
CANADA / JUDGMENT

R. v. Boutilier

2012 BCSC 1391

COURT

Supreme Court of British Columbia

DECIDED

20 September 2012

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2012 BCSC 1391 R. v. Boutilier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Boutilier,

2012 BCSC 1391

Date: 20120920

Docket: 25686

Registry: Vancouver

Regina

v.

Donald Joseph Boutilier

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Crown:

Isobel Keeley

Counsel for the Accused:

Gary Botting

Place and Date of Trial:

Vancouver, B.C.

May 28, June 22 and August 3, 2012

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2012

[1] Mr. Boutilier pled guilty to the following charges on the morning that his trial was to start:

Count 1

At or near Vancouver, in the Province of British Columbia, on or about the 11th day of April, 2010, he did commit robbery of Noreen Jamal, contrary to Section 344(1)(b) of the Criminal Code.

Count 2

At or near Vancouver, in the Province of British Columbia, on or about the 11th day of April, 2010, he did use an imitation firearm while committing or attempting to commit the indictable offence of robbery of Noreen Jamal, contrary to Section 85(2) of the Criminal Code.

Count 3

At or near Vancouver, in the Province of British Columbia, on or about the 11th day of April, 2010, he did in committing an assault upon Joseph Marshall Robson, use a weapon, contrary to Section 267(a) of the Criminal Code.

Count 4

At or near Vancouver, in the Province of British Columbia, on or about the 11th day of April, 2010, he did commit robbery of Brian Shaw, contrary to Section 344(1)(b) of the Criminal Code.

Count 5

At or near Vancouver, in the Province of British Columbia, on or about the 11th day of April, 2010, he did use an imitation firearm while committing or attempting to commit the indictable offence of robbery of Brian Shaw, contrary to Section 85(2) of the Criminal Code.

Count 6

At or near Vancouver, in the Province of British Columbia, on or about the 11th day of April, 2010, he did operate a motor vehicle, in a manner that was dangerous to the public having regard to all the circumstances including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably be expected to be at that place, contrary to Section 249(1)(a) of the Criminal Code.

- [2] The Crown thereafter communicated its intention to make an application pursuant to s. 752.1(1) of the Criminal Code, R.S.C., 1985, c. C-46 for an order remanding Mr. Boutilier, for a period not exceeding 60 days, for an assessment of the risk he poses to public safety. The results of that assessment could then be used in an application brought under s. 753 or s. 753.1 of the Criminal Code to have Mr. Boutilier declared either a dangerous or a long-term offender.
- [3] The Crown relies on the first five of the foregoing charges and convictions as the predicate offences which form the basis of its present application. Two central issues, both of which flow directly from s. 752.1(1), arise on this application:
- i) did any of the predicate offences constitute a "serious personal injury offence"?; and
 - ii) are there reasonable grounds to conclude that Mr. Boutilier might be found to be either a dangerous offender or a long-term offender?
- [4] In support of its application, Crown filed various materials including:
- a) an Agreed Statement of Facts pertaining to the offences which underlie Mr. Boutilier's present convictions; and
 - b) two binders of materials which pertain to and detail many of the early offences on Mr. Boutilier's criminal record, including his youth record. These binders also contain other materials concerning his criminal record, his responses to rehabilitation and numerous assessments that address various issues.
- [5] Mr. Boutilier filed two affidavits which addressed his background, the circumstances of some of his earlier convictions and certain events that preceded his commission of the predicate offences.
- 1) The Circumstances Relevant to the Present Convictions including the Predicate Offences
- [6] The following facts emerge from the Agreed Statement of Facts:
- a) On Sunday, April 11, 2010, at approximately 6:25 p.m., Mr. Boutilier entered the Shoppers Drug Mart store located at 586 Granville Street, Vancouver, with an unknown male.
 - b) While the unknown male was paying the cashier, Ms. Noreen Jamal, for an item, Mr. Boutilier approached Ms. Jamal's cash register, lifted up his shirt to show her the handle of a handgun in the waistband of his pants and told her "this is a robbery ... give me the fucking money!"
 - c) Another cashier also observed the gun, assisted Ms. Jamal with opening the till and handed Mr. Boutilier a total of approximately \$300.

