
CANADA / JUDGMENT

R. v. Boutilier

2017 SCC 64

COURT

Supreme Court of Canada

DECIDED

21 December 2017

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R. v. Boutilier

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Report

[2017] 2 SCR 936

Case number

37168

Judges

McLachlin, Beverley; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément; Côté, Suzanne; Brown, Russell; Rowe, Malcolm

On appeal from

British Columbia

Notes

SCC Case Information: 37168

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. Boutilier, 2017 SCC 64, [2017] 2 S.C.R. 936

Appeal Heard: May 23, 2017

Judgment Rendered: December 21, 2017

Docket: 37168

Between:

Donald Joseph Boutilier

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Saskatchewan,
Attorney General of Alberta, Criminal Lawyers' Association of Ontario, Aboriginal Legal Services
Inc. and Yukon Legal Services Society

Interveners

Coram: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and
Rowe JJ.

Reasons for Judgment:

(paras. 1 to 89)

Côté J. (McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Brown and Rowe JJ. concurring)

Reasons Dissenting in Part:

(paras. 90 to 137)

Karakatsanis J.

R. v. Boutilier, 2017 SCC 64, [2017] 2 S.C.R. 936

Donald Joseph Boutilier Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Canada,

Attorney General of Ontario,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Criminal Lawyers' Association of Ontario,
Aboriginal Legal Services Inc. and
Yukon Legal Services Society Interveners
Indexed as: R. v. Boutilier

2017 SCC 64

File No.: 37168.

2017: May 23; 2017: December 21.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Fundamental justice — Overbreadth — Sentencing — Dangerous offender — Designation — Whether sentencing judge precluded from considering future treatment prospects when deciding whether to designate an offender as dangerous — If so, whether s. 753(1) overbroad contrary to s. 7 of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C. 1985, c. C-46, s. 753(1) .

Constitutional law — Charter of Rights — Fundamental justice — Overbreadth — Cruel and unusual punishment — Sentencing — Dangerous offender — Penalty — Indeterminate detention — Principles governing application of s. 753(4.1) of Criminal Code — Whether s. 753(4.1) overbroad by applying to offenders that could be monitored under long-term offender scheme — Whether s. 753(4.1) leads to grossly disproportionate sentence by presumptively imposing indeterminate detention and preventing judge from imposing fit sentence consistent with principles and objectives of sentencing under Criminal Code — Canadian Charter of Rights and Freedoms, ss. 7 , 12 — Criminal Code, R.S.C. 1985, c. C-46, s. 753(4.1) .

Criminal law — Sentencing — Dangerous offender — Indeterminate detention — Accused declared to be dangerous offender — Whether sentencing judge erred in imposing indeterminate sentence — Criminal Code, R.S.C. 1985, c. C-46, s. 753(4) , (4.1) .

B pleaded guilty to six criminal charges arising out of the robbery of a pharmacy with an imitation firearm and an ensuing car chase. The Crown brought an application seeking his designation as a dangerous offender and the imposition of a sentence of indeterminate detention. B challenged the constitutional validity of s. 753(1) and (4.1) of the Criminal Code under ss. 7 and 12 of the Canadian Charter of Rights and Freedoms .

Section 753(1) lists the statutory requirements that must be met before a court can designate an offender as dangerous. Section 753(4.1) relates to the sentencing of a dangerous offender. The dangerous offender scheme is designed as a two-stage process: the designation stage and the penalty stage. At the designation stage, if a sentencing judge is satisfied that the statutory criteria under s. 753(1) have been met, the designation as a dangerous offender must follow. At the penalty stage, under s. 753(4.1), a sentencing judge must impose an indeterminate sentence on a designated individual unless he or she is satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public.

The sentencing judge granted B's application in part, finding only that s. 753(1) is unconstitutionally overbroad. Nevertheless, the sentencing judge held that B was a dangerous offender and sentenced him to an indeterminate detention. The Court of Appeal held that the sentencing judge had erred in finding s. 753(1) to be overbroad but agreed with the sentencing judge that s. 753(4.1) did not violate ss. 7 and 12 of the Charter. The Court of Appeal dismissed B's appeal of his dangerous offender designation and indeterminate sentence.

Held (Karakatsanis J. dissenting in part): The appeal should be dismissed.

Per McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Côté, Brown and Rowe JJ.: Section 753(1) does not preclude a sentencing judge from considering future treatment prospects before designating an offender as dangerous and therefore is not overbroad under s. 7 of the Charter. To obtain a designation of dangerousness resulting from violent behaviour, the Crown must demonstrate beyond a reasonable doubt, *inter alia*, that the offender represents a threat to the life, safety or physical or mental well-being of other persons. Before designating a dangerous offender, a sentencing judge must be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. Intractable conduct means behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness. All of the evidence adduced during a dangerous offender hearing must be considered at both the designation and penalty stages of the sentencing judge's analysis, though for the purpose of making different findings related to different legal criteria. 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. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. A provision imposing an indeterminate detention is therefore not overbroad if it is carefully confined in its application to those habitual criminals who are dangerous to others.

Section 753(4.1) does not lead to a grossly disproportionate sentence, contrary to s. 12 of the Charter, by presumptively imposing indeterminate detention and preventing the sentencing judge from imposing a fit sentence. Properly read and applied, s. 753(4.1) does not impose an onus, a rebuttable presumption, or mandatory sanctioning. It provides guidance on how a sentencing judge can properly exercise his or her discretion in accordance with the applicable objectives and principles of sentencing. Sentencing principles and mandatory guidelines

outlined in ss. 718 to 718.2 of the Criminal Code apply to every sentencing decision, whether made under the regular sentencing regime, the dangerous offender regime or the long-term offender regime. Parliament is entitled to decide that protection of the public is an enhanced sentencing objective for individuals who have been designated as dangerous. This does not mean that this objective operates to the exclusion of all others. Indeterminate detention is only one sentencing option among others available under s. 753(4). In lieu of an indeterminate detention, a judge may impose a sentence that is more proportionate, whether it is imprisonment for a minimum of two years followed by long-term supervision — which amounts to a long-term offender sentence — or a sentence under the regular sentencing regime. The sentencing alternatives listed in s. 753(4) therefore encompass the entire spectrum of sentences contemplated by the Criminal Code. In order to properly exercise his or her discretion under s. 753(4), the sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme. Nothing in the wording of s. 753(4.1) removes the obligation incumbent on a sentencing judge to consider all sentencing principles in order to choose a sentence that is fit for a specific offender. An offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public.

Section 753(4.1) is not overbroad in violation of s. 7 of the Charter. Section 753(1) limits the availability of an indeterminate detention under s. 753(4) and (4.1) to a narrow group of offenders that are dangerous per se. The dangerous offender designation criteria are more onerous than the long-term offender criteria. It therefore cannot be said that both regimes target the same offenders. Furthermore, s. 753(4.1) does not create a presumption that indeterminate detention is the appropriate sentence — the sentencing judge is under the obligation to conduct a thorough inquiry that considers all the evidence presented during the hearing in order to decide the fittest sentence for the offender. Under s. 753(4), a long-term offender sentence remains available for dangerous offenders who can be controlled in the community in a manner that adequately protects the public from murder or a serious personal injury offence.

In this case, although the sentencing judge committed an error of law, since he failed to consider B's treatment prospects before designating him as a dangerous offender, this error has not resulted in a substantial wrong or miscarriage of justice. This error of law does not change the sentencing judge's conclusion regarding B's dangerousness. The judge found B's conduct to be intractable because his prospect of overcoming his addictions, the source of his dangerousness, was nothing more than an expression of hope. The sentencing judge explained that his analysis would remain unchanged even if he considered B's treatment prospects at the designation stage. Absent any material error of law, a dangerous offender designation is a question of fact. The role of an appellate court is therefore to determine if the designation was reasonable. Based on the sentencing judge's findings of fact, the designation of B as a dangerous offender and the imposition of an indeterminate detention cannot be said to be unreasonable.

Per Karakatsanis J. (dissenting in part): There is agreement with the majority that s. 753(1) of the Criminal Code calls for consideration of the offender's future treatment prospects, and thus is not unconstitutionally overbroad on that basis. However, s. 753(4.1) should be declared to be of no force and effect as it violates s. 12 of the Charter and cannot be saved by s. 1 . A new hearing should be ordered to determine the appropriate penalty under s. 753(4) .

By demanding a singular focus on public safety, s. 753(4.1) imposes indeterminate detention in cases where it is grossly disproportionate to the sentence mandated by the sentencing principles in the Criminal Code and the public protection objective of the dangerous offender scheme. The mandatory designation stage, which captures a broad group of offenders, combined with the narrow, structured discretion at the penalty stage has created a legislative context that fails to ensure offenders are only sentenced to indeterminate incarceration if this sentence is appropriate. The dangerous offender scheme removes all judicial discretion at the designation stage. Thus, an offender who meets the legislative criteria for dangerousness must be designated a dangerous offender under s. 753(1) . At the penalty stage, s. 753(4) provides the sentencing judge with broad discretion; however, s. 753(4.1) curtails this discretion significantly — if there is not a reasonable expectation that the public will be adequately protected against the commission of another serious personal injury offence, indeterminate detention must be imposed, even if this sentence is disproportionate to the gravity of the predicate offence and the offender's degree of responsibility. Proportionality is not reflected in the s. 753(4.1) public safety threshold. Section 753(4.1) may also preclude a sentence that respects the principle of restraint as it creates a presumption for an indeterminate sentence that is only rebuttable by evidence adduced during the hearing. If no evidence of community supervision programs is presented, or if it is unknown whether the offender will be amenable to treatment, s. 753(4.1) mandates indeterminate detention. Life experiences and systemic factors that may have contributed to bringing a dangerous offender before the courts cannot be considered in the s. 753(4.1) analysis.

Indeterminate detention is so excessive as to outrage standards of decency in cases where the offender's degree of responsibility and the gravity of the predicate offence are on the low end of the spectrum, especially where alternative measures, including lengthy sentences of incarceration with long-term supervision orders, permit public safety concerns to be addressed. While Parliament is entitled to take steps to protect Canadians against the threat posed by the most dangerous criminals, the current scheme goes too far. Indeterminate detention — the most severe penalty, apart perhaps from life sentences — is grossly disproportionate to the sentence some offenders would otherwise receive under the sentencing principles in the Criminal Code . In applying s. 753(4.1) , a sentencing judge must ask whether the offender, due to the level of the risk and the nature of future harm likely to be caused, falls within the small group of truly dangerous offenders who must be imprisoned indefinitely in order to protect the public.

In this case, the evidence suggests there may be a reasonable possibility that B's risk could be controlled in the community. The record before the sentencing judge suggests that a determinate sentence with a long-term supervision order may well have been appropriate and been adequate for public protection had the sentencing judge not proceeded on the basis that his discretion was curtailed by s. 753(4.1), an unconstitutional provision. A new hearing is therefore required to determine the appropriate sentence.

Cases Cited

By Côté J.

