

CANADA / JUDGMENT

R. v. Hexamer

2019 BCCA 285

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 285 R. v. Hexamer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hexamer,

2019 BCCA 285

Date: 20190802

Docket: CA43881

Between:

Regina

Respondent

And

Ibata Noric Hexamer

Appellant

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Corrected Judgment: The text of the judgment was corrected at paragraph 222 on August 9, 2019.

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated February 5, 2016 (R. v. Hexamer, 2016 BCSC 185, Vancouver Docket 25968).

Counsel for the Appellant:

G. Botting

Counsel for the Respondent:

D.M. Scanlan

Place and Date of Hearing:

Vancouver, British Columbia

January 8, 2019

Place and Date of Judgment:

Vancouver, British Columbia

August 2, 2019

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Griffin

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Summary:

The appellant pleaded guilty to six counts involving the sexual assault and unlawful confinement of six children in three incidents over a 14-year period. He was designated a dangerous offender and sentenced to an indeterminate period of incarceration pursuant to s. 753(1) and (4) of the Criminal Code, R.S.C. 1985, c. C-46. On appeal, the appellant raised a host of substantive and procedural issues alleging error in the judge's approach at both the designation and sentencing stages of the dangerous offender proceeding. Held: Appeal dismissed. The appellant failed to demonstrate any error in principle in the judge's analysis. Although the judge did not have the benefit of the Supreme Court of Canada's decision in *R. v. Boutilier*, 2017 SCC 64, his analytical approach to both the designation and sentencing stages of the proceeding was consistent with the framework set out in that decision. The appellant failed to show that the indeterminate sentence was unreasonable in the circumstances.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant, Iбата Noric Hexamer, appeals his designation as a dangerous offender as well as the indeterminate sentence imposed upon him pursuant to s. 753(1) and (4) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. He seeks orders under s. 759(3)(a)(i) allowing the appeal, setting aside the dangerous offender designation and indeterminate sentence, and substituting a 15-year determinate sentence with 2:1 credit for the time he has spent in custody.
- [2] The Reasons for Sentence, indexed as 2016 BCSC 185, were released on February 5, 2016, prior to the decision of the Supreme Court of Canada in *R. v. Boutilier*, 2017 SCC 64 [Boutilier SCC].
- [3] The appellant raises numerous grounds of appeal, both procedural and substantive. They are not easily summarized. The central issues on appeal appear to me to be whether the sentencing judge erred by: (1) conflating the distinct requirements of s. 753(1)(a) and (b); (2) treating proof of the patterns of offending behaviour contemplated by s. 753(1)(a)(i) and (ii) as proof that the appellant poses a future threat to the life, safety or physical or mental well-being of others; (3) unreasonably concluding that the appellant was at high risk to commit future sexual assault offences against children contrary to the evidence of the court-appointed assessor, Dr. Lindsey Jack, that he was at a moderate risk to reoffend and in the absence of any other evidence capable of establishing this beyond a reasonable doubt; (4) failing to consider treatment prospects at the designation stage as required by Boutilier SCC; (5) failing to consider whether a determinate sentence or a determinate sentence with a period of long-term supervision would reduce the appellant's risk to an acceptable level before proceeding to impose an indeterminate sentence; and (6) imposing a sentence that is unreasonable.
- [4] For the reasons that follow, I would dismiss the appeal.

II. Background

1. The Plea and the s. 752.1 Order

- [5] The appellant pleaded guilty on August 3, 2012, to one count of sexual assault, three counts of sexual assault with a weapon and two counts of unlawful confinement.
- [6] The charges arose out of three separate sexual assaults that took place in 1995, 2007, and 2009.
- [7] The victims in all three incidents were minors. They were strangers to the appellant. The appellant abducted them from the street in broad daylight and confined or sexually assaulted them. The offences were predatory, violent and profoundly invasive of the physical integrity and emotional security of the young victims. The appellant dominated his victims, forcing them to perform or witness acts that inflicted significant psychological damage. As is evident, the offending conduct occurred over a period of 14 years.
- [8] The appellant was arrested on December 10, 2010 and charged on a 23-count indictment. Following resolution discussions between the appellant's counsel and the Crown, an agreement was reached whereby: (1) the appellant would plead guilty to the six above-noted offences; (2) the Crown would stay proceedings on the remaining counts; (3) a joint submission would be made that the appellant be sentenced to 15 years' imprisonment; and (4) the Crown would not make an application for an assessment report under s. 752.1 of the Code, a necessary preliminary step to the commencement of a dangerous offender proceeding (the "plea agreement").
- [9] The appellant later resiled from the plea agreement and submitted to an assessment under s. 752.1 of the Code in hopes that it would be favourable and support a shorter determinate sentence.
- [10] On February 28, 2013, the Crown made an oral application for an assessment remand order under s. 752.1 of the Code. The application was not opposed and a warrant remanding the appellant for forensic assessment was prepared. Dr. Jack performed that assessment. Her report was filed on May 24, 2013.
- [11] The Attorney General having consented, the Crown filed a notice of application on July 24, 2013, seeking to have the appellant designated a dangerous offender and sentenced to an indeterminate period of incarceration pursuant to s. 753(1) and (4) of the Code. The Crown filed a supplemental notice of application on July 16, 2015, giving notice of its intention to tender on the application off-indictment evidence from H.B., a young person also said to have been sexually assaulted by the appellant.