- d) Two loss prevention officers, Joseph Robson and Ali Rahnumah, were standing outside the store and observed the robbery taking place. Mr. Rahnumah telephoned 911 and informed the Vancouver Police operator of the robbery. He stayed on the line with the operator until Mr. Boutilier was arrested by police officers about ten minutes later.
- e) After Mr. Boutilier received the money, he left the Shoppers Drug Mart store and quickly ran northbound on Granville Street. He thereafter ran through several streets of downtown Vancouver while pursued by Messrs. Robson and Rahnumah.
- f) At one point while he was being pursued, Mr. Boutilier turned around and briefly pointed his handgun at Mr. Robson, threatening to shoot Mr. Robson if he continued to follow him. These events were witnessed by another civilian who was waiting for a bus.
- g) Mr. Boutilier continued to flee. He was subsequently observed by Mr. Rahnumah entering the back seat of a grey Hyundai Accent which was stopped at a red light.
- h) Mr. Boutilier showed the handgun he was carrying to the driver of the vehicle, Brian Shaw, and ordered him to drive. Both Mr. Shaw and his front passenger immediately jumped out of the vehicle.
- i) Mr. Boutilier climbed into the driver's seat of the vehicle, at which point two police officers approached the stopped vehicle and, at gunpoint, ordered Mr. Boutilier to exit the vehicle. He refused to do so and proceeded to drive the stolen vehicle eastbound on West Hastings Street at a high rate of speed.
- j) Mr. Boutilier was followed by three police vehicles through the streets of the Downtown Eastside in Vancouver. He drove through several red lights and proceeded into oncoming traffic to bypass vehicle traffic in front of him. He drove at speeds of up to 80 km/h. He ultimately collided with a parked vehicle as he rounded a corner.
- k) Throughout this time, the roadways were busy with both vehicle traffic and pedestrians. The stolen vehicle narrowly missed several pedestrians in the crosswalk at West Hastings Street and Main Street.
- l) As Mr. Boutilier attempted to continue driving after the collision, he was pinned in by a police vehicle. A number of police officers approached the stolen vehicle with their firearms drawn and ordered Mr. Boutilier out of the vehicle.
- m) Mr. Boutilier was searched incidental to his arrest. Located on the front passenger floor of the stolen vehicle was an imitation firearm.
- n) The foot pursuit described above covered just over five city blocks in less than ten minutes. The vehicle pursuit covered over four city blocks and was less than a minute in duration.
- o) Mr. Boutilier was sweating heavily when arrested and was noted by one of the officers as being under the influence of narcotics, though he had no difficulty either walking or communicating with the police.

2) Mr. Boutilier's History and Record

- [7] Mr. Boutilier is currently 43 years of age. His upbringing and background are tragic. His mother died of a drug overdose when he was six years old. He was raised for a time by his stepfather in what an earlier sentencing judge described as a "biker culture surrounded by drugs, alcohol and prostitutes". Between the ages of six and eight, he was encouraged to participate in drug and alcohol use. His affidavit indicates that he was placed in 32 different foster homes. His youth record starts at the age of ten and he was apparently first placed in a detention facility at that same age. By the time he was in his mid-teens, he was regularly in detention. The materials before me indicate that he escaped from detention more than 20 times. He has some 16 convictions as a youth with numerous property related offences and break and enters. He was convicted of forcible confinement and sexual assault, but now contests or seeks to explain the circumstances of that assault.
- [8] He has some 27 convictions as an adult. Of these convictions, two groupings are particularly relevant.
- [9] First, in 1988, while on parole, and while in the Seattle, Washington area, Mr. Boutilier stole a car from a parking lot and, at gunpoint, tried to force the driver of the vehicle to drive him elsewhere. The driver escaped on foot and Mr. Boutilier drove away in the vehicle. Mr. Boutilier was then pursued by the police. The pursuit took place at high speed over several miles and the records indicate that the pursuit endangered others. The police ultimately rammed Mr. Boutilier's vehicle to bring it to a stop. In a signed statement, Mr. Boutilier accepts that he shot in the direction of the police while being pursued. He was sentenced to ten years in prison and served the whole of that sentence. I have described these events the "Seattle Incident".
- [10] Subsequently, in 2002, he was convicted for a series of robberies which occurred over an eight or nine day period in the Brantford, Ontario area. Mr. Boutilier used a sawed-off rifle for at least some of these robberies, though the firing pin of the rifle apparently did not function properly. Mr. Boutilier was also convicted of kidnapping. The relevant materials indicate that Mr. Boutilier and another male approached an individual and, at gunpoint, forced him to return to his car and to get into the back of the vehicle. The victim was told several times that, if he did not comply, he would be killed. After approximately a half-hour, the victim was able to flee when the car pulled to a stop. Mr. Boutilier was sentenced to nine years for the offences associated with the robberies and kidnapping. I have described these events the "Brantford Incident".
- [11] Mr. Boutilier's affidavit and the submissions made on his behalf emphasized that, prior to each of the Seattle Incident, the Brantford Incident and the activities which underlie his most recent convictions, Mr. Boutilier succumbed to his drug addictions. The materials before me indicate that Mr. Boutilier has, since his mid or late teens, suffered from a serious drug addiction which has also plagued him during some of the periods that he was incarcerated.