Overruled: *R. v. Szostak*, 2014 ONCA 15, 118 O.R. (3d) 401; applied: *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; referred to: *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39; *R. v. Currie*, [1997] 2 S.C.R. 260; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. Carleton* (1981), 32 A.R. 181, *aff'd* [1983] 2 S.C.R. 58; *R. v. Sullivan* (1987), 20 O.A.C. 323; *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197; *R. v. Oliver* (1997), 114 C.C.C. (3d) 50; *R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Warawa*, 2011 ABCA 294, 278 C.C.C. (3d) 409; *R. v. Osborne*, 2014 MBCA 73, 314 C.C.C. (3d) 57; *R. v. Bragg*, 2015 BCCA 498, 332 C.C.C. (3d) 145; *R. v. Smarch*, 2015 YKCA 13, 374 B.C.A.C. 291; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Crowe*, Ont. Ct. J., No. 10-10013990, March 22, 2017.

By Karakatsanis J. (dissenting in part)

R. v. Lyons, [1987] 2 S.C.R. 309; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138; *R. v. Currie*, [1997] 2 S.C.R. 260; *R. v. Taillefer*, 2015 ONSC 2357; *R. v. S.M.* (2005), 196 O.A.C. 127; *R. v. Langevin* (1984), 45 O.R. (2d) 705; *R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97; *R. v. Szostak*, 2014 ONCA 15, 118 O.R. (3d) 401; *R. v. Shea*, 2017 NSCA 43, 349 C.C.C. (3d) 231; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Walsh*, 2017 BCCA 195, 348 C.C.C. (3d) 1; *R. v. Payne* (2001), 41 C.R. (5th) 156; *R. v. Radcliffe*, 2017 ONCA 176, 347 C.C.C. (3d) 3; *R. v. B. (D.V.)*, 2010 ONCA 291, 100 O.R. (3d) 736, leave to appeal refused, [2011] 3 S.C.R. vii; *Re Moore and the Queen* (1984), 10 C.C.C. (3d) 306; *R. v. R.S.*, 2016 ONSC 7767; *R. v. Smarch*, 2015 YKCA 13, 374 B.C.A.C. 280; *R. v. Goodwin*, 2002 BCCA 513, 168 C.C.C. (3d) 14; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *R. v. Horvath* (1997), 117 C.C.C. (3d) 110.

Statutes and Regulations Cited

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Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 12 .

Constitution Act, 1982, s. 52(1) .

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Criminal Code, R.S.C. 1985, c. C-46, ss. 718 to 718.2 , 718 , 718.1 , 718.2 , 718.3 , 742.1 , Part XXIV, 752 to 761, 752 “serious personal injury offence”, 752.1, 753, 753.01, 753.1, 757(a), 759, 761(1).

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APPEAL from a judgment of the British Columbia Court of Appeal (Smith, Groberman and Goepel JJ.A.), 2016 BCCA 235, 336 C.C.C. (3d) 293, 356 C.R.R. (2d) 275, 29 C.R. (7th) 419, 388 B.C.A.C. 264, 670 W.A.C. 264, [2016] B.C.J. No. 1116 (QL), 2016 CarswellBC 1487 (WL Can.), setting aside in part the decisions of Voith J., 2015 BCSC 901, 325 C.C.C. (3d) 345, [2015] B.C.J. No. 1102 (QL), 2015 CarswellBC 1464 (WL Can.); and 2014 BCSC 2187, 317 C.C.C. (3d) 1, 324 C.R.R. (2d) 221, [2014] B.C.J. No. 2867 (QL), 2014 CarswellBC 3475 (WL Can.). Appeal dismissed, Karakatsanis J. dissenting in part.

Eric Purtzki, Gary N. A. Botting and Michael Sobkin, for the appellant.

Rodney Garson and Michael Brundrett, for the respondent.

Diba B. Majzub, for the intervener the Attorney General of Canada.

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Sarah Clive, for the intervener the Attorney General of Alberta.

Catriona Verner and Corbin Cawkell, for the intervener the Criminal Lawyers' Association of Ontario.

Jonathan Rudin and Caitlyn E. Kasper, for the intervener the Aboriginal Legal Services Inc.

Vincent Larochelle, for the intervener the Yukon Legal Services Society.

The judgment of McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Côté, Brown and Rowe JJ. was delivered by

Côté J. —

I. Overview

- [1] The appellant, Mr. Boutilier, challenges the constitutional validity of s. 753(1) and (4.1) of the Criminal Code, R.S.C. 1985, c. C-46, two provisions at the core of the dangerous offender regime, under ss. 7 and 12 of the Canadian Charter of Rights and Freedoms.
- [2] Mr. Boutilier pleaded guilty to six criminal charges arising out of the robbery of a pharmacy with an imitation firearm and an ensuing car chase. In turn, the Crown brought an application seeking his designation as a dangerous offender and the imposition of a sentence of indeterminate detention. After the close of evidence in the dangerous offender hearing, Mr. Boutilier served a notice of constitutional question challenging the constitutionality of the provisions.
- [3] The impugned Criminal Code provisions, which were most recently amended in 2008 by the Tackling Violent Crime Act, S.C. 2008, c. 6 ("2008 amendments"), authorize the most extreme and clearest form of preventive sentence that can be imposed on an offender, indeterminate detention, in order to protect the public from a small group of persistent criminals with a propensity for committing violent crimes against the person.
- [4] Mr. Boutilier submits that s. 753(1) is overbroad and violates s. 7 on the basis that a sentencing judge is precluded from considering an offender's future treatment prospects in conducting a prospective risk assessment. He further submits that s. 753(4.1) is overbroad and violates s. 7 as it may result in the imposition of an indeterminate sentence on an offender who can be controlled under the long-term supervision provisions of the Criminal Code. He also submits that s. 753(4.1) imposes "grossly disproportionate" punishment

contrary to s. 12 on the basis that it heavily curtails judicial discretion at the sentencing stage in favour of indeterminate detention. Finally, he submits that the sentencing judge erred in imposing an indeterminate sentence.

[5] The sentencing judge granted Mr. Boutilier's application in part, finding only that s. 753(1) is unconstitutionally overbroad. The Court of Appeal held that the sentencing judge had erred in finding s. 753(1) to be overbroad but agreed with the sentencing judge that s. 753(4.1) did not violate ss. 7 and 12 of the Charter . The Court of Appeal dismissed Mr. Boutilier's appeal of his indeterminate sentence.

[6] The appeal to this Court raises four issues, which I resolve as follows:

A. Does s. 753(1) preclude a sentencing judge from considering future treatment prospects before designating an offender as dangerous? If so, is this section overbroad under s. 7 of the Charter ?

In my view, consideration of future treatment prospects has always been part of the prospective assessment of risk required by s. 753(1). There is no overbreadth.

B. Does s. 753(4.1) lead to a grossly disproportionate sentence, contrary to s. 12 of the Charter , by presumptively imposing indeterminate detention and preventing the sentencing judge from imposing a fit sentence consistent with the principles and objectives of sentencing?

In my view, s. 753(4.1) does not impose punishment that is grossly disproportionate. It does not create a presumption in favour of indeterminate detention, and the sentencing judge must apply the principles and objectives of sentencing to impose a fit sentence.

C. Is s. 753(4.1) overbroad in violation of s. 7 of the Charter because it applies to offenders that could have been monitored under the long-term offender scheme?

In my view, it is not.

D. Did the sentencing judge err by sentencing Mr. Boutilier to an indeterminate period of detention?

In my view, he did not.

[7] For these reasons, the appeal should be dismissed.

II. Judgments Below

A. Sentencing Judgment — Supreme Court of British Columbia, 2014 BCSC 2187, 317 C.C.C. (3d) 1, and 2015 BCSC 901, 325 C.C.C. (3d) 345, per Voith J. (November 21, 2014 and May 29, 2015)

[8] The sentencing judge found that s. 753(1) is overbroad and thus violates s. 7 of the Charter . In his view, this subsection does not allow a sentencing judge to consider an offender's future treatment prospects before designating him or her as dangerous. Consequently, an offender who may not necessarily be dangerous in the future could still be designated under the scheme and face the risk of a sentence of indeterminate detention. Additionally, he found that the designation under s. 753(1) is permanent and can have downstream

consequences under s. 753.01 , potentially leading the accused to be sentenced to an indeterminate sentence for a subsequent offence without necessarily being redesignated as dangerous. He held that the s. 7 breach was not justified under s. 1 of the Charter as Parliament could have enacted legislation addressing the legitimate objectives of the scheme while infringing offenders' rights to a lesser extent. He declared s. 753(1) to be invalid but suspended this declaration of invalidity for one year.

- [9] The sentencing judge found that the other impugned subsection, s. 753(4.1), does not violate s. 7 or 12 of the Charter . First, he held that this provision does not impose a persuasive or evidentiary burden on the accused to rebut the presumption of indeterminate detention. Second, he held that a judge's residual discretion under s. 753(4.1) ensures that indeterminate detention will not be imposed where it is unnecessary to protect the public.
- [10] Despite the suspended declaration of invalidity, the sentencing judge found that, in this case, the Crown had established the statutory criteria under s. 753(1) beyond a reasonable doubt. The sentencing judge held that Mr. Boutilier was a dangerous offender and sentenced him to an indeterminate detention, finding that his prospect of successful treatment was nothing more than an "expression of hope" and, therefore, that no lesser sentence would adequately protect the public: s. 753(4.1).

B. Court of Appeal for British Columbia, 2016 BCCA 235, 336 C.C.C. (3d) 293, per Smith J.A. (Groberman and Goepel JJ.A. Concurring) (June 2, 2016)

- [11] The Crown appealed the declaration of constitutional invalidity with respect to s. 753(1). In turn, Mr. Boutilier appealed the sentencing judge's decision on the constitutionality of s. 753(4.1) as well as his dangerous offender designation and his indeterminate sentence. The Crown's appeal was allowed and Mr. Boutilier's appeal was dismissed.
- [12] The Court of Appeal held that the sentencing judge had erred in finding s. 753(1) to be unconstitutionally overbroad. Although it found that treatment prospects have a limited role to play at the designation stage, its ultimate conclusion was that consideration of future treatment prospects at the sentencing stage is sufficient to avoid capturing offenders who may not be dangerous. The Court of Appeal upheld the sentencing judge's decision regarding s. 753(4.1) and Mr. Boutilier's sentence.

III. The Statutory Scheme

- [13] The dangerous offender scheme is designed as a "two stage" process.
- [14] Section 753(1) lists the statutory requirements that must be met before a court can designate an offender as dangerous ("designation stage"):

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; 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.

[15] Subsections (4) and (4.1) of s. 753 relate to the sentencing of a dangerous offender ("penalty stage"):

- (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 a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

- [16] Section 753(1) contemplates two categories of dangerousness: (a) dangerousness resulting from violent behaviour (as in Mr. Boutilier’s case), and (b) dangerousness ensuing from sexual behaviour. Only the former category is at issue in this appeal.
- [17] The Crown must demonstrate two elements to obtain a designation of dangerousness resulting from violent behaviour. First, the offence for which the offender has been convicted must be “a serious personal injury offence”: s. 753(1)(a). This first criterion is objective. There is no room for judicial discretion, since s. 752 defines the list of serious personal injury offences.
- [18] Second, the offender must represent “a threat to the life, safety or physical or mental well-being of other persons”. This second element, the requisite threat level, requires that the judge evaluate the threat posed by the offender on the basis of evidence establishing one of the following three violent patterns of conduct:
- (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;
- These subparagraphs are disjunctive — they provide three standalone grounds for finding that the offender is a “threat” under s. 753(1).
- [19] These grounds have not changed since the enactment of the scheme in 1977. Indeed, a brief overview of the scheme’s legislative history is in order.
- [20] The scheme was first introduced in 1977, subsequently amended in 1997, and amended again in 2008. When the scheme was enacted in 1977, it was referred to as a “two stage” process. At the designation stage, the sentencing judge had to determine if the statutory criteria were satisfied and then had the discretion to designate the individual. At the sentencing stage, the sentencing judge had to exercise his or her discretion again to decide whether to impose an indeterminate sentence. In 1997, the scheme became a “one stage” process. The judge had discretion to designate an offender as dangerous, but there was no discretion at the sentencing stage — an indeterminate sentence flowed as a consequence of the designation. The current version of the scheme reverts to a “two stage” process but removes the discretionary language from the designation stage. If a sentencing judge is satisfied that the statutory criteria have been met, the designation must follow. There is,

however, some discretion remaining at the sentencing stage. Under s. 753(4.1), a sentencing judge must impose an indeterminate sentence on a designated individual unless he or she is satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public.

