence on this point into account. He contends that Dr. Tomita never resiled from his opinion that, although the appellant would likely repeat a pattern of community release followed by substance use, it was unlikely that such brief usage would lead to the demoralized state where he is most at risk of offending.
- [114] In my view, the appellant's submission on this point takes aspects of Dr. Tomita's evidence out of context. It is true that Dr. Tomita did not consider a repeated pattern of community release followed by substance use to be unmanageable per se. However, he considered the appellant's substance abuse to be a significant factor leading to instability and acknowledged that his optimistic view was based on an assumption that the appellant would have an enduring motivation to address his addictions and make changes to his lifestyle to the point where he achieved some stability, such as having a place to live and positive social connections. He agreed that the appellant would likely commit offences "pretty quickly" if this assumption was incorrect and that his history of breaching release conditions by drinking suggested that he reoffended "very quickly, violently and sexually".
- [115] Dr. Tomita considered that the appellant was motivated as a result of the severity of the sanction being proposed, but acknowledged that if the possibility of such a sanction were removed, there was a reasonable likelihood that he would "go back to where he's always been". He was not able to opine on the length of time it would take to successfully treat the

appellant's antisocial personality disorder, substance abuse and trauma issues. He said that the appellant would need to "at least enter a program to gauge how much treatment is going to be required".

- [116] Ultimately, the judge had to be satisfied that there existed a reasonable expectation, grounded in the evidence, that some measure less than an indeterminate sentence would adequately protect the public. In this regard, she was not satisfied:
- [182] In view of Mr. Awasis' severe antisocial personality disorder, his psychopathic traits, and his longstanding and severe addiction to alcohol and other drugs, in view of the questions that remain about the sincerity of his motivation to change, and about his capacity to change even if highly motivated to do so, in view of the complete lack of any evidence that Mr. Awasis' level of risk might be sufficiently reduced within a definite period of time so that the risk he poses would be manageable in the community, regardless of the treatment he undertakes, I conclude that the necessary sentence here is a period of incarceration for an indeterminate period.
- [183] I have concluded on all of the evidence that the risk that Mr. Awasis will commit further violent and sexual offences cannot be managed so as to adequately protect the public with any sanction other than an indeterminate sentence. There is no sentencing measure less than an indeterminate sentence of incarceration that will adequately protect the public.
- [117] In my view, the judge's findings are supported by the evidence, including the evidence of Dr. Tomita. She did not find a "complete lack of evidence that the appellant's risk could be reduced to a manageable level", as he submits, but rather a complete lack of evidence that the appellant's risk "might be sufficiently reduced within a definite period of time" so that his risk would be manageable in the community, a distinction of some importance. As noted above, Dr. Tomita did not know how long it would take to successfully treat the appellant's antisocial personality disorder, substance abuse and trauma issues, as he had not yet been in a high-intensity program to gauge what treatment was actually needed. In light of this evidence, it was open to the judge to conclude, as she did, that the appellant's risk could not be managed in the community so as to adequately protect the public.
- [118] It is not a function of this court to re-weigh the evidence of Dr. Tomita. Deference is owed to the judge's findings of fact and credibility with respect to the question of whether an offender's risk would be manageable in the community: Currie at para. 38; Malakpour at para. 54.
- [119] I would not give effect to this ground of appeal.
2. Did the judge fail to give tangible effect to Gladue factors in determining sentence?