[12] Mr. Boutilier also has one conviction which arose from stabbing another inmate while in prison. He says he did so in self-defence.

[13] Mr. Boutilier has spent more than three quarters of his adult life incarcerated.

3) Analysis

[14] Section 752.1 of the Criminal Code provides:

Application for remand for assessment

752.1(1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

Report

(2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

Extension of time

(3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

[15] The two issues I identified earlier align with the two preconditions for making an order under s. 752.1:

- a) that the offender be convicted of a "serious personal injury offence"; and
- b) that there be reasonable grounds to believe that the offender might be found to be a dangerous offender or a long-term offender.

i) Serious Personal Injury Offence

[16] "Serious personal injury offence" is defined in s. 752 of the Criminal Code which provides:

"serious personal injury offence" means

- (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).

[17] The Crown accepts that count six, which I have previously described, and which provides for a maximum jail sentence of five years, is not a "serious personal injury offence".

[18] Each of counts one through five is an offence "for which the offender may be sentenced to imprisonment for 10 years or more".

[19] The Crown's primary assertion was that the two counts of robbery, the one involving Ms. Jamal at the Shoppers Drug Mart store, and the other involving the theft of Mr. Shaw's car, each of which involved the use of an imitation firearm, constituted the "use or attempted use of violence against another person". The Crown argued that a Victim Impact Statement prepared by Ms. Jamal might also reflect that she had suffered "serious psychological harm". By virtue of the conclusions I have come to, I need not address that latter submission directly.

[20] The submission advanced on behalf of Mr. Boutilier relied, as its cornerstone, on the case of *R. v. Neve*, 1999 ABCA 206, 237 A.R. 201. In *Neve*, the accused, who was a prostitute and a friend, lured another prostitute into a field where the victim was told to strip. She refused to do so. She was told her arm would be broken if she did not comply. She was struck in the face several times. Her clothes were cut off of her with a knife and she was "nicked" in the process, though she admitted the accused had been careful not to cut her.

[21] In *Neve*, following a lengthy analysis which addressed a number of issues, the court concluded that "violence or endangerment as those terms are used under ss. 752(a)(i) and (ii) must be objectively serious before an offence qualifies as a serious personal injury offence under either of these sections" (para. 86). That conclusion was based, in part, on the meaning of the word "violence", which the court considered "contemplates an element of severity to the physical force that constitutes the violent act" (para. 74), in part on the legislative text (para. 76) and in part on a series of further considerations (paras. 76-80).

[22] Mr. Boutilier now argues that none of the predicate offences gave rise to any physical injury of any nature and certainly no injury of any "severity".

[23] The *Neve* decision, as it relates to the requirement that the accused's use of violence has to be "objectively serious", appears to have been overtaken by subsequent case law. In *R. v. Goforth*, 2005 SKCA 12, 27 C.R. (6th) 263, Cameron J.A., for the court, addressed *Neve* squarely and came to a different decision. Justice Cameron placed significant weight on *R. v.*

Currie, [1997] 2 S.C.R. 260, 146 D.L.R. (4th) 688, a decision not referred to in Neve, and said at para. 74 that the reasons in Currie "virtually foreclose interpreting the definition of 'serious personal injury offence' contained in paragraph 752(a) as requiring objectively serious violence or endangerment." (Emphasis in original)

[24] The issue before the court in Currie had been framed in the following terms:

[16] Must a trial judge, when evaluating a dangerous offender application under s. 753(b) of the Criminal Code [now section 753(1)], focus on the seriousness of the specific predicate offences that have led to the Crown's dangerous offender application?

[25] Because I consider that the decision in Goforth dictates the outcome of this aspect of the application, I have quoted from the reasons of Cameron J.A. at some length:

[58] In deciding the issue, the [Supreme] Court [of Canada] noted [in Currie] that once a person has committed an offence specifically defined by the Criminal Code as a "serious personal injury offence", that person has made it possible for the Crown to invoke the Criminal Code's dangerous offender application process. If the process is successfully invoked, the Court observed, it is then incumbent upon the trial judge to evaluate the offender's potential danger to the public, an exercise that does not necessarily depend on the specific nature and objective gravity of the predicate offence.