IV. Analysis

A. Does Section 753(1) Preclude a Sentencing Judge From Considering Future Treatment Prospects Before Designating an Offender as Dangerous? If So, Is This Section Overbroad Under Section 7 of the Charter ?

- [21] Mr. Boutilier's contention is as follows. Under the current "two stage" approach, prospective evidence of future treatment cannot be considered at the designation stage and is relevant only at the penalty stage under s. 753(4.1). As a result, the provision is overbroad since it captures offenders who do not pose a future threat to public safety. Mr. Boutilier concedes that, should the Court find that prospective evidence must be considered at the designation stage, his overbreadth argument must fail.
- [22] The sentencing judge agreed with Mr. Boutilier. He assumed that, with the passing of the 2008 amendments, the designation criteria now only allow for the consideration of retrospective evidence at the designation stage. This led him to find that, absent any consideration of an offender's treatment prospects, the statutory criteria for designation under s. 753(1) are so broad in scope that they capture offenders who do not pose a future risk to public safety. This overbreadth is contrary to the principles of fundamental justice and to s. 7 of the Charter . The Court of Appeal, while of the view that consideration of future treatment prospects at the penalty stage does not result in overbreadth, found that the designation stage has never required consideration of an offender's future treatment prospects.
- [23] In my view, Mr. Boutilier's arguments are unavailing. A prospective assessment of risk has always been part of s. 753(1). The 2008 amendments did not change the requirements for this assessment. In line with the purpose and wording of s. 753(1) as well as the consistent jurisprudence of this Court, an offender cannot be designated as dangerous unless the judge concludes that he or she is a future "threat" after a prospective assessment of risk. Contrary to the divided jurisprudence on this point and the reasons of the Court of Appeal in this matter, this future risk assessment has always required consideration of future treatment prospects. This, in turn, means that the designation provision is not overbroad as it does not capture offenders who, though currently a threat to others, may cease to be in the future, notably after successful treatment.
- (1) The Requirements for Prospective Assessment of Risk Under Section 753(1) Remain Unchanged

- [24] Mr. Boutilier’s submissions and the sentencing judge’s conclusions relating to overbreadth rely on the assumption that the required assessment of prospective risk under s. 753(1) changed with the 2008 amendments, increasing the scope of the provision. This is not the case. The consistent language and the purpose of the provision both lead to the conclusion that the prospective risk assessment remains the same.
- [25] This Court considered the constitutionality of this statutory scheme in the leading case of *R. v. Lyons*, [1987] 2 S.C.R. 309.
- [26] In *Lyons*, Justice La Forest read the objective element of the designation — the requirement that the predicate offence be a “serious personal injury offence” — together with the subjective element — the “threat” assessment — and concluded that four criteria were “explicit” from the language of s. 753(1): (1) the offender has been convicted of, and has to be sentenced for, a “serious personal injury offence”; (2) this predicate offence is part of a broader pattern of violence; (3) there is a high likelihood of harmful recidivism; and (4) the violent conduct is intractable (p. 338). The last three criteria are part of the assessment of the “threat” posed by the offender. The last two of these are future-oriented, and Justice La Forest explained them as follows:

Thirdly, it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subparagraph of s. [688, now 753] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. [Emphasis added; p. 338.]

- [27] The language of s. 753(1), which led Justice La Forest to develop the four criteria outlined above, has never been amended since its enactment in 1977. Before designating a dangerous offender, a sentencing judge must still be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand “intractable” conduct as meaning behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness.
- [28] Justice La Forest concluded what would today be referred to as an overbreadth analysis by finding that the four s. 753(1) criteria define a very small group of offenders for whom the risk of indeterminate preventive detention is constitutional:

Not only has a diligent attempt been made to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration, but it would be difficult to imagine a better tailored set of criteria that could effectively accomplish the purposes sought to be attained. [p. 339]

He held that the designation criteria are sufficiently narrow and precise so as to apply only to offenders that pose a future threat to other persons, such that the risk of indeterminate detention is rationally tied to the public protection purpose of the scheme. Since these criteria have not subsequently been amended, the Court's conclusion that s. 753(1) does not overreach still applies.

- [29] Mr. Boutilier relies on *R. v. Szostak*, 2014 ONCA 15, 118 O.R. (3d) 401, for the proposition that intractability is no longer a requirement under the current dangerous offender regime. In my view, it is Lyons and not Szostak that remains authoritative on this issue.
- [30] The Ontario Court of Appeal in *Szostak*, at paras. 53-55, concluded that intractability is no longer an element of dangerousness because it is incompatible with the exercise of discretion to impose a determinate sentence at the penalty stage. The Court of Appeal considered that an offender whose conduct is intractable should rarely, if ever, be eligible to receive a lesser sentence.
- [31] I respectfully disagree with this conclusion. As I will discuss below, the purposes of prospective evidence at the designation and sentencing stages are different. The designation stage is concerned with assessing the future threat posed by an offender. The penalty stage is concerned with imposing the appropriate sentence to manage the established threat. Though evidence may establish that an offender is unable to surmount his or her violent conduct, the sentencing judge must, at the penalty stage, turn his or her mind to whether the risk arising from the offender's behaviour can be adequately managed outside of an indeterminate sentence.
- [32] The elements of the dangerous offender designation as set out in Lyons are therefore not incompatible with the exercise of discretion at the penalty stage. Indeed, there was also discretion at the penalty stage under the 1977 regime. This did not prevent this Court from concluding that intractability was a requirement in Lyons. More importantly, this Court in Lyons clearly grounded the intractability requirement in the statutory language, which has not changed since 1977. I therefore cannot see how it can be said that intractability has ceased to be a requirement of the designation.
- [33] There are therefore four designation criteria under s. 753(1) — two of which are meant to limit designation to offenders posing a real future threat to other persons. These limits on designation align with the provision's purpose, which has also been consistent over time. This Court has characterized the sentence of indeterminate detention as being a preventive sentence "in its clearest and most extreme form": *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 19. The purpose of this type of sentence has always been "neither punitive nor reformatory but primarily [the offender's] segregation from society": Report of the Royal Commission to Investigate the Penal System of Canada (1938), at p. 223. This preventive sanction can be imposed only upon offenders for whom segregation from society is a rational means to achieve the overriding purpose of public safety.

- [34] A provision imposing an indeterminate detention is therefore not overbroad if it is carefully “confined in its application to those habitual criminals who are dangerous to others”: Lyons, at p. 323. For an offender to be so “dangerous” as to render the “clearest and most extreme form” of preventive sentence a rational means to achieve the purpose of public safety, the offender must pose a future “threat” to public safety. This threat, characterized by the elements set out in Lyons, must consequently elevate the sentencing objective of segregation from society, at least in part, over the other objectives: Lyons, at pp. 328-29.
- [35] Determining whether or not a high risk of recidivism and intractability are present necessarily involves a prospective inquiry into whether an offender will continue to be, in Justice Dickson’s words (as he then was), “a real and present danger to life or limb”: Hatchwell v. The Queen, [1976] 1 S.C.R. 39, at p. 43. For the Court in Lyons, this prospective inquiry was critical to the constitutionality of the scheme. An entirely retrospective assessment could not ensure that indeterminate sentences were rationally connected to the objective of public safety going forward. Nor could it avoid catching offenders who had proved violent in the past but who presented no future threat.
- [36] The jurisprudence of this Court subsequent to Lyons has consistently considered a prospective assessment of risk to be a component of dangerous offender applications. In R. v. Currie, [1997] 2 S.C.R. 260, Lamer C.J. said that a judge has to “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”: para. 25.[1] In Sipos, at para. 20, which concerned s. 753(1)(b), this Court explained that designation requires evidence on both the retrospective and the prospective elements.
- [37] Indeed, three features of the designation scheme demonstrate the importance of prospective evidence to a finding of dangerousness. First, the pattern of violence that is proven through evidence of past conduct is future-oriented — it must show a “likelihood” of harmful recidivism “in the future”: see the language in s. 753(1)(a). As Neuberger put it, “[t]hough a past pattern may be proved by the Crown, if there is no evidence that such a pattern will necessarily lead to a likelihood of re-offence, the dangerous offender application will fail”: J. A. Neuberger, *Assessing Dangerousness: Guide to the Dangerous Offender Application Process* (loose-leaf), at p. 4-27. A past pattern of violence is considered in the global assessment of an offender’s future behaviour, which, in turn, is considered by the court in determining whether the offender constitutes a “threat”.
- [38] Reference to the other category of dangerousness based on sexual conduct, under s. 753(1)(b), reinforces the conclusion that s. 753(1)(a) mandates a prospective assessment. This category requires, in addition to evidence of a pattern of past conduct, an independent assessment of future risk:

The offender must be shown to have failed in the past “to control his or her sexual impulses” and, in the future, that there is “a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses”. [Emphasis added; citation omitted.]