- [120] The appellant submits that the sentencing judge failed to give "tangible effect" to the Gladue factors that affected him, resulting in an erroneous elevation of his moral culpability and a disproportionate sentence. Although the judge described in some detail his history, the appellant says that she failed to consider how that history ought to impact his sentence, which is contrary to Ipeelee.
- [121] The Crown submits that the appellant's assertion finds no support in the judge's reasons, as she detailed his antecedents, early life, the Gladue reports and the evidence of Mr. Cadwallader in some detail, and recognized that Gladue principles apply to dangerous offender proceedings. The Crown also submits that characteristics which mitigate an offender's moral blameworthiness have lesser impact in dangerous offender proceedings, citing *R. v. Jennings*, 2016 BCCA 127 and *R. v. Smarch*, 2015 YKCA 13.
- [122] It is beyond dispute that judges have a duty to consider Gladue factors in determining a just and appropriate sentence in any case involving an Aboriginal offender, including dangerous and long-term offender proceedings: Ipeelee at para. 87; Boutilier at paras. 53-54 and 63; Shanoss BCCA at para. 24; *R. v. Fontaine*, 2014 BCCA 1 at para. 33. Even so, applying Gladue factors is not an easy task when sentencing a dangerous offender.
- [123] Section 718.2(e) of the Criminal Code directs sentencing judges to give particular attention to the circumstances of Aboriginal offenders when considering "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community". Given that public protection is the primary objective of the dangerous offender scheme, and the available sanctions are limited to sentences of imprisonment as set out in s. 753(4), this court has noted that the application of Gladue factors in this context may be limited: Garnot at para. 66; Jennings at para. 37; see also Smarch at para. 47, citing *R. v. Ominayak*, 2012 ABCA 337 at para. 41; *R. v. Standingwater*, 2013 SKCA 78 at para. 49; and contra Shanoss BCSC.
- [124] In Boutilier, the majority confirmed that public protection as an enhanced sentencing objective for dangerous offenders does not operate to exclude other objectives:
- [56] It is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstance without curtailing their ability to look at the whole picture. Emphasis on the public safety component is consistent with the fact that public protection is the general purpose of Part XXIV of the Code
- [125] The "ability to look at the whole picture" then, which of course includes Gladue considerations, will necessarily be constrained to some extent in a dangerous offender proceeding due to the emphasis on public safety and the narrower options available to a sentencing judge. However, as Bennett J.A. noted in *R. v. Ladue*, 2011 BCCA 101 at para. 53 (aff'd in Ipeelee), the choice for the sentencing judge is not simply custody or not custody, but rather the possibility of reducing a sentence to accommodate subsequent probation, or in this case, long-term supervision. Rehabilitation remains an important sentencing principle for dangerous offenders, as the question of whether a sentence less than an

indeterminate period is appropriate will depend on the offender's prospects for addressing the issues that contribute to his or her risk. That said, the court in both Gladue and Ipeelee emphasized that s. 718.2(e) can be seen as Parliament's direction to judges to inquire into the causes of the problem of the drastic overrepresentation of Aboriginal people in the prison population and criminal justice system, "and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process": Gladue at para. 64; Ipeelee at para. 68 (emphasis added).

- [126] In Ipeelee and its companion case, Ladue, relied on by the appellant, the court noted that it was not enough for sentencing judges to acknowledge an offender's Aboriginal status; they must consider how it ought to impact their sentencing decisions. Those cases involved sentences for breaches of long-term supervision orders, where the protection of the public was considered by the majority to be an important, but not paramount, sentencing objective, along with rehabilitation. In both cases, the majority concluded that the sentencing judges had not put sufficient emphasis on rehabilitation due to the unique circumstances of the Aboriginal offenders.
- [127] Earlier jurisprudence noted that dangerous and long-term offender designations, while both contributing to assuring public safety, have different objectives, in that dangerous offenders are kept in prison to separate them from society, while long-term offenders will eventually be under supervision in the community for the purpose of assisting in their rehabilitation: *R. v. L.M.*, 2008 SCC 31 at para. 42. This distinction has been attenuated in the 2008 amendments to Part XXIV of the Criminal Code, as a designated dangerous offender is no longer automatically sentenced to indeterminate detention. Gladue factors are clearly important considerations for a sentencing judge when determining "the least intrusive sentence required" to achieve the primary purpose of public protection, per Boutilier at para. 60. While it may seem counterintuitive to suggest that Gladue factors could overcome findings of dangerousness, a high risk of recidivism and intractability--they could, for example, provide a basis for assessing the viability of traditional Aboriginal-focused treatment options aimed at addressing the issues that contribute to or aggravate an offender's risk. If such resources are available and considered appropriate, they could provide a basis for finding that a lesser sentence will adequately protect the public. In this regard, see the comments of Caldwell J.A. in *Standingwater* at para. 51.
- [128] The sentencing judge's assessment of the appellant's Gladue factors was briefly summarized in the concluding section of her reasons:
- [181] It is clear to me that Mr. Awasis' experiences as an Aboriginal person have contributed to his present personality and tendencies such that he must by law be considered to be less morally blameworthy for his criminal acts than if he did not have those antecedents. Nevertheless, Mr. Awasis is who he is now, not only because of his antecedents, but because he has declined to deal in any focused, positive way with the issues that he has known of and recognized as contributors to his misconduct for almost two decades. He has been offered or required to engage in appropriate treatment for all of that time. He has almost

never been both out of custody and not supervised by a youth worker, a probation officer or a parole officer. In spite of long stretches of time in custody, and all of those years of community supervision, he remains an untreated sex offender because he declined to engage in treatment. In spite of having taken some treatment to address his other violent offending, he has repeatedly very quickly reoffended after being released from custody.