2. The Strike Plea Application

- [12] In August 2014, the appellant applied to have his guilty pleas set aside. He said he was unaware when he renounced the plea agreement that the Crown would proceed with an application for a s. 752.1 assessment. He said his counsel led him to believe that the Crown had agreed to proceed with a regular sentencing hearing with no joint submission which would be informed by a psychological report he would obtain himself. He maintained that the Crown resiled from this "revised plea agreement" by applying for the s. 752.1 assessment.
- [13] The strike plea application was dismissed for reasons indexed as 2015 BCSC 1176. The judge found that when the appellant entered his guilty pleas, he understood the nature and consequences of pleading guilty and that the pleas were voluntary, informed, and unequivocal. He found that after entering the guilty pleas, the appellant became dissatisfied with the joint submission for a 15-year determinate sentence and believed he had a good chance of avoiding a dangerous offender designation and securing a shorter determinate sentence. Accordingly, he made a conscious decision, against legal advice, to repudiate the plea agreement and the joint submission. The appellant knew that doing so would breach the terms of the plea agreement and that the Crown would, as a consequence, proceed with an application for a s. 752.1 assessment. The judge rejected the appellant's arguments that there was a "revised plea agreement" from which the Crown resiled. He also rejected the appellant's arguments that the Crown misled the appellant and his counsel about the consequences of repudiating the plea agreement, or that the appellant's counsel misled him about the consequences of renouncing the plea agreement.
- [14] The appellant appealed from conviction arguing that the judge erred by dismissing his strike plea application. The conviction appeal was dismissed in Reasons for Judgment indexed as 2018 BCCA 142.

3. The Offences and Victim Impact

- [15] The details of the offences to which the appellant pleaded guilty are set out in a 78-paragraph Agreed Statement of Facts. What follows is a brief summary of each incident.
- (a) April 1, 1995: The Offence Against A.K.
- [16] On April 1, 1995, at about 4:30 p.m., 13-year-old A.K. was walking in a residential neighbourhood about a block away from her home. After visiting the corner store, she crossed the street and walked by the local elementary school. The appellant was following her. He caught up to her as she passed the school and asked her if she could help him find a child named Kevin. He was polite and appeared to be a concerned brother or parent.
- [17] After engaging A.K., the appellant suddenly grabbed her wrist, told her he had a knife and said she was going to help him find Kevin. She promised to help him if he let her go.
- [18] The appellant pulled A.K. toward a below-ground outdoor stairwell attached to the elementary school, disregarding her screams and pleas to let her go. He put his hand over her mouth and told her to be quiet or he would hurt her. He told her to lie back on the stairs.

She complied. He asked her how old she was, if she had a boyfriend, and if she had ever done anything like this before. He kissed her face, lifted her shirt and kissed her breasts. He pulled down her pants and underwear and touched her vagina. He attempted to penetrate her vagina with his penis, but she stopped him by keeping her legs closed. He digitally penetrated her vagina. He then straddled her and forced her to perform fellatio until he ejaculated into her mouth and onto her T-shirt. She gagged and spat his ejaculate out.