(Sipos, at para. 20)

- [39] Second, the Criminal Code requires that an assessment report be filed before a dangerous offender application can proceed: ss. 752.1 and 753(1) . Usually, the assessment is conducted by a psychiatrist or psychologist: Neuberger, at p. 2-1. This report includes expert evidence on prospective aspects of dangerousness, such as risk factors, probabilities of recidivism, and treatment prospects: *R. v. Jones*, [1994] 2 S.C.R. 229; see also Lyons, at pp. 364-65.
- [40] Third, s. 757(a) provides that “evidence of character and repute may be admitted on the question of whether the offender is or is not a dangerous offender”. Such evidence, while grounded in past conduct, is future-oriented — it speaks to the likelihood of harmful recidivism and the intractability of the violent pattern of conduct. If a dangerousness finding could be made without any prospective assessment of risk, this type of reputational evidence would be irrelevant to the designation, since it tends to show the offender’s propensity for future bad acts. Indeed, it is not highly probative of past conduct, which is better proven by evidence of the prior bad acts themselves. Thus, by making evidence of character and repute relevant to the designation, this provision strongly suggests that a prospective assessment of future risk is part of the inquiry.
- [41] Section 753(1) states that, once the judge is satisfied that the designation criteria are met, the judge “shall” designate the offender as dangerous. Recall that before the 2008 amendments, the legislation provided that, once these criteria were met, the judge “may” make the designation. Some interveners suggested that this amendment requires the judge to declare an offender dangerous as soon as the statutory criteria are met, even if the judge is not satisfied of his or her future dangerousness. This argument is based on the premise that the statutory criteria for designation are overbroad and might apply to non-dangerous offenders. However, as explained above, a prospective assessment of the future risk posed by an offender is embedded within the dangerous offender criteria. Thus, a judge “shall” designate an offender as dangerous only if he or she is satisfied beyond a reasonable doubt that the offender actually constitutes a future threat to safety in light of all the relevant evidence. Once a judge finds an offender to be a “threat” after a prospective assessment of harmful recidivism and intractability, requiring a further exercise of discretion to determine whether the offender poses a future risk would be unnecessary and would contradict the very conclusion the judge has just reached.
- (2) Evidence of Future Treatment Prospects Remains Relevant at Both Stages of the Statutory Scheme

- [42] This brings us to the central issue in the instant case, namely whether a sentencing judge is entitled to consider evidence of future treatment prospects when deciding whether to designate an offender as opposed to when imposing a sentence. Though I recognize that the jurisprudence on this question has been divided, with some courts finding future treatment prospects to be irrelevant at the designation stage (*R. v. Carleton* (1981), 32 A.R. 181 (C.A.), at para. 13, *aff'd* [1983] 2 S.C.R. 58; *R. v. Sullivan* (1987), 20 O.A.C. 323, at para. 23; *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197 (C.A.), at para. 127; *R. v. Oliver* (1997), 114 C.C.C. (3d) 50 (Alta. C.A.), at p. 57), and some finding them to be a relevant consideration (*R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97, at para. 241), I cannot agree with the Court of Appeal that the criteria for designation “have never included the future treatability of the offender”: para. 53. An offender’s future treatment prospects are, and have always been, a relevant consideration at the designation stage.
- [43] As the assessment of prospective risk described above is concerned with whether an offender will continue to be “a real and present danger”, being unable to surmount his or her violent conduct, the sentencing judge must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects. Furthermore, I am of the view that confining the consideration of treatability to the choice of penalty under s. 753(4.1) rests on a theoretical distinction between the designation stage and the penalty stage that is neither practical nor useful.
- [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.

(3) Conclusion

[46] In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects. Had the prospective aspects of the dangerousness criteria been removed by the 2008 amendments, the constitutionality of the provision might have required a deeper analysis. But that is not the case. The sentencing judge erred in concluding otherwise. Accordingly, this Court need not revisit its decision in *Lyons* as to the constitutionality of s. 753(1).

[47] A final point must be addressed. The 2008 amendments also introduced s. 753.01. The sentencing judge found that this provision made the s. 753(1) designation permanent and imposed new consequences on the offender. The dangerous offender regime, however, has had permanent effect since *Lyons*: p. 342. The change has to do with the potential consequences of that designation as a result of s. 753.01. That being said, the constitutionality of those consequences is not at stake in this case. Mr. Boutilier was not sentenced to an indeterminate detention on the basis of s. 753.01, but rather after a regular application for a dangerous offender designation pursuant to s. 753. It would be imprudent for this Court to rule on the constitutionality of s. 753.01 without a concrete example of its real effects. It is therefore unnecessary to consider the constitutional validity of the interaction between s. 753(1) and s. 753.01, a provision applying to later convictions of dangerous offenders.

B. Does Section 753(4.1) Lead to a Grossly Disproportionate Sentence, Contrary to Section 12 of the Charter , by Presumptively Imposing Indeterminate Detention and Preventing the Sentencing Judge From Imposing a Fit Sentence Consistent With the Principles and Objectives of Sentencing?

[48] The current s. 753(4.1) was introduced in 2008. This Court has not yet considered its constitutionality. It reads as follows:

(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 a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[49] Mr. Boutilier contends that s. 753(4.1) infringes s. 12 of the Charter .

[50] McLachlin C.J. recently summarized the framework applicable to a claim of cruel and unusual punishment under s. 12 of the Charter :

A sentence will infringe s. 12 if it is “grossly disproportionate” to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: [R. v.] Nur [2015 SCC 15, [2015] 1 S.C.R. 773], at para. 39; R. v. Smith, [1987] 1 S.C.R. 1045, at p. 1073. A law will violate s. 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law’s reasonably foreseeable applications will impose grossly disproportionate sentences on others: Nur, at para. 77.

(R. v. Lloyd, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 22)

[51] Mr. Boutilier argues that the reasonably foreseeable applications of s. 753(4.1) lead to grossly disproportionate sentences because the provision presumptively imposes indeterminate detention on designated offenders each time there are public safety concerns, even when such a sentence would be unfit in a specific case. This argument rests on two premises. First, Mr. Boutilier argues that s. 753(4.1) is properly read as impeding the discretion of a sentencing judge to impose a fit sentence in light of all relevant factors and circumstances and the principles and objectives of sentencing. Second, he says that s. 753(4.1) imposes a presumption of indeterminate detention for designated offenders.

[52] Having carefully read my colleague’s reasons, I cannot, for the reasons outlined below, agree that s. 753(4.1) imposes indeterminate detention in cases where it is grossly disproportionate to the sentence mandated by sentencing principles. The sentencing principles and objectives set out in the Criminal Code , including the fundamental principle of proportionality in s. 718.1 , do not have constitutional status and may be limited by Parliament where necessary to achieve a valid penal purpose, so long as a sentencing judge is not required to impose a sentence that is “grossly disproportionate” to the sentence normally mandated by ss. 718 to 718.2 of the Criminal Code : R. v. Safarzadeh-Markhali, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 71; R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 40-42. In R. v. Smith, [1987] 1 S.C.R. 1045, this Court referred to three factors that are useful in determining whether punishment is “grossly disproportionate” to what would have been appropriate: “. . . whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed . . .” (p. 1074). Considering the provision’s heightened preventive purpose, recognized by s. 718 (c), as well as the sentencing judge’s duty to carefully inquire into the appropriateness of alternatives to indeterminate detention

in light of the full range of sentencing principles, I cannot conclude that s. 753(4.1) imposes punishment that is “grossly disproportionate” to the extent that Canadians would find it abhorrent or intolerable.

(1) The Sentencing Judge’s Discretion to Impose a Fit Sentence Under Section 753(4.1)

- [53] This Court has consistently affirmed that dangerous offender proceedings are sentencing proceedings: *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138, at para. 40; *Jones*, at pp. 279-80 and 294-95; *Lyons*, at p. 350. Accordingly, a sentencing judge in a dangerous offender proceeding must apply the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2 : *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 23; *Neuberger*, at p. 3-4. These sections of the Criminal Code set out the purpose and objectives of sentencing (s. 718), the fundamental principle of proportionality (s. 718.1) — “the sine qua non of a just sanction” (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37) — and the other sentencing principles that a court “shall” consider before imposing any sentence on an offender (s. 718.2). An error in the application of these principles is reviewable by an appellate court: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.
- [54] Mr. Boutilier’s position that, under the dangerous offender scheme, a sentencing judge lacks discretion to impose an appropriate sentence in light of the principles and objectives of sentencing has no support in the jurisprudence. Appellate courts have continued to apply these principles under s. 753 since the 2008 amendments: *R. v. Warawa*, 2011 ABCA 294, 278 C.C.C. (3d) 409, at para. 40; *R. v. Osborne*, 2014 MBCA 73, 314 C.C.C. (3d) 57, at paras. 90-91; *R. v. Bragg*, 2015 BCCA 498, 332 C.C.C. (3d) 145, at para. 26; *R. v. Smarch*, 2015 YKCA 13, 374 B.C.A.C. 291, at paras. 46-47. These sentencing principles apply to every sentencing decision, whether made under the regular sentencing regime, the dangerous offender regime or the long-term offender regime. One example is provided by *Ipeelee*, in which Manasie Ipeelee and Frank Ralph Ladue were sentenced under the long-term offender regime. Nevertheless, this Court reviewed the fitness of their sentence according to sentencing principles, and more specifically the principle in s. 718.2 (e) requiring judges to pay attention to the circumstances of Aboriginal offenders in sentencing proceedings: see *R. v. Gladue*, [1999] 1 S.C.R. 688.
- [55] Mr. Boutilier’s contention is also not supported by the principles underlying indeterminate detention. This exceptional sentence is not an exception to the principles of sentencing, but rather a sentence mandated by their proper application. As La Forest J. explained in *Lyons*, preventive detention “represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased”: p. 329. To conclude that the objectives of rehabilitation and retribution are trumped by that of prevention in a given case, the sentencing judge must assess the relative importance of the sentencing objectives in that particular case.

- [56] Mr. Boutilier contends that, by referring solely to the objective of public protection, the wording of s. 753(4.1) excludes other sentencing objectives and principles from the sentencing judge's discretion. In my view, a fair reading of s. 753(4.1) does not result in the exclusion of these principles. Parliament is entitled to decide that protection of the public is an enhanced sentencing objective for individuals who have been designated as dangerous. This does not mean that this objective operates to the exclusion of all others. It is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances 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: Steele, at para. 27. Further, because the enhanced objective of public safety parallels the justification for imposing an indeterminate detention, such emphasis is also consistent with the principles of sentencing generally.
- [57] It follows that, if the goal of public protection could be achieved in a given case without imposing indeterminate detention, a dangerous offender provision requiring a sentencing judge to declare an offender dangerous and then sentence him or her to an indeterminate period of detention would “overshoot the public protection purpose of the dangerous offender regime”: Johnson, at para. 20. This accords with the principle in s. 718.2 (d) that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”. Even though the current sentencing mechanism for dangerous offenders differs from the one in place when Johnson was decided, the Court's reasoning in Johnson is still applicable. Let me explain.
- [58] Since the 2008 amendments, indeterminate detention is no longer automatic for a dangerous offender. Rather, this sentence is only one option among others available under s. 753(4). In lieu of an indeterminate detention, a judge may impose a sentence that is more proportionate to the predicate offence for which the offender is being sentenced, whether it is imprisonment for a minimum of two years followed by long-term supervision — which amounts to a long-term offender sentence — or a sentence under the regular sentencing regime. The sentencing alternatives listed in s. 753(4) therefore encompass the entire spectrum of sentences contemplated by the Criminal Code .
- [59] When Johnson was decided, indeterminate detention was the only sentence available for dangerous offenders under s. 753. Nonetheless, this Court did not interpret this provision as requiring indeterminate detention for every designated offender. It refused to do so because this would have been “in direct conflict with the underlying principle that the sentence must be appropriate in the circumstances of the individual case”: Johnson, at para. 24.
- [60] Section 753(4) and (4.1) should therefore be read as a codification of Johnson: the first subsection lists the alternatives available to a sentencing judge, while the second codifies the exercise of the sentencing judge's discretion required by Johnson. In order to properly exercise his or her discretion under s. 753(4), the sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme.