- [129] This passage demonstrates that the judge accepted that the appellant's Gladue factors reduced his moral blameworthiness, but she considered his repeated history of reoffending and his long-standing failure to address the issues that contributed to his criminal conduct to be so entrenched that the need to protect the public had to be paramount. Although she did not articulate in any detail the unique systemic and background factors that may have played a part in bringing the appellant before the court, she did address the need to consider these factors and she reviewed much of the appellant's background earlier in her reasons.
- [130] The judge expressly accepted that Gladue principles applied in dangerous offender proceedings and drew guidance from Shanoss BCSC (where Bruce J. took a broader approach to the application of Gladue in this context). She reviewed in some detail the appellant's very difficult background and early life, which included the intergenerational effects of residential schools, the Gladue reports, and the evidence of Mr. Cadwallader. She accepted that the appellant's life was "marked by loss and tragedy", that he grew up in circumstances marked by the effects of poverty and alcoholism, and that he was "sexually, physically and emotionally abused" while he was at residential school (at paras. 17 and 148).
- [131] Along with this background, however, the judge also reviewed the considerable evidence about the appellant's long-standing failures to participate in sex offender treatment in custody, to address his addiction problems, to participate in Aboriginal-focused programs in the community, and to abide by conditions when released into the community. She also considered evidence of improved behaviour in the previous 18 months, in which the appellant had been "more compliant with expectations respecting his conduct while in custody" and had indicated in his written comments to the court some increased insight into the causes of his criminal conduct. The judge reviewed all of that history, along with the evidence of Mr. Cadwallader, Dr. Lamba and Dr. Tomita, noting in particular Dr. Tomita's acknowledgment that once the sanction of an indeterminate sentence was removed, there was a reasonable likelihood that the appellant would return to his more familiar attitudes and patterns of behaviour. Ultimately, the judge was not satisfied that the appellant had the motivation or capability to meaningfully participate in treatment or address his addiction problems such that he could be managed in the community to an acceptable level.
- [132] I do not accept the appellant's submission that he was "blamed and made to bear sole responsibility" for aspects of his criminal conduct that resulted from his experiences as an Aboriginal offender. In the context of a dangerous offender proceeding, it does not necessarily follow that a determination that public protection must be paramount

demonstrates a failure to give Gladue factors tangible consideration. While the appellant's lack of motivation and capacity undoubtedly stem largely from his tragic background, the judge was unable to remedy this complex problem through the sentencing process. Mr. Cadwallader's recommendation regarding community-based programs was predicated upon the appellant first having the opportunity to meaningfully participate in sex offender treatment before being reintegrated into the community, but at the time of sentencing, the appellant remained an untreated sex offender. And because the appellant had not yet been in a high-intensity program, Dr. Tomita was unable to say how long it would take to successfully treat his underlying issues.

[133] In my view, this was a difficult case. As I stated earlier in these reasons, indeterminate detention is intended to be limited to "habitual criminals who pose a tremendous risk to public safety" (Boutilier at paras. 34 and 77), yet the appellant's antecedents as an Indigenous person that have contributed to his risk are unfortunately not unique. It is for this reason that judges must remain vigilant in exercising restraint and proportionality in respect of an Aboriginal offender in assessing whether there is a "reasonable expectation" that a lesser measure "will adequately protect the public against the commission by the offender of a serious personal injury offence" under s. 753(4.1) of the Criminal Code.

[134] While the judge in this case ought to have articulated more precisely how she considered the appellant's Gladue factors, when her reasons are read as a whole and in conjunction with the evidence, I cannot conclude that she did not adequately consider them. Her determination that public protection was paramount despite the appellant's reduced moral blameworthiness is supported by the evidence. Her findings are entitled to deference and it is not the function of this court to re-weigh that evidence.

[135] Therefore, I would not give effect to this ground of appeal.

3. Is the indeterminate sentence manifestly unfit?

[136] The appellant's final submission, that the indeterminate sentence is grossly disproportionate to his moral culpability, relies on the first two grounds of appeal. Given my conclusions on those grounds, there is no basis to conclude that the indeterminate sentence imposed is manifestly unfit.

Disposition

[137] I would dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/00/2020BCCA0023.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-awasis-2020>

Prepared on 26 October 2026 · Esheria