[59] The Court went on to hold that serious personal injury offences, as such, are inherently serious and that it is unnecessary to focus on the objective seriousness of the predicate offence. It also held that it is unnecessary for an offender to have committed a particularly violent or grievous predicate offence as a condition to being declared a dangerous offender.

[60] As Chief Justice Lamer observed in delivering the judgment of the Court:

There may be, as the respondent asserts, an objective difference between the nighttime rape at knife point and the predicate offences, but this distinction is not reflected in s. 752 or s. 753 of the Criminal Code. Indeed the respondent is asking the Court to alter or even reduce the definition of "serious personal injury offence". This alteration would, as the appellant notes, effectively guarantee that an accused who has committed an arguably less serious sexual predicate offence would never be declared a dangerous offender. I cannot imagine that Parliament wanted the courts to wait for an obviously dangerous individual, regardless of the nature of his criminal record and notwithstanding the force of expert opinion as to his potential dangerousness, to commit a particularly violent and grievous offence before he or she can be declared to be a dangerous offender [pp. 274-75].

[61] The Court also held that there is nothing objectionable in treating all serious personal injury offences the same in applying the dangerous offender provisions of section 753. The Chief Justice suggested it might be otherwise were the section to provide, without qualification, that a trial judge could designate any person who commits a "serious personal injury offence" a dangerous offender. But it does not do so, prompting him to remark:

... it is crucial to recognize that the conviction for a "serious personal injury offence" merely triggers the [s. 753(1)] application process. There remains a second stage to [s. 753(1)], at which point the trial judge must be satisfied beyond a reasonable doubt of the likelihood of future danger that an offender presents to society before he or she can impose the dangerous offender designation and an indeterminate sentence. [p. 275]

[62] He went on to note that Parliament has thus created a standard of preventive detention that measures an offender's present condition according to past behaviour and patterns of conduct, adding that under this scheme dangerous offenders who have committed serious personal injury offences can properly be sentenced as dangerous offenders "without having to wait for them to strike out in a particularly egregious way. By way of example, he said this:

... suppose a known sexual deviate has been convicted of repeated offences for stalking and sexually assaulting young girls in playgrounds. He operates by offering them candy, touching their private parts, and if the children seem to comply or submit to his criminal advances, by taking them away where he violently sexually assaults them. Now suppose that individual is at large in society and caught by a parent at a playground after having offered a child candy and improperly touching her. In this example, like the present case, the predicate offence is objectively less serious than a violent and invasive rape, but the trial judge need not justify the dangerous offender designation and an indeterminate sentence as a just desert for the isolated act of sexual touching. On the theory of [s. 753(1)], the offender has committed an inherently "serious personal injury offence". On a dangerous offender application, a trial judge is then entitled to consider his "conduct in any sexual matter" to determine if he presents a future danger to society. Otherwise, we would be saying that an offender's present condition is defined by the precise degree of seriousness of the predicate offences. That is the equivalent to assuming that a dangerous individual will always act out, or be caught for that matter, at the upper limits of his dangerous capabilities. [p. 276, Emphasis in original]

[63] Based on considerations such as these - considerations grounded in the object and scheme of the enactment, and in the intention of Parliament - the Court concluded that the term "serious personal injury offence", as defined in paragraph 752(b), does not invite qualitative assessment of the objective seriousness of the predicate offence. (See, too, *R. v. H. (M.B.)* (2004), 186 C.C.C. (3d) 62 (Ont. C.A.))

[64] These same considerations appear to apply, and to apply with equal force, to the term "serious personal injury offence" as defined by paragraph 752(a). Assuming they do, there is nothing in the object and scheme of the enactment, including the purpose served by the term, to suggest that paragraph 752(a) be read in anything but its ordinary and grammatical sense, and without any addition to it. In other words there is no basis for importing the word "serious" into clause (i) of paragraph 752(a), and "seriously" into clause (ii). [Emphasis in original.]