- [61] Against this backdrop, it would strain credulity to suggest that the principles enumerated in ss. 718 to 718.2 are irrelevant to the exercise of the sentencing judge's newly codified discretion in s. 753(4) and (4.1) when they were relevant even under the former scheme, which imposed automatic indeterminate detention for every dangerous offender. The 2008 amendments replaced mandatory indeterminate detention with a codification of the principle that a sentencing judge must impose a sentence that is tailored to the specific offender and consistent with the principles of sentencing. When considered in its historical context, the current s. 753(4.1) confers a discretion to apply general sentencing principles more explicitly than the former scheme did. It does so for the benefit of the offender, who cannot complain of a discretion that can only operate to his or her benefit: see Lyons, at pp. 348-49.
- [62] Further, nothing in the wording of s. 753(4.1) removes the obligation incumbent on a sentencing judge to consider all sentencing principles in order to choose a sentence that is fit for a specific offender.
- [63] For all these reasons, an offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public. Mr. Boutilier's suggestion to the contrary has been repeatedly rejected by this Court in relation to any of the Criminal Code's sentencing regimes and, in effect, seeks to read a prohibition into s. 753(4.1) where none exists.
- (2) The Question of the Presumption of an Indeterminate Period of Detention Under Section 753(4.1)
- [64] Section 753(4.1) states that a judge "shall" impose an indeterminate sentence unless he or she is satisfied on the evidence "that there is a reasonable expectation that a lesser measure . . . will adequately protect the public against the commission by the offender of murder or a serious personal injury offence". Mr. Boutilier contends that this provision enacts a presumption that an indeterminate sentence is a fit sentence for a dangerous offender and imposes a burden on the offender to adduce evidence to demonstrate "a reasonable expectation" that a lesser measure will adequately protect the public. He also argues that this burden extends beyond the one envisioned by this Court in Johnson. Again, I disagree.
- [65] Section 753(4.1) guides the discretion of the judge, who ultimately must determine the fittest sentence in a given case based on the evidence adduced during the sentencing hearing. This Court in Johnson stated that the "sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level": para. 44. Again, s. 753(4.1) is simply a codification of the exercise of discretion required by Johnson in light of the regime's general purpose of public protection

in dealing with offenders presenting a very high likelihood of harmful recidivism.

[66] This interpretation of s. 753(4.1) is consistent with s. 718.3 :

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

[67] It is also consistent with this Court's interpretation of s. 742.1 — a provision requiring judges to be "satisfied that the service of the sentence in the community would not endanger the safety of the community" before imposing a conditional sentence. As Lamer C.J. explained:

The wording used in s. 742.1 does not attribute to either party the onus of establishing that the offender should or should not receive a conditional sentence. To inform his or her decision about the appropriate sentence, the judge can take into consideration all the evidence, no matter who adduces it ([R. v.] Ursel [(1997), 96 B.C.A.C. 241], at pp. 264-65 and 287).

In matters of sentencing, while each party is expected to establish elements in support of its position as to the appropriate sentence that should be imposed, the ultimate decision as to what constitutes the best disposition is left to the discretion of the sentencing judge. [Emphasis added.]

(R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 120-21)

[68] Under s. 753(4.1), the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community: Johnson, at para. 50. The judge considers all the evidence presented during the hearing in order to determine the fittest sentence for the offender:

The judge should . . . take into account all the evidence available before making a determination, which will inevitably require a thorough investigation. Once such an investigation has been conducted, it will be up to the judge to determine the sentence; there is no obligation on any of the parties to prove on any standard the adequate sentence one way or another.

(Neuberger, at p. 4-4.1; see also p. 10-10.)

[69] In other words, s. 753(4.1) provides guidance on how a sentencing judge can properly exercise his or her discretion in accordance with the applicable objectives and principles of sentencing. As explained above, it is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their discretion. Once the sentencing judge has exhausted the least coercive sentencing options to address the question of risk based on the evidence, indeterminate detention in a penitentiary is the last option.

[70] The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained by Justice Tuck-Jackson of the Ontario Court of Justice: *R. v. Crowe*, No. 10-10013990, March 22, 2017. First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is “yes”, then that sentence must be imposed. If the answer is “no”, then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

[71] In sum, Mr. Boutilier’s s. 12 argument is grounded in an erroneous reading of the impugned provision. Properly read and applied, s. 753(4.1) does not impose an onus, a rebuttable presumption, or mandatory sanctioning. Nor does it prevent a sentencing judge from considering sentencing objectives and principles. Every sentence must be imposed after an individualized assessment of all of the relevant factors and circumstances. Seen in this way, s. 753(4.1) will not result in grossly disproportionate sentences or in the imposition of a detention of indeterminate duration in cases where such a sentence is unfit. The sentencing judge and the British Columbia Court of Appeal therefore rightly rejected Mr. Boutilier’s position on this point.

C. Is Section 753(4.1) Overbroad in Violation of Section 7 of the Charter Because It Applies to Offenders That Could Have Been Monitored Under the Long-Term Offender Scheme?

[72] Mr. Boutilier also argues that s. 753(4.1) is overbroad in a manner contrary to s. 7 on the basis that some offenders who are designated as dangerous meet the statutory criteria for a long-term offender designation under s. 753.1. He argues that the provision is overbroad because these offenders, who could have been properly monitored under the long-term offender regime, face the risk of an indeterminate detention under s. 753(4.1). He argues that an anomaly flows from the fact that, under the dangerous offender regime, offenders must satisfy the higher standard of a “reasonable expectation” of control to obtain a lower sentence, whereas under the long-term offender regime, they would need to meet the lower standard of a “reasonable possibility” of control. As such, Mr. Boutilier contends that the risk of indeterminate detention under s. 753(4) and (4.1) depends only on whether the Crown uses its discretion to place the offender within the dangerous offender scheme or the long-term offender stream.

[73] The criteria to be designated as a long-term offender are in s. 753.1(1):

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

[74] While it is true that this Court in *Johnson* found that “[a]lmost every offender who satisfies the dangerous offender criteria will satisfy the first two criteria in the long-term offender provisions” (para. 31) and that, in some cases, an offender designated as dangerous may establish “a reasonable possibility of eventual control” so as to fall within the long-term offender regime, this is of no relevance to the constitutionality of s. 753(4.1).

[75] Undoubtedly, the dangerous offender designation criteria are more onerous than the long-term offender criteria. In particular, under s. 753(1), the sentencing judge must be satisfied that “the offender constitutes a threat to the life, safety or physical or mental well-being of other persons”, whereas under s. 753.1, the sentencing judge must merely be satisfied that “there is a substantial risk that the offender will reoffend”. As explained above, when read properly, s. 753(1) limits the availability of an indeterminate detention under s. 753(4) and (4.1) to a narrow group of offenders that are dangerous per se. It therefore cannot be said that both regimes target the same offenders.

[76] Furthermore, as I have already concluded, s. 753(4.1) does not create a presumption that indeterminate detention is the appropriate sentence — the sentencing judge is under the obligation to conduct a thorough inquiry that considers all the evidence presented during the hearing in order to decide the fittest sentence for the offender. Indeed, under s. 753(4), a long-term offender sentence remains available for dangerous offenders who can be controlled in the community in a manner that adequately protects the public from murder or a serious personal injury offence.

[77] Imposing indeterminate detention where the sentencing judge is not satisfied that there is a “reasonable expectation” that a lesser sentence “will adequately protect the public against the commission by the offender of murder or a serious personal injury offence” is a rational means to achieve the public protection objective of Part XXIV of the Criminal Code insofar as such detention is limited to habitual criminals who pose a tremendous risk to public safety. A rigorous application of the designation criteria under s. 753(1) ensures that the provision does not overreach by capturing offenders that should not face the risk of a sentence of indeterminate detention.

D. Did the Sentencing Judge Err by Sentencing Mr. Boutilier to an Indeterminate Period of Detention?

- [78] Mr. Boutilier pleaded guilty to six criminal charges arising out of the robbery of a pharmacy with an imitation firearm and an ensuing car chase. He was 41 years old at the time of the predicate offences and 46 at the time of sentencing.
- [79] His criminal record is lengthy, and he has spent the majority of his life incarcerated for similar robbery-related offences committed in Seattle in 1988 and in Brantford in 2000-2001. His adult record, excluding the offences for which the sentencing judge sentenced him, includes 24 convictions for several instances of breaking and entering and other property-related offences, robberies, conspiracy to commit robbery, escape from lawful custody, assault, assault with a weapon, and kidnapping.
- [80] Mr. Boutilier was assessed by Dr. Schweighofer, a forensic psychologist who found that his tendency to commit dangerous criminal offences flowed from his drug addictions. On this basis, Dr. Schweighofer found that he was very likely to continue committing criminal offences to fund his drug use in the future. He explained that Mr. Boutilier had had little success with the wide variety of drug treatment programs he had been through in his life, with the exception of a program at a halfway house in Vancouver (Belkin House) where he had stayed for several months in 2007-2008, to which he had responded well.
- [81] While Mr. Boutilier's appeal is limited to the imposition of an indeterminate sentence, I must first consider his designation as a dangerous offender. Section 759 of the Criminal Code regulates the right to appeal in such cases. On the basis of the broad language of this section, this Court has stated that "appellate review of a dangerous offender designation is somewhat more robust" than regular appellate review of a sentence: Sipos, at para. 26. Nonetheless, the appellate court must give some deference to the findings of the sentencing judge. In sum, errors of law will be reviewed on a correctness standard, while errors of fact will be reviewed on a reasonableness standard: Neuberger, at p. 9-2.
- [82] The sentencing judge committed an error of law, since he failed to consider Mr. Boutilier's treatment prospects before designating him as a dangerous offender. However, not every error of law requires that a new hearing be ordered. In rare circumstances, where the error of law has not resulted in a substantial wrong or miscarriage of justice, a court of appeal may dismiss an appeal against a declaration that an offender is dangerous under s. 759(3)(b):

But if a court of appeal has the power to dismiss an appeal against a declaration that an offender is dangerous on the basis that the error of law has resulted in no substantial wrong or miscarriage of justice, that power may be exercised in only the rarest of circumstances. In *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, the Court concluded that the curative proviso contained in s. 686(1)(b)(iii) is to be applied in only those circumstances in which there is no reasonable possibility that the verdict would have been any different had the error of law not been made. The same high standard applies in the context of s. 759(3)(b).

(Johnson, at para. 49; see also Sipos, at para. 35.)

[83] The instant case involves such a rare circumstance. Here, the error of law does not change the sentencing judge's conclusion regarding Mr. Boutilier's dangerousness. The judge found Mr. Boutilier's conduct to be intractable because his prospect of overcoming his addictions, the source of his dangerousness, was nothing more than an "expression of hope".

[84] The sentencing judge anticipated a potential disagreement on appeal as to whether s. 753(1) still includes "intractability". Accordingly, he explained that his analysis would remain unchanged even if he considered Mr. Boutilier's treatment prospects at the designation stage:

I note for completeness, that even were it possible to consider future treatment prospects as part of the designation stage under s. 753(1), an expression of hope would not alter my conclusion of a "likelihood" of future harm, as described earlier. [2015 BCSC 901, at para. 210]

[85] Absent any material error of law, a dangerous offender designation is a question of fact. The role of an appellate court is therefore to determine if the designation was reasonable: Currie, at para. 33. Mr. Boutilier did not direct the attention of this Court to any aspect of the sentencing judge's decision that would render it unreasonable. The most favourable evidence presented to the sentencing judge concerned Mr. Boutilier's conduct during the period from November 2007 to August 2008, when he resided at Belkin House in Vancouver. Mr. Boutilier relies heavily on this period in his submissions. However, as the Crown rightly noted during the hearing, the Belkin House period is just one aspect of an overall bleak picture.