- [19] The appellant then told A.K. he had done something wrong. He calmly helped her pull her pants up and walked away.
- [20] A.K. went home. She was crying hysterically and told her mother what had happened. Her mother immediately called the Vancouver Police Department ("VPD"). A.K. gave a description of her assailant to them.
- [21] A.K. went to the hospital the day of the assault and two more times in the following week. The doctor who performed a sexual assault examination noted that she had suffered bruising and striations on her breasts but had no other obvious physical signs of trauma. It was recommended that A.K. get HIV testing in 3 and 6 months. She was treated with a morning-after pill and an antibiotic.
- [22] The doctor who examined A.K. made slides of a dried white residue on her face and of a swab of her throat. Cuttings were made of her T-shirt. The RCMP forensic lab informed the VPD that semen was identified on the slides and on the T-shirt. However, there was no suspect to compare the DNA to, and at the time of the offence there was no DNA databank. The police closed their file on February 7, 1996, until further information surfaced.
- [23] A.K. filed a victim impact statement in which she described how the offence changed her life. She suffered from Post-Traumatic Stress Disorder ("PTSD") and experienced nightmares, panic attacks, depression, and difficulty sleeping. She felt scared walking in her neighbourhood for years because the appellant had told her he knew where she lived. She was afraid of every man she encountered except her father. She saw a counsellor weekly for two years after the attack.
- (b) August 30, 2007: The Offences Against C.R. and K.C.
- [24] On August 30, 2007, at about 3:00 p.m., C.R. and K.C., 14-year-old female friends, were walking along a street on their way to meet a friend.
- [25] The appellant came out of some bushes and approached them. He asked them for directions. After engaging them in conversation, he grabbed K.C. by the arm and threatened her with a knife. C.R. said the appellant had K.C. in a headlock. C.R. screamed and began to run. She pulled out her cellphone to call the police. The appellant repeatedly told C.R. not to run or call the police or he would kill K.C. K.C. was crying and asking C.R. not to leave. C.R. ultimately rejoined them without calling the police. C.R. thought the appellant wanted to rob them, so she took out her iPod and threw it in his direction. Both girls also offered him their cellphones. The appellant did not take the iPod or cellphones, but he asked the girls if they

had any money or identification and asked them how old they were.

- [26] The appellant took the girls into a forested area where there was a discarded mattress on the ground. He ordered them to take off their clothes and lie down on the mattress. They did. The appellant took away the girls' cellphones and asked them to tell him their names. C.R. gave a false first name, but K.C. gave her real first name because she was afraid the appellant would discover her name on her cellphone. The appellant said that he knew where they lived and pointed in the direction of K.C.'s neighbourhood.
- [27] C.R. asked the appellant what he was going to do. He said he was not going to do anything, just play with them and kiss them. He was polite and calm. C.R. begged the appellant not to hurt them.
- [28] The appellant pulled his pants down around his knees. He knelt on the mattress between the girls and put the knife down. He continued to threaten to kill K.C. if the girls did not comply with his directions. He touched and licked their breasts and K.C.'s vagina. He ordered both of them to perform fellatio on him. When C.R. refused, he threatened to kill K.C. and picked up the knife again. The girls were very afraid, so they complied. Both of them were crying.
- [29] The appellant ejaculated into K.C.'s mouth and told her to swallow. She refused and he reached for the knife, so she complied. He told her to show him that she had swallowed and inspected her open mouth. The appellant wiped her mouth with his shirt and, according to the Agreed Statement of Facts, "laughed or something." He then digitally penetrated C.R.'s vagina.
- [30] The appellant told the victims not to tell their parents or he would find and kill them. He said again that he knew where they lived and pointed in that direction. He said he knew their numbers. He told them to wait ten minutes and ran away.
- [31] The girls waited briefly, then put their clothes back on and went straight to C.R.'s house. They told her parents what had happened. C.R.'s parents called the Delta Police Department.
- [32] Both girls gave statements to the police. K.C. submitted to a sexual assault examination. C.R. was also examined.
- [33] K.C. filed a victim impact statement. She said that the assault still affects her life. She said it was hard to feel safe given that she had been assaulted in broad daylight on a path she took to school every day while she was with a friend. She said it was difficult for her to lead a normal life because she was afraid to walk anywhere except with a group of people. She was afraid to be at home by herself, especially at night, because the appellant told her that he knew where she lived. Because the assault took place close to her home, she believed him. She was afraid the appellant was going to come and kill her. She said she was bullied and tormented at school because few people believed that the assault had actually happened until the DNA results came back. She said she experienced depression and difficulty sleeping. She said that she still cannot walk anywhere by herself, day or night.