[26] Cameron J.A. concluded:

- [81] In light of the fact the term "serious personal injury offence" as defined in paragraph 752(a) operates in relation to both sections 753 and 753.1, it might be worth noting that the implied addition of words such as "serious" or "seriously" to the definition of the term contained in paragraph 752(a) invites uncertainty, even intractable difficulty, in the application of the term. To add words such as these by implication is to invite the question of whether the same degree of violence or endangerment required in respect of dangerous offender proceedings is also required in respect of long-term offender proceedings. Logic would suggest otherwise, for the sentence reserved for the long-term offender is a lesser sentence compared to that reserved for the [dangerous] offender. But to search for greater or lesser degrees of seriousness in relation to violence or endangerment for this purpose is to search in vain.
- [27] In *R. v. M.B.H.* (2004), 70 O.R. (3d) 257, 186 C.C.C. (3d) 62 (C.A.), referred to in Goforth, Doherty J.A., for the court, addressed the meaning of "serious personal injury", referred to portions of Currie, and concluded:
- [49] The respondent was convicted of sexual assault. Under s. 753(1)(b), sexual assault is a "serious personal injury offence". There is no requirement that the facts surrounding the sexual assault clear any seriousness threshold. The trial judge erred in law by effectively holding that some sexual assaults were not sufficiently serious to engage s. 753(1)(b). Rather than fixing on the seriousness of the circumstances surrounding the offence which triggered the application, the trial judge should have focused on whether the totality of the respondent's conduct in sexual matters showed a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons.
- [50] The extracts from the trial judge's reasons quoted above also make it clear that he interpreted the long-term offender provisions as applicable only where the circumstances surrounding the offence giving rise to the application were so serious as to approach the worst offender/worst offence category. This limitation is not found in s. 753.1. The seriousness of the offences giving rise to the application is addressed in s. 753.1(1)(a). If the offence or offences for which the offender was convicted merit a sentence of two years or more, they are sufficiently serious to trigger the further inquiry into the risk posed by the offender and the possibility of controlling that risk within the community.
- [28] *R. v. Roberts*, 2007 ONCA 64, 219 C.C.C. (3d) 32 dealt with an appeal from a sentencing judge who had concluded that s. 753 of the Code, the dangerous offender provision, required that he first had to find that a minimum sentence of two years would have to be imposed for the predicate offence. Feldman J.A., for the court, said:
- [46] When the sentencing judge made his ruling in this case, he did not have the benefit of this court's decision in *R. v. M.B.H.* (2004), 186 C.C.C. (3d) 62, released on April 15, 2004. As in this case, the trial judge had ruled that the offender could not be declared a dangerous or long-term offender because the predicate offences he had committed were not factually serious enough to trigger those provisions. He concluded that the predicate offence or offences

must "approa[ch] the worst type of conduct imaginable" and the offender must be "among the worst of offenders". This court disagreed and held, following the Supreme Court of Canada decision in *R. v. Currie* (1997), 115 C.C.C. (3d) 205, that the predicate offence need only qualify as a "serious personal injury offence", as defined, in order to trigger the dangerous offender provision. The court then applied the tests set out in the section in order to determine whether the offender's past conduct, including the predicate offence, revealed that he presented a potential future danger to the public. This court quoted from Lamer J.'s reasons in *Currie*:

... once an individual has committed an offence specifically defined in the Criminal Code as a "serious personal injury offence", he or she has made it possible for the Crown to invoke the Criminal Code's dangerous offender application process. If that process is invoked, it is incumbent upon the trial judge to evaluate the offender's potential danger to the public and this may or may not depend upon the specific nature and objective gravity of the predicate offence. (214)

[47] This court held in *M.B.H.* that the trial judge erred by limiting the application of the dangerous and long-term offender designations based on an evaluation of the seriousness of the facts of the predicate offence.

[48] A similar error was made by the sentencing judge in this case by imposing a requirement that the predicate offence merit a sentence of two years or more before a dangerous offender application can be considered. As in *M.B.H.*, this is another way of adding a requirement regarding the seriousness of the facts and circumstances surrounding the predicate offence, as a prerequisite to the court's jurisdiction to consider a dangerous offender application. This approach has been rejected by the Supreme Court in *Currie* and by this court in *M.B.H.*

[29] More recently, in *R. v. Lebar*, 2010 ONCA 220, 252 CCC (3d) 411, the court addressed the meaning of "serious personal injury offence" in the context of the availability of a conditional sentence. In *Lebar*, the accused had walked into a store armed with a five inch knife and persuaded the cashier to hand over the money in her till. The cashier was not physically injured. The trial judge concluded that the use of the knife was a threat to induce the desired result and constituted an act of violence. The trial judge went on, however, to find that the violence in issue was not sufficiently egregious to amount to a serious personal injury offence under the first branch of the definition in s. 752 of the Code.

[30] Epstein J.A., for the court, disagreed and concluded that the key to fulfilling the relevant criterion of a "serious personal injury offence" was a sustainable finding of violence. Once it was established that the accused had committed an act of violence, a conditional sentence was no longer available.