[86] The judge concluded that Mr. Boutilier is not a psychopath or a sexual offender, but rather a drug addict that becomes impulsive and dangerous when using drugs — one who is at a high risk of committing offences when he is in a state of relapse, since he will do whatever is needed to obtain drugs. The judge concluded that, when he commits offences, he puts other people's physical safety and lives at risk. The judge inferred the depth and intractability of his addiction in part from the fact that he continued to use drugs while in custody despite having overdosed numerous times in his life. The judge concluded that the prospect of successful treatment of Mr. Boutilier's addiction did not rise above an expression of hope, as his positive experience at Belkin House was a brief positive interlude in a 35-year history: 2015 BCSC 901, at paras. 203-10. Mr. Boutilier does not argue that these findings of fact are unsupported by the evidence.

[87] Since Mr. Boutilier had consistently failed to adhere to the conditions of his release, the sentencing judge found it impossible to conclude that a determinate sentence and a period of supervision would adequately protect the public from the commission of a serious personal injury offence.

[88] Based on these findings of fact, the designation of Mr. Boutilier as a dangerous offender and the imposition of an indeterminate detention cannot be said to be unreasonable.

[89] For these reasons, the appeal is dismissed. Sections 753(1) and 753(4.1) of the Criminal Code are constitutional. The sentencing judge did not err by sentencing Mr. Boutilier to an indeterminate period of detention.

The following are the reasons delivered by

Karakatsanis J. (dissenting in part) —

I. Overview

[90] Thirty years ago, this Court held that a narrowly tailored scheme for the indefinite imprisonment of a very small group of highly dangerous offenders was constitutionally permissible (*R. v. Lyons*, [1987] 2 S.C.R. 309). Broad judicial discretion was a key safeguard. But legislative changes have since removed much of the judicial discretion on which Lyons was premised. The dangerous offender scheme now mandates indeterminate detention — one of the most extreme sanctions in the Criminal Code, R.S.C. 1985, c. C-46 — even when it is grossly disproportionate to the offender’s moral blameworthiness.

[91] I agree with my colleague that s. 753(1) of the Criminal Code calls for consideration of the offender’s future treatment prospects, and thus is not unconstitutionally overbroad on that basis. But given that s. 753(1) provides no judicial discretion, and that Mr. Boutilier has not successfully challenged its constitutionality, I cannot agree that s. 753(4.1) passes constitutional muster. By demanding a singular focus on public safety, this provision imposes indeterminate detention in cases where it is grossly disproportionate to the sentence mandated by the sentencing principles in the Criminal Code . Section 753(4.1) violates s. 12 of the Canadian Charter of Rights and Freedoms and cannot be saved by s. 1 . I would therefore declare it of no force or effect.

[92] Mr. Boutilier was sentenced to indeterminate detention on the basis of an unconstitutional provision. There is a reasonable possibility that a determinate sentence with a long-term supervision order would have been imposed had the sentencing judge not proceeded on the basis that his discretion was curtailed by s. 753(4.1) . A new hearing is therefore required to determine the appropriate sentence.

II. Legislative Evolution

[93] The dangerous offender provisions are found in ss. 752 to 761 of the Criminal Code . On the application of a prosecutor, after an expert psychological assessment, a hearing is held to determine whether the offender should be designated as dangerous and, if so, whether he or she should be sentenced to indeterminate detention (s. 753).

[94] When this Court first assessed the constitutionality of the dangerous offender scheme in *Lyons*, the legislation provided the sentencing judge with discretion at both the designation and the penalty stages. The legislation stated that a sentencing judge “may” designate an offender as dangerous if the legislative criteria for dangerousness were met. In addition, the

sentencing judge had discretion as to whether to impose indeterminate detention on a designated dangerous offender (Criminal Code, R.S.C. 1970, c. C-34, s. 688 [rep. & sub. 1976-77, c. 53, s. 14]).

- [95] Changes were made to the dangerous offender scheme in 1997 by the Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act, S.C. 1997, c. 17. The legislative amendments removed the discretion at the penalty stage. While sentencing judges retained discretion on whether to designate an offender as dangerous when the statutory criteria for dangerousness were met (s. 753(1)), the legislation stated that a judge “shall” sentence designated dangerous offenders to indeterminate detention (s. 753(4)). In *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, this Court confirmed that, under this legislative scheme, judges could not impose an indeterminate sentence if they were “satisfied that the sentencing options available under the long-term offender provisions [were] sufficient to reduce the threat to the life, safety or physical or mental well-being of other persons to an acceptable level” (para. 40). This ensured that offenders who met the statutory criteria were only designated as dangerous and sentenced to indeterminate detention if their risk could not be adequately managed through the long-term offender scheme. Although there was no discretion at the penalty stage, discretion at the designation stage ensured that the sentencing principles in ss. 718 to 718.2 of the Criminal Code continued to guide decisions under the dangerous offender scheme (*Johnson*, at para. 28). Once again, judicial discretion helped guarantee that only “a small group of highly dangerous criminals posing threats to the physical or mental well-being of their victims” would be sentenced to indefinite imprisonment (*Lyons*, at p. 347; *Johnson*, at para. 19).
- [96] The dangerous offender scheme was amended again in 2008 when the Tackling Violent Crime Act, S.C. 2008, c. 6, came into force. It removed all judicial discretion at the designation stage. Thus, an offender who meets the legislative criteria for dangerousness must be designated a dangerous offender (s. 753(1)). At the penalty stage, s. 753(4) provides the sentencing judge with broad discretion to impose either an indeterminate sentence, a determinate sentence with a long-term supervision order of a maximum of 10 years, or a determinate sentence alone. However, s. 753(4.1) curtails this discretion significantly. It mandates an indeterminate sentence unless the sentencing judge is satisfied by the evidence presented at the hearing “that there is a reasonable expectation that [either a determinate sentence followed by a long-term supervision order or a determinate sentence alone] will adequately protect the public against the commission by the offender of murder or a serious personal injury offence”. If the evidence on the application does not satisfy this threshold, a judge must impose indeterminate detention. These changes have dramatically altered the legislative scheme this Court deemed constitutional in *Lyons*.

III. Analysis

[97] Mr. Boutilier argues that s. 753(4.1) is overbroad and mandates grossly disproportionate sentences in reasonably foreseeable circumstances, in violation of ss. 7 and 12 of the Charter . I agree that s. 753(4.1) violates s. 12 , and that this violation cannot be justified under s. 1 of the Charter . Given these conclusions, it is unnecessary to consider whether the provision also violates s. 7 .

A. Section 753(4.1) Violates Section 12 of the Charter

[98] Section 12 of the Charter states: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” A law violates s. 12 if it mandates a sentence that is “grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code ” (R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 82). The appropriate sentence, for comparative purposes, is determined in light of the relevant sentencing principles and objectives set out in ss. 718 to 718.2 of the Criminal Code (Nur, at paras. 40-42). A mere distinction between the sentence imposed by the challenged provision and the appropriate sentence does not suffice to render the provision unconstitutional. The sentence imposed must be “disproportionate to the extent that Canadians ‘would find the punishment abhorrent or intolerable’” in order to constitute cruel and unusual punishment (R. v. Ferguson, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14, quoting R. v. Wiles, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 4). The law violates s. 12 if it imposes a grossly disproportionate sentence on the individual before the court or in reasonably foreseeable cases (R. v. Lloyd, 2016 SCC 13, [2016] 1 S.C.R. 130, at paras. 22-23).

[99] I agree with Mr. Boutilier that s. 753(4.1) violates the Charter protection against cruel and unusual punishment. To explain why, this challenged provision must be interpreted and considered in the context of the dangerous offender scheme.

(1) Section 753(1)

[100] Section 753(1) , the dangerous offender designation provision, is the gateway to indeterminate detention. As decisions of this Court since Lyons make clear, the degree of responsibility of the offenders caught by s. 753(1) and the gravity of their offences vary greatly.

[101] For an offender to be designated as dangerous, he or she must have been convicted of a “serious personal injury offence” as defined in s. 752 of the Criminal Code . Serious personal injury offences include offences involving violence or attempted violence against another person (s. 752 (a)(i)) and offences likely to endanger life or safety or cause severe psychological damage (s. 752 (a)(ii)) for which the maximum penalty is at least 10 years in prison. As this Court acknowledged in R. v. Steele, 2014 SCC 61, [2014] 3 S.C.R. 138, the predicate offence must be violent to qualify under s. 752 (a)(i), but the violence need not be serious (paras. 38-39; see also R. v. Currie, [1997] 2 S.C.R. 260, at para. 28). Serious personal injury offences include criminal harassment, obstruction of justice, offences involving

threats of violence (but no physical harm), and some negligence-based offences, such as dangerous operation of a motor vehicle causing bodily harm (see, e.g., *R. v. Taillefer*, 2015 ONSC 2357; *R. v. S.M.* (2005), 196 O.A.C. 127, at para. 11; Steele, at paras. 3-4 and 58; s. 752 (a) (i) and (ii)). As well, all sexual assault offences — regardless of the degree of harm they cause — are serious personal injury offences (s. 752 (b)). Thus, in some cases, the dangerous offender regime allows for the imposition of what can effectively be life sentence even when this far exceeds the maximum sentence normally available for the predicate offence under the Criminal Code .

- [102] The other dangerous offender designation criteria in s. 753(1) are also fairly broad. A conviction for a serious personal injury offence will lead to a dangerous offender designation if the offender is a threat to the “physical or mental well-being of other persons” and the offence is part of a pattern of repetitive behaviour showing a likelihood of causing future injury to others through the offender’s failure to restrain his or her behaviour (s. 753(1) (a)(i)). The future injury does not need to be serious injury. Two similar incidents may suffice to constitute a pattern (*R. v. Langevin* (1984), 45 O.R. (2d) 705 (C.A.), at p. 717). For sexual offences, a single conviction can give rise to a dangerous offender designation (s. 753(1) (b)). In short, s. 753(1) does not exclusively catch highly dangerous and morally blameworthy offenders.
- [103] Furthermore, s. 753(1) is mandatory — the sentencing judge must designate the offender as dangerous if the legislative criteria are met. In contrast, the 1977 and 1997 versions of the legislation provided judicial discretion at the designation stage. This ensured that sentencing principles in the Criminal Code guided designation decisions (*Johnson*, at paras. 28-34). Judicial discretion required sentencing judges to “step back and reassess” whether a dangerous offender designation was truly warranted when the designation criteria were met (*R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97, at para. 229). In *Lyons*, this Court cited this discretion as a key reason that the legislation did not lead to cruel and unusual punishment (pp. 337-38). As this Court later recognized in *Johnson*, “the discretion helped ensure the dangerous offender provisions’ constitutionality” (para. 36). It helped guarantee that designations were made based on “accepted standards of rationality and proportionality” rather than “on the basis of rigid classifications” (*Neve*, at para. 228).
- [104] Since the legislative change from “may” to “shall” in s. 753(1) of the Criminal Code was implemented, the number of designated dangerous offenders has risen.[2] Indeed, with the 2008 changes, Parliament intended to capture a broader group of offenders (*R. v. Szostak*, 2014 ONCA 15, 118 O.R. (3d) 401, at para. 54; *R. v. Shea*, 2017 NSCA 43, 349 C.C.C. (3d) 231, at para. 16). Of course, not all designated dangerous offenders will be sentenced to indeterminate detention. But s. 753(1) creates a broad pool of offenders who may be subjected to this extreme sanction. Furthermore, the vast majority of dangerous offenders are currently serving indeterminate sentences.[3]

(2) Section 753(4)