- [34] The police submitted 20 crime scene exhibits to the RCMP forensic lab for DNA analysis. In November 2007, the RCMP lab advised investigators that the DNA samples taken from the swabs of C.R. and K.C.'s breasts matched the semen samples taken from cuttings of A.K.'s T-shirt.
- (c) July 3, 2009: The Offences Against C.M., B.M., and J.M.
- [35] On July 3, 2009, two male friends, C.M. and B.M., and B.M.'s younger sister J.M. walked to a McDonald's restaurant near B.M. and J.M.'s house for dinner. C.M. was 14, B.M. was 12, and J.M. was six years old.
- [36] The children left the McDonald's between 6:30 and 7:00 p.m. The appellant approached them from behind, seeming to come out of nowhere. He asked them if there was a bridge nearby and then suddenly grabbed J.M. from behind and pulled out a red Swiss Army-type knife. He pointed the knife at J.M.
- [37] The appellant picked up J.M. and began carrying her into an adjacent forested area. He told the boys to follow him or he would stab her. They complied. J.M. was crying out to her brother for help. He was afraid and told her to be quiet and listen to the appellant.
- [38] The appellant stopped at a certain place and told the boys to lie down on the ground and put their heads down. They did so. He then told them to get up and go further into the forest. He grabbed B.M. by the arm. He told the boys to get down on their knees and look the other way. He said he needed five minutes with J.M. Both boys were crying.
- [39] C.M. did not see what the appellant did to J.M. but could hear him say "kiss me", "put this in there" and "drink this". He could hear J.M. crying and saying "ow", "don't", "why", "Please don't. What are you doing this for?", "Stop", "Don't bite me" and "That's gross." He also heard J.M. say to the appellant, "swear you won't hurt me." B.M. said that he heard the appellant say something like "suck me" and "kiss me" and heard his sister say, "I don't want to suck you."
- [40] According to J.M., the appellant told her to calm down and said he would not hurt anyone. He made her lie down on a big dirty blanket. He took off her pants and his own and made her pull her shirt up and take her underwear down. He told her to "suck it", meaning his penis, and to "suck my milk from him." She said that he alternated between "sucking" her vagina and forcing her to suck his penis. He ejaculated into her mouth. She spat it out.
- [41] After five to seven minutes, the appellant brought J.M. back to the boys and told them to wait five minutes. He then left.

- [42] The children waited briefly, then rushed back to B.M. and J.M.'s house. On the way, J.M. said that the appellant "put his winky in my mouth" and "bit me down there". When they got home, they called J.M.'s mother and told her what happened. She immediately returned home. The RCMP was contacted. They searched the area but did not find the appellant. All three children were interviewed by the police. B.M. and C.M. both gave descriptions of the assailant.
- [43] J.M.'s mother prepared a victim impact statement. She said that before the offence, J.M. was happy and enjoyed playing outside with her friends. After the offence she became angry and aggressive and rarely went outside. She has nightmares and wets the bed regularly because she is afraid to get up in the dark.
- [44] J.M. was examined at BC Children's Hospital on July 4 and 14, 2009. A full sexual assault exam was not done, but a visual exam was done and oral swabs were taken. The RCMP forensic lab identified a male DNA profile and human semen on the sleeve of J.M.'s T-shirt. The DNA profile found in this sample, A.K.'s T-shirt, and the breast swabs from C.R. and K.C. all came from the same person.

4. The Investigation

- [45] Based on an analysis of cellphone usage records for the date and time of the second and third offences, the police identified the appellant as the likely perpetrator. They began efforts to locate the appellant to obtain a cast-off sample of his DNA. A meeting was arranged on December 10, 2010, at a mall in Vancouver. The appellant was arrested after eating a meal in a restaurant. A fork the appellant had used was seized. The police also seized the appellant's laptop computer, which was in his possession at the time of the arrest.
- [46] A DNA warrant was obtained and executed. The DNA samples taken from the appellant and his saliva residue on the fork were compared to the crime scene samples from the cuttings of A.K. and J.M.'s T-shirts, and the swabs taken from C.R. and K.C. In each case, the samples matched. The probability that a randomly selected individual from the Canadian Caucasian population unrelated to the appellant would coincidentally share the same DNA profile located on the samples taken from the complainants was estimated to be 1 in 1.0 quadrillion.
- [47] The police performed an initial forensic examination of the laptop computer found in the appellant's possession on his arrest. It was an agreed fact on sentencing that 5,785 images found on the appellant's computer were child pornography.

III. Dangerous Offender Regime and the Crown's Application

1. Overview

- [48] Conviction of a "serious personal injury offence" is a prerequisite to designation as a dangerous offender under s. 753(1). "Serious personal injury offence" is defined in s. 752 as follows:

Serious personal injury offence means

- (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
- (i) the use or attempted use of violence against another person, or
- (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

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

[49] The Crown identified as serious personal injury offences (the "predicate offences") the three counts to which the appellant had pleaded guilty arising out of the 2009 incident:

- a) The unlawful confinement of B.M. contrary to s. 279(2) of the Code;
- b) The unlawful confinement of C.M. contrary to s. 279(2) of the Code; and
- c) The sexual assault with a weapon of J.M. contrary to s. 272(2)(b) of the Code.