[31] Epstein J.A., in addressing the issue before her, first addressed the meaning of the word "violence":

- [39] As I will discuss, a contextual analysis leads to the conclusion that the legislators intended a broad definition of the term violence.
- [40] I start with the legislative history, as it can play a role, albeit limited, in the task of interpreting the meaning of a word used in a statute. See: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 85 C.C.C. (3d) 118.
- [41] Section 752 of the Code, defining "serious personal injury offence", was first introduced in 1977, as part of an omnibus bill, which included strict firearm control and the new dangerous offender provision. Until 2007, "serious personal injury offences" were exclusively of interest to the dangerous and long term offender regimes.
- [42] The defined term received more attention in 2007 when s. 742.1 was revised to exclude "serious personal injury offences" from the conditional sentencing regime.
- [32] Epstein J.A. then concluded:
- [48] To be true to Parliament's intention, the concept of violence must be given a broad interpretation.
- [49] In my view, the meaning of "violence" in this definition must be informed by the entirety of the definition of a serious personal injury offence. A serious personal injury offence is defined, in part, either as an offence involving the use or attempted use of violence against another person, or "conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person." Taken together, and especially taking into account the far-reaching meaning of the word "safety", these two clauses point to the legislature's intention to cover a very expansive range of dangerous behaviour with the term "serious personal injury offence".
- [50] A finding that violence was used remains a matter of factual determination for the trial judge. Whether the criminal conduct amounted to the use or attempted use of violence is a matter relating to the circumstances under which the crime was committed. This is not tantamount to an objective assessment of the seriousness of the violence; rather it is a question of determining whether the evidence proves that violence was actually used.
- [33] Justice Epstein directly addressed the competing analyses advanced in *Neve* and *Goforth* and, at para. 65, said: "I agree with the appellant that the preferable line of reasoning is that represented by *Goforth*".
- [34] The reasoning in *Goforth* has consistently found favour in the Superior Courts of most provinces other than Alberta. In Manitoba see, for example, *R. v. B.F.A.*, 2011 MBQB 277 at para. 16, 272 Man.R. (2d) 158; and *R. v. Cook*, 2010 MBQB 237 at para. 25, 259 Man.R. (2d) 109. In Saskatchewan see, for example, *R. v. Fulton*, 2005 SKQB 534 at para. 16, 274 Sask.R. 144, rev'd on other grounds, 2006 SKCA 115, 214 C.C.C. (3d) 214; and *R. v. Standingwater*, 2010 SKQB 33 at para. 22, 351 Sask.R. 96. In Ontario see, for example, *R. v. Naess* (2005), W.C.B. (2d) 176 at para. 54, [2005] O.T.C. 176; *R. v. Vanderwal*, 2010 ONSC 265, [2010] O.J. No. 246;

and *R. v. Thompson*, 2009 ONCJ 359 at para. 25, [2009] O.J. No. 3330. Additionally, Goforth is considered to represent the prevailing state of the law in Canada in each of *Clatyon Ruby et al*, *Sentencing*, 7th ed. (Markham, Ont: LexisNexis Canada Inc., 2008) at ss. 17.21 and *Halsbury's Laws of Canada - Criminal Procedure*, 1st ed., "Sentencing and Other Post-Conviction Orders" (Markham, Ont: Lexis Nexis Canada Inc., 2007) at HC2-517.

- [35] No decision of this court or of the British Columbia Court of Appeal has directly addressed this issue. A number of decisions of this province's provincial court have, however, expressed a "preference" for the analysis advanced in Goforth; see, for example, *R. v. Reed*, 2009 BCPC 201 at para. 47, [2009] B.C.J. No. 1333; and *R. v. Ferguson*, 2009 BCPC 73 at para. 40, [2009] B.C.J. No. 448.
- [36] I also note that the Alberta courts have recently limited the application of *Neve* in light of amendments to the Code since *Neve* was handed down. Section 742.1 of the Code now dictates that, if a person is convicted a "serious personal injury offence as defined in section 752", then a conditional sentence is not available. In *R. v. Ponticorvo*, 2009 ABCA 117, 448 A.R. 275, the Alberta Court of Appeal stated at para. 15 that "the restrictive definition [of 'serious personal injury offence'] adopted by the Court in *Neve* does not apply in the context of s. 742.1", despite the fact that s. 742.1 expressly incorporates the definition of "serious personal injury offence" from section 752.
- [37] Based on the reasoning in Goforth, as explained and further developed in *Roberts and Lebar*, I do not accept that, in order to find that an accused has committed a "serious personal injury offence" under s. 752 of the Criminal Code, a sentencing judge is required to engage in a qualitative assessment of the "seriousness" of the violence used by the accused in the predicate offence at issue.
- [38] In this case, I am satisfied that Mr. Boutilier used or attempted to use violence in: (a) Count 1, where he showed Ms. Jamal the handle of his handgun and concurrently used aggressive language when demanding that she provide him with the money in her till; (b) Count 3, where he pointed his gun at Mr. Robson and, based on the language of the Agreed Statement of Facts, threatened to "shoot him"; and (c) Count 4, where he showed Mr. Shaw his gun and then ordered him to drive his vehicle.
- [39] The conclusion that such conduct on the part of Mr. Boutilier constituted the use or attempted use of violence for the purposes of each of ss. 752 and 753 of the Criminal Code is supported in a number of decisions.
- [40] In *R. v. McNabb*, 2007 SKQB 89, 292 Sask.R. 145, the accused was convicted of armed robbery. He had pointed either a gun or an object imitating a gun at the victim while he robbed a store. He argued that the mere pointing of a gun or an imitation gun without any physical violence in an armed robbery did not constitute a "serious personal injury offence" as required by the dangerous offender provisions of the Criminal Code. Schiebel J. concluded, at para. 12, that "[t]he threat of violence with a weapon during a robbery is encompassed by the definition of 'serious personal injury offence' in s. 752 of the Code."