- [105] Once an offender has been designated as dangerous, the sentencing judge has discretion to determine the appropriate sentence under s. 753(4):
- (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.
- [106] The sentencing judge’s discretion under s. 753(4) must be guided by the relevant sentencing principles and purposes in the Criminal Code (see Johnson, at para. 23). The predominant purpose of the dangerous offender scheme is public protection, and this must be respected in the sentencing judge’s choice under s. 753(4) (Johnson, at para. 29; Lyons, at p. 329; Steele, at para. 29; Criminal Code, s. 718 (c)).
- [107] While public safety is the predominant objective of the dangerous offender scheme, the fundamental principle of sentencing — proportionality — must guide the sentencing judge’s discretion in selecting the appropriate penalty for a dangerous offender. This principle is set out in s. 718.1 of the Criminal Code : “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Proportionality is “the sine qua non of a just sanction” (R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 36-37). “It is grounded in elemental notions of justice and fairness, and is indispensable to the public’s confidence in the justice system” (R. v. Safarzadeh-Markhali, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 70). Proportionality reconciles the disparate sentencing goals of the Criminal Code : “Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality” (Ipeelee, at para. 37; R. v. Nasogaluak, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 40; see also Nur, at para. 42).
- [108] If the offender is an Indigenous person, Gladue principles are important in crafting a proportionate sentence. Indigenous persons are greatly overrepresented in prisons and especially in the dangerous offender population (Canada, Public Safety Canada Portfolio Corrections Statistics Committee, Corrections and Conditional Release Statistical Overview (2015 Annual Report), at p. 107). This Court has recognized that racism, colonialism, and intergenerational trauma inform this disturbing statistic (R. v. Williams, [1998] 1 S.C.R. 1128, at para. 58; R. v. Gladue, [1999] 1 S.C.R. 688, at para. 65; Ipeelee, at para. 61). Through s. 718.2(e) of the Criminal Code , Parliament has directed sentencing judges to pay particular attention to the circumstances of Indigenous offenders. This recognizes that the systemic disadvantages and marginalization faced by Indigenous people inform moral blameworthiness and therefore the proportionality of sentences for Indigenous offenders (Ipeelee, at para. 73). In Gladue, this Court interpreted s. 718.2 (e) as requiring sentencing

judges to consider the following principles in sentencing decisions for Indigenous offenders:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. [para. 66]

[109] The sentencing judge must also be guided by the principle of restraint (s. 718.2(d) and (e)) in sentencing a dangerous offender. This principle “dictate[s] that a judge ought to impose an indeterminate sentence only in those instances in which there does not exist less restrictive means by which to protect the public adequately from the threat of harm” (Johnson, at para. 29).

(3) Section 753(4.1)

[110] These objectives and principles guide sentencing judges in selecting the appropriate sentence under s. 753(4). However, s. 753(4.1) significantly curtails judicial discretion at the penalty stage:

(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 a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[111] Section 753(4.1) imposes indeterminate detention unless the sentencing judge is satisfied that there is a reasonable expectation that a lesser measure is adequate for public protection. In assessing whether a lesser measure “will adequately protect the public against the commission by the offender of murder or a serious personal injury offence”, sentencing judges must consider both the level of the risk presented by the offender and the nature of the harm the offender is likely to cause. The specific reference to murder in s. 753(4.1) suggests that indeterminate detention should only be imposed in cases where the offender’s risk is expected to manifest itself in the most severe forms of serious personal injury offences. For example, if there is a high risk that the offender will commit another serious personal injury offence, but this offence is not likely to involve significant violence (e.g. criminal harassment, obstruction of justice), s. 753(4.1) does not necessarily mandate indeterminate detention. Indeed, the principle of restraint bars sentencing judges from imposing indeterminate detention on offenders who are not likely to commit very serious crimes in the future (see Johnson, at para. 40). As discussed above, serious personal injury offences include offences that do not involve serious violence. The question a sentencing judge must ask in applying s. 753(4.1) is this: Does this offender, due to the level of the risk and the nature of future harm likely to be caused, fall within the small group of truly

dangerous offenders who must be imprisoned indefinitely in order to protect the public?

- [112] I agree with Mr. Boutilier that s. 753(4.1) prevents sentencing judges from imposing appropriate sentences on dangerous offenders in some cases. This provision imposes indeterminate detention on some offenders for whom this sentence is unfit in light of all the sentencing principles and the public protection objective of the scheme. This is because s. 753(4.1) mandates indeterminate detention even where it is disproportionate to the offender's degree of responsibility and the gravity of the predicate offence. And, given the legislative changes since Lyons, no judicial discretion is available to preclude such a sentence.
- [113] While proportionality — the fundamental principle of sentencing — obviously governs under s. 753(4), it is not reflected in the s. 753(4.1) public safety threshold. Section 753(4.1) is imperative — if there is not a reasonable expectation that the public will be adequately protected against the commission of another serious personal injury offence, indeterminate detention must be imposed, even if this sentence is disproportionate to the gravity of the predicate offence and the offender's degree of responsibility. Like mandatory minimum sentencing provisions, s. 753(4.1) overrides the fundamental principle of sentencing. It “function[s] as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences” (see Nur, at para. 44).
- [114] Given the severity of indeterminate detention, this sentence will only be proportionate when the offender is very blameworthy and the offence is quite grave. Apart perhaps from life imprisonment, an indeterminate sentence is the harshest sanction available under the Criminal Code . Testimony in a recent case indicated that only 4-5 percent of dangerous offenders are ever released on parole (R. v. Walsh, 2017 BCCA 195, 348 C.C.C. (3d) 1, at para. 22). In addition, they are viewed as low priority for placement in treatment programs in prison, contributing to their poor prospects for rehabilitation and release (ibid.; R. v. Payne (2001), 41 C.R. (5th) 156 (Ont. Sup. Ct.)). In effect, an indeterminate sentence amounts “to a life sentence with little chance of parole” (Walsh, at para. 22). This Court has characterized the effects of indeterminate detention as “profoundly devastating” (Lyons, at p. 339).
- [115] The respondent, the Crown in right of British Columbia, asserts that subss. (1), (4) and (4.1) of s. 753 “embody the proportionality principle” and the dangerous offender scheme mandates indeterminate detention only when it is consistent with the sentencing principles. Similarly, my colleague Côté J. says s. 753(4.1) sets out the inevitable application of the sentencing principles for an offender who has been designated as dangerous. If this is correct, s. 753(4.1) would be redundant in light of s. 753(4). In any event, I cannot agree.
- [116] Proportionality is the governing principle in sentencing — s. 718.1 says that a sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. Outside the dangerous offender scheme, sentencing judges cannot impose a disproportionate sentence in the name of public protection. But once an offender is designated as dangerous, they are sometimes required to.

- [117] The offender's degree of responsibility is not reflected in the s. 753(4.1) public safety threshold (see *R. v. Radcliffe*, 2017 ONCA 176, 347 C.C.C. (3d) 3, at para. 57; *R. v. B. (D.V.)*, 2010 ONCA 291, 100 O.R. (3d) 736, at para. 80, leave to appeal refused, [2011] 3 S.C.R. vii). And given the broad definition of serious personal injury offences (which, despite their name, need not necessarily entail serious injury), indeterminate detention will be disproportionate to the gravity of the offence for many offenders who meet the designation criteria. But a sentencing judge is required to impose indeterminate detention on offenders whose moral blameworthiness is limited if the public safety threshold in s. 753(4.1) is not met, even if this sentence is inconsistent with Gladue principles.
- [118] Of course, Parliament is entitled "to identify those offenders who, in the interests of protecting the public, ought to be sentenced according to considerations which are not entirely reactive or based on a 'just deserts' rationale" (Lyons, at pp. 328-29), truly dangerous individuals who should receive a sentence which "is partly punitive but is mainly imposed for the protection of the public" (Lyons, at p. 329, quoting *Re Moore and the Queen* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.)). Parliament can dictate that public protection, which is recognized as a sentencing objective in s. 718 (c), is an enhanced objective for dangerous offenders (see Lyons, at p. 329). But s. 12 of the Charter limits this power. While Parliament can impose sentences that depart from the principle of proportionality, grossly disproportionate sentences are unconstitutional (Safarzadeh-Markhali, at para. 73). Moral blameworthiness is the bedrock of our criminal law tradition, and it has been since long before the principle of proportionality in sentencing was codified in 1995 (Ipeelee, at para. 36). The Charter thus ensures that Canada does not come to resemble Philip K. Dick's *Minority Report*, a frightening dystopia in which citizens who have done no wrong are arrested for crimes they are predicted to commit.
- [119] Section 753(4.1) may also preclude a sentence that respects the principle of restraint. This provision resolves any uncertainty about the offender's amenability to treatment in favour of indeterminate detention (*R. v. R.S.*, 2016 ONSC 7767, at paras. 51 and 102 (CanLII)). Section 753(4.1) creates a presumption for an indeterminate sentence that is only rebuttable by "evidence adduced during the hearing". The Crown will often know about the existence of community-based supervision programs, but it is not required to lead evidence on this point, and if no relevant evidence is provided to the court, the appropriate sentence is an indeterminate one (*Radcliffe*, at para. 58; *R. v. Smarch*, 2015 YKCA 13, 374 B.C.A.C. 280, at para. 48). As one of the interveners, the Yukon Legal Services Society, points out, the absence of evidence that suitable community supervision programs exist is sometimes attributable to an offender's limited resources or the lack of programming in a particular community, rather than to the inability to manage the offender's risk.
- [120] In short, the mandatory designation stage, in the dangerous offender scheme, which captures a broad group of offenders, combined with the narrow, structured discretion at the penalty stage, has created a legislative context that fails to ensure offenders are only sentenced to indeterminate incarceration if this sentence is appropriate. While judicial

discretion in sentencing is not a general constitutional imperative, Parliament cannot curtail this discretion in a manner that requires judges to impose grossly disproportionate sentences.

- [121] Given the design of the dangerous offender scheme, it is not difficult to foresee circumstances where s. 753(4.1) will impose grossly disproportionate sentences. This may happen notably where the gravity of the predicate offence is on the low end of the spectrum and the offender's degree of responsibility is minimal. The indeterminate detention of such offenders is particularly troubling if their risk will likely manifest itself in crimes that fall on the lower end of the "serious personal injury offence" spectrum.
- [122] On the low end of the spectrum, serious personal injury offences include criminal harassment and obstruction of justice. They can also include robbery where the victim is threatened, but the offender does not have a weapon and no one is injured (Steele). If an offender commits one of these offences twice, a pattern may be established. If the Crown seeks this designation and there is a likelihood that the offender will cause injury or severe psychological damage in the future, the offender must be designated as dangerous. At the penalty stage, if no evidence of community supervision programs is presented, or if it is unknown whether the offender will be amenable to treatment, s. 753(4.1) mandates indeterminate detention.
- [123] These offenders must be imprisoned indefinitely, regardless of their degree of responsibility. The fact that an offender is youthful, has pled guilty (as in this case), or commits crimes due to developmental disability (*R. v. Goodwin*, 2002 BCCA 513, 168 C.C.C. (3d) 14) or addiction (as in this case) has no bearing in the s. 753(4.1) analysis or on designation decisions. Addiction is often linked to poverty and childhood abuse, and while these experiences speak to the offender's moral blameworthiness (Ipeelee, at para. 73), they are irrelevant under s. 753(4.1). Such life experiences are not rare. Criminal courts in this country are tragically filled with offenders whose crimes are linked to the disease of addiction and the consequences of marginalization.
- [124] If the dangerous offender is an Indigenous person, systemic factors that may have contributed to bringing him or her before the courts, such as the roots of the offender's criminality in intergenerational trauma, cannot be considered in the s. 753(4.1) analysis, even though Parliament has expressly directed sentencing judges to consider these factors for Indigenous offenders (see Radcliffe, at para. 63; s. 718.2(e)). This is particularly concerning because there is no judicial discretion at the designation stage, and because Indigenous offenders are significantly overrepresented in the dangerous offender population.