[50] Section 753(1) sets out four bases upon which an offender who has committed a serious personal injury offence may be designated a dangerous offender:

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

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
 - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
 - (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
 - (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint;

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.

[51] Pursuant to s. 753(4.1), where an offender is designated a dangerous offender, an indeterminate period of incarceration shall be imposed unless the judge is satisfied by the evidence adduced at the hearing that there is a reasonable expectation that a lesser measure will adequately protect the public against the commission by the offender of murder or another serious personal injury offence.

[52] The Crown based its application upon each of s. 753(1)(a)(i), (ii), and (iii) and s. 753(1)(b).

[53] The Crown gave notice that, in support of the application, it would be relying on: the Agreed Statement of Facts, the convictions for the other offences to which the appellant had pleaded guilty, the child pornography found on the appellant's computer, victim impact statements tendered by or on behalf of the children, the assessment report of Dr. Jack, and the evidence of H.B. The Crown alleged that the appellant sexually assaulted H.B. on two occasions in 1999 or 2000 when H.B. was 12 or 13 years of age. The appellant was never charged with any offence in relation to H.B.

2. Evidence on the Dangerous Offender Proceeding

(a) The Appellant's Circumstances

[54] The appellant, who did not testify on the dangerous offender hearing, was 47 years old at the time of sentencing. He had no prior criminal record.

[55] The appellant was born in South Korea to a Korean mother and a Caucasian father. He has one younger sister. The family relocated to Canada when the appellant was very young, though they lived in various cities in Asia for periods of time while the children were growing up. The appellant obtained a Bachelor of Fine Arts degree from the University of British Columbia and subsequently worked as a DJ and for a political party. He was involved in two long-term intimate relationships with women, including when the offences were committed.

[56] The appellant denied having any difficulties with alcohol or drug use, an assertion confirmed by his sister.

[57] The appellant told Dr. Jack that in recent years he had recovered two previously repressed memories about traumatic events that happened to him when he was about eight years old.

- [58] The appellant claimed to have spontaneously recalled one incident in 2006. He said that two male adolescent family members sexually abused him while visiting from out of town. They performed oral sex on him, made him perform oral sex on them, and touched his penis.
- [59] The appellant claimed to have recalled the other incident after his arrest in 2010. He said he and his sister were out walking when two adolescent boys approached them, took them into an outdoor stairwell, and forced them to perform oral sex on them and on each other. He said that he believed this experience created in him a subconscious impulse towards oral sex. He said that he spoke with his sister about the incident, but she did not remember it.
- [60] The appellant called Mr. Soren Shamsian, a counsellor with a degree in counselling psychology from a university in California, as an expert witness. Mr. Shamsian was not qualified to hold himself out as a psychologist in California and was not a member of the BC College of Psychologists, but was a member of the Association of Clinical Counsellors. The principal focus of his training was with respect to parenting relationships. Mr. Shamsian conceded on the voir dire that he had little formal education and no specific training in either PTSD or recovered memory -- subjects on which the appellant initially sought his opinion. He was not conversant with Correctional Service of Canada programs, parole supervision, or the treatment of violent offenders. He had no training in conducting risk assessments of offenders.
- [61] The Crown strongly objected to the qualification of Mr. Shamsian on the terms initially sought by the appellant. He was ultimately qualified as an expert with respect to counselling and the therapeutic process.
- [62] Mr. Shamsian explained that he became connected with the appellant through the BC Society for Male Survivors of Sexual Abuse. He had performed about 200 counselling sessions with the appellant since 2012. The counselling primarily focused on addressing the appellant's alleged childhood sexual abuse and its effects on him.
- [63] The sentencing judge noted that Mr. Shamsian appeared to accept the premise, sourced in the appellant's account, that the appellant was a victim of childhood sexual abuse and that his criminal offending against the children was a re-enactment of what had happened to him. Mr. Shamsian's opinion is that the appellant's crimes were not sexually motivated.
- [64] The appellant also called as a witness on the dangerous offender hearing Dr. Frederic Bass. Dr. Bass is a medical practitioner, scientist and Professor Emeritus at the University of British Columbia. He came to know the appellant after being elected as a city counsellor in