- [41] In *R. v. Guilford*, [1999] O.J. No. 4894, 44 W.C.B. (2d) 523 (S.C.J.), the accused had robbed two shops and had threatened the clerks at those shops with a gun that turned out to be an imitation weapon. Hill J., at para. 33, concluded that the accused "having committed two robberies, has committed a 'serious personal injury offence' as that term is defined in s. 752 of the Code".
- [42] In *R. v. Nikolovski*, [2000] O.J. No. 4452, 48 W.C.B. (2d) 181 (S.C.J.), aff'd on appeal, (2005), 194 O.A.C. 258, [2005] O.J. No. 494 (C.A.), the accused robbed two banks while masked. He kept his hand in his pocket causing the tellers to believe that he had a weapon. Wilson J., at para. 56, concluded that the accused had used or attempted to use violence during the robberies. Nikolovski pre-dated Goforth. It is interesting to note that Wilson J. applied the analysis in Neve, but was nevertheless satisfied that the accused's conduct was "objectively serious".
- [43] Finally, in *R. v. McLeod*, 2010 ONCJ 354, [2010] O.J. No. 3596, the accused robbed a gas station kiosk on two consecutive days by presenting a note to the attendants demanding money and indicating that he had a gun. Forsyth J. concluded, at para. 75, that each of the two robberies committed by the accused involved the attempted use of violence and each constituted a "serious personal injury offence".
- [44] There are a number of further authorities whose factual circumstances are somewhat attenuated but which nevertheless support the foregoing conclusion.
- [45] In *Lebar*, the accused had robbed a store using a five inch knife. At para. 28, the Court of Appeal noted the trial judge's conclusion that the "very nature of using a knife as a threat to induce a desired result, whether implied or real is an act of violence".
- [46] In *R. v. Griffin*, 2011 NSCA 103, 279 C.C.C. (3d) 464, Bryson J.A., for the court, reversed the trial judge and concluded that an accused who, while committing a robbery, wore a disguise and tapped a knife on the counter while asking for money had threatened violence and committed a "serious personal injury offence".
- [47] In *Ferguson*, two accused had participated in the robbery of a jewelry store. One of them had used a hammer to smash several jewelry cases. The trial judge leaned to the view that that act constituted a threat of violence and gave rise to a "serious personal injury offence".
- [48] The foregoing authorities, whose circumstances align in material respects with Mr. Boutilier's, support the conclusion that Mr. Boutilier's conduct constituted the use or attempted use of violence and constituted "serious personal injury offences".
- [49] Accordingly, I am satisfied that each of Counts 1, 3 and 4 constituted a "serious personal injury offence".

ii) Reasonable Grounds to believe that Mr. Boutilier Might be Found to be Either a Dangerous Offender or a Long-Term Offender