- [125] Offenders sentenced to indefinite imprisonment receive low priority for treatment programs in prison, and there is no assurance of addiction treatment before the first Parole Board review seven years after they enter custody (s. 761(1)). Further, the possibility of parole has no bearing on the constitutionality of the challenged provision. In the words of the Chief Justice in *Nur*, “[t]he discretionary decision of the [P]arole [B]oard is no substitute for a constitutional law” (para. 98).
- [126] By including full discretion at the designation stage (under the 1997 scheme) and at both the designation and penalty stages (under 1977 scheme), previous versions of the dangerous offender scheme ensured that sentencing judges were not required to impose grossly disproportionate sentences on dangerous offenders (*Johnson*, at paras. 28 and 34). Thus in *Neve*, which was decided under the 1977 scheme, the Alberta Court of Appeal overturned a decision designating a 21-year-old Indigenous woman as a dangerous offender and sentencing her to indeterminate detention. Ms. Neve had been a prostitute since she was 12 and she struggled with substance abuse issues. The offence giving rise to the dangerous offender application was a robbery committed when Ms. Neve was 18 during which the victim sustained only a minor injury. The decision ordering Ms. Neve’s indeterminate detention was overturned notably because this sentence was not proportionate to the gravity of her offence and her degree of responsibility. Similarly, in *Goodwin*, which was decided under the 1997 scheme, the majority overturned a decision designating a man who had the “mental age of about eight years” as a dangerous offender because “indefinite incarceration [was] disproportionate in light of his low moral culpability” (paras. 1 and 8). But under the current scheme, Ms. Neve and Mr. Goodwin would be sentenced to indeterminate detention if the public safety threshold in s. 753(4.1) is not met.
- [127] Thus, consider an Indigenous offender who suffers from serious drug addiction rooted in intergenerational trauma and whose treatment prospects are uncertain. If this offender commits a number of robberies to sustain his addiction, but does not use a real weapon and causes no injury, he may well face indeterminate detention under s. 753(4.1). In this case, the dangerous offender regime requires a sentence that is grossly disproportionate to the gravity of the predicate offence and the degree of responsibility of the offender.
- [128] In sum, indeterminate detention is “so excessive as to outrage standards of decency” in cases where the offender’s degree of responsibility and the gravity of the predicate offence are on the low end of the spectrum (*Ferguson*, at para. 14, quoting *Wiles*, at para. 4), especially where alternative measures, including lengthy sentences of incarceration with long-term supervision orders, permit public safety concerns to be addressed. While Parliament is, of course, entitled to take steps to protect Canadians against the threat posed by the most dangerous criminals, the current scheme goes too far. Indeterminate detention — the most severe penalty, apart perhaps from life sentences — is grossly disproportionate to the sentence some offenders would otherwise receive under the sentencing principles in the Criminal Code .

B. Section 753(4.1) Is Not Saved by Section 1 of the Charter

- [129] Violations of s. 12 of the Charter can rarely be justified under s. 1 . This Court recently recognized that it will be difficult for the government to establish that a sentencing provision that is grossly disproportionate under s. 12 nevertheless represents a proportionate balancing between the deleterious and salutary effects of the law under the s. 1 analysis (Nur, at para. 111).
- [130] The dangerous offender scheme advances the laudable goal of protecting the public from violent offenders likely to reoffend (Steele, at para. 29). But while there is a rational connection between s. 753(4.1) and its intended purpose, the provision fails the second branch of the Oakes test (R. c. Oakes, [1986] 1 S.C.R. 103). It does not minimally impair the s. 12 right of dangerous offenders not to be subjected to cruel and unusual punishment. The respondent has not established that the provision is reasonably tailored to the objective of the law (Nur, at para. 116). It has not shown that less harmful means for achieving the public protection objective were unavailable. For example, Parliament could have included residual judicial discretion to allow for a lesser sentence to be imposed where indeterminate detention would be grossly disproportionate (see Lloyd, at para. 49).
- [131] Section 753(4.1) is therefore inconsistent with s. 12 of the Charter and is not saved by s. 1 . I would therefore declare it of no force or effect under s. 52(1) of the Constitution Act, 1982 . It is unnecessary to suspend the declaration of invalidity because immediate invalidity does not pose a danger to the public (Schachter v. Canada, [1992] 2 S.C.R. 679). Without s. 753(4.1), offenders can still be designated as dangerous (under s. 753(1)) and judges must exercise their discretion in determining the appropriate penalty (under s. 753(4)) in accordance with the relevant sentencing goals and principles set out in the Criminal Code (Johnson, at para. 28). The appropriate sentence must reflect that public protection is the predominate purpose of the dangerous offender scheme. Indeterminate detention remains available for offenders whose risk cannot be adequately managed through the long-term offender scheme. However, indeterminate detention can only be imposed if it is a proportionate sentence.

C. Application to Mr. Boutilier

- [132] The sentencing judge imposed an indeterminate sentence on the basis of an unconstitutional provision, s. 753(4.1). This appeal can nonetheless be dismissed if “there is no reasonable possibility that the verdict would have been any different had the error of law not been made” (Johnson, at para. 49; R. v. Sipos, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 35). In my view, this appeal is not one of those rare cases where this curative power should be exercised (Johnson, at para. 49). There is a reasonable possibility that a determinate sentence with a long-term supervision order would have been imposed had the sentencing judge not proceeded on the basis that his discretion was curtailed by s. 753(4.1). The record before the sentencing judge suggests that a determinate sentence with a long-term supervision order may well have been appropriate.

- [133] Had the sentencing judge declared s. 753(4.1) to be of no force or effect, he could not have imposed indeterminate detention unless it was proportionate to the gravity of the predicate offences and to Mr. Boutilier's degree of responsibility (s. 718.1). While the sentencing judge made no reference to proportionality in his judgment, his findings suggest that indeterminate detention may not have been proportionate. The predicate offences that gave rise to the dangerous offender application were two robberies and an assault with a weapon. Mr. Boutilier did not injure anyone and the gun he used to threaten the victims was an imitation firearm. His tragic background, addiction, and guilty plea speak to his degree of moral blameworthiness (s. 718.1 ; Ipeelee, at para. 73; R. v. Horvath (1997), 117 C.C.C. (3d) 110 (Sask. C.A.), at para. 41; C. C. Ruby, G. J. Chan and N. R. Hasan, Sentencing (8th ed. 2012), at §5.211). The sentencing judge explained that "Mr. Boutilier's childhood, upbringing, and personal circumstances have been extraordinarily difficult" (2015 BCSC 901, 325 C.C.C. (3d) 345, at para. 104). He was physically and sexually abused as a child. "His stepfather . . . began to provide him with alcohol and illegal substances when he was as young as six or seven years old and, as an apparent source of amusement, would watch him become impaired" (para. 104). Mr. Boutilier was using drugs weekly by the time he was 14. The sentencing judge concluded: "Mr. Boutilier's ongoing drug use, and his inability to overcome his crippling addictions, is likely the central issue before me" (para. 110). The record showed that addiction was at the root of Mr. Boutilier's criminality, and that this addiction developed through tragic personal circumstances.
- [134] Furthermore, the principle of restraint prevented the sentencing judge from imposing an indeterminate sentence if the long-term offender criteria were met and the sentence available under that scheme was adequate for public protection (Johnson, at paras. 29 and 40; s. 718.2(d) and (e)). The sentencing judge did not consider whether the long-term offender criteria were met, and the evidence before him suggested that they may well have been (s. 753.1). The psychiatric evidence was that "the possibility of the eventual management of Mr. Boutilier's risk in the community is moderate based on the likelihood that he will be amenable to treatment and that he will benefit from treatment" (para. 127). The sentencing judge noted that Mr. Boutilier had expressed a desire to stop taking drugs. Although Mr. Boutilier has a terrible behavioural record in prison, the sentencing judge remarked that "[h]is positive experience at Belkin House was a brief, positive interlude in a 35-year history" (para. 208). While Mr. Boutilier was enrolled in the structured, residential program at Belkin House, he "was able to form positive therapeutic relationships . . . and made some positive changes" (para. 176). Mr. Boutilier's age at the time that a 10-year long-term supervision order would expire (over 50) also indicates a greater chance that his risk could be managed. The evidence before the sentencing judge was that the risk of reoffending is significantly reduced for most offenders by age 50 and 60. Overall, this evidence suggests there may be a reasonable possibility that Mr. Boutilier's risk could be controlled in the community (s. 753.1(c)).

[135] The record also suggested that a determinate sentence with a long-term supervision order may be adequate for public protection. To determine whether a sentence other than indeterminate detention would be adequate for public protection, both the level of the risk and the nature of harm Mr. Boutilier is likely to cause in the future must be considered. The sentencing judge only considered the level of the risk presented by Mr. Boutilier (i.e. how likely he was to overcome his addiction), and not the nature of the harm Mr. Boutilier was likely to cause (i.e. the gravity of the offences Mr. Boutilier would commit in the future if he did not), in deciding to impose indeterminate detention. In assessing whether a lesser measure would be adequate for public protection, it is significant that Mr. Boutilier's criminal record is not characterized by offences that caused serious harm.

[136] A new hearing is therefore required under s. 759(3)(a)(ii) to determine which penalty should be imposed under s. 753(4).

IV. Conclusion

[137] For the foregoing reasons, I would allow the appeal in part and declare s. 753(4.1) of the Criminal Code to be of no force or effect under s. 52(1) of the Constitution Act, 1982 . I would also order a new hearing under s. 759(3) (a)(ii) of the Criminal Code to determine the appropriate penalty under s. 753(4) .

Appeal dismissed, Karakatsanis J. dissenting in part.

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- [1] While the Crown must prove every dangerousness criterion beyond a reasonable doubt (*R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Jones*, [1994] 2 S.C.R. 229), what must be proven beyond a reasonable doubt with respect to these two prospective criteria is not their certainty, but their likelihood: Currie, at para. 42. This is so because “as a matter of practicality, the most that can be established in a future context is a likelihood of certain events occurring”: Lyons, at p. 364.
- [2] According to statistics relied on by the Attorney General of Canada in this appeal, there were 394 dangerous offenders in 2008 (2.8 percent of the total federal inmate population). That number rose to 622 dangerous offenders in 2015 (3.9 percent of the total federal inmate population) (Canada, Public Safety Canada Portfolio Corrections Statistics Committee, Corrections and Conditional Release Statistical Overview (2008 and 2015 Annual Reports)). While the number of dangerous offenders designated per year ranged from 3 to 28 between 1978 and 2008, those numbers have since increased, peaking at 65 in 2015 (2016 Annual Report).
- [3] At the end of fiscal year 2015-2016, 86 percent of the dangerous offenders under the responsibility of Correctional Service Canada were serving indeterminate sentences (2016 Annual Report).
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