- [50] Both counsel focused their submissions on the issue of whether Mr. Boutilier might ultimately be found to be a dangerous offender. Accordingly, it is this focus that I have addressed. In so doing, I have not expressly considered whether Mr. Boutilier might ultimately be found to be a long-term offender. Nevertheless, I am mindful that it would be an error for me to conclude, at this stage, that the assessment which the Crown seeks should be limited to only one of s. 753 or s. 753.1; *R. v. Fulton*, 2006 SKCA 115 at paras. 18-23, 214 C.C.C. (3d) 135.
- [51] The primary submission made on behalf of Mr. Boutilier, as it relates to this stage of the analysis, is that there are no reasonable grounds to believe that Mr. Boutilier might ultimately be found to be a dangerous offender. This submission, in turn, is based on the assertion that Mr. Boutilier never physically injured any party during the Seattle Incident, the Brantford Incident or the predicate offences. Accordingly, counsel for Mr. Boutilier argued that there is no reasonable prospect that the Crown will satisfy the requirements of s. 753(a)(i) of the Criminal Code (the section on which the Crown focused). Specifically, it was argued that the Crown will not be able to show that Mr. Boutilier's conduct evinces a pattern of repetitive behavior that shows both the failure to restrain his conduct and, more importantly for present purposes, "a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons".
- [52] Section 753 of the Criminal Code provides, in part:

Application for finding that an offender is a dangerous offender

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 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 behavioural restraint

- [53] The Crown's submissions focused on Mr. Boutilier's conduct as it relates to s. 753(a)(i). There was no suggestion before me that Mr. Boutilier's past conduct, including his conduct in the commission of the predicate offences, satisfies the requirements of either ss. 753(a)(ii) or (iii).
- [54] The issue before me thus raises two sub-issues. The first pertains to the threshold or burden that the Crown must meet on this application.
- [55] The relevant case law establishes that the threshold for a s. 752.1(1) order is low; *R. v. Ellis*, 2008 BCSC 1890 at para. 2, [2008] B.C.J. No. 2789; *R. v. Hopley*, 2012 BCSC 1329 at para. 113. I need not address those further nuances that emerge from the various authorities which suggest that the threshold is "very low"; *R. v. Wong*, [2002] O.J. No. 3330 at para. 13 (S.C.J.); or those which suggest that the prospect of the offender being found to be a dangerous or a long-term offender must be within "the realm of possibility"; *Fulton*, SKCA at para. 21; *R. v. Pascal*, 2012 SKQB 97 at para. 21, 391 Sask.R. 310. While the applicable threshold is low, I recognize that the court exercises a gatekeeper function in applying s. 752.1 of the Criminal Code; *R. v. P.H.*, [2005] O.T.C. 1137, [2005] O.J. No. 5698 (S.C.J.).
- [56] The second sub-issue pertains to the evidence in the record that is relevant to the requirements of s. 753 and s. 753.1. Is that record consistent with a possible finding that Mr. Boutilier has engaged in a pattern of repetitive behavior which satisfies either the dangerous offender criteria in s. 753 or the long-term offender criteria in s. 753.1? Once again, I have focused, as did the parties before me, on the criteria in s. 753(a)(i) and on the evidence which addresses such criteria.
- [57] In this case, I have evidence that Mr. Boutilier fired his handgun in the direction of the police during the Seattle Incident. He kidnapped and threatened to kill his victim during the Brantford Incident. He also held his gun to the head of one of the shopkeepers who he robbed. Thereafter, this victim exhibited signs of extreme paranoia and had to be hospitalized. He received medication and counseling on an ongoing basis. I note that, prior to the Brantford Incident, this victim suffered from a bi-polar affective disorder. But, for present purposes, I need not address the legal principles relevant to thin skull victims.
- [58] Furthermore, the detailed institutional records and evaluations that I have reviewed, many of which are admittedly dated, consistently speak to Mr. Boutilier's violent and dangerous nature. They conclude that there is little prospect of his rehabilitation and a very high risk of his reoffending. They note that he has repeatedly and consistently been placed in segregation (for close to a year on at least one occasion). Moreover, the records and other evidence before me confirm that Mr. Boutilier has suffered from a long-term and debilitating drug addiction that has fueled many of his illegal activities.

[59] Given the threshold relevant to this application, I am satisfied that there exists the prospect that Mr. Boutilier will be found to be a dangerous offender under s. 753. Specifically, I am satisfied that the evidence might establish a pattern of behavior showing that Mr. Boutilier has been unable to restrain himself and was likely to cause death or injury or inflict severe psychological damage on other persons, and that this behaviour renders Mr. Boutilier a threat to the life, safety or physical or mental well being of others. In arriving at this conclusion, I confirm, of course, that I am not making that determination at this stage. Rather, I am only called upon to consider the possibility of that result.

[60] I am also satisfied that the other preconditions for an assessment order are met.

[61] Accordingly, I make an order under s. 732.1(i) remanding Mr. Boutilier into custody for 60 days for an assessment by experts.

"Voith J."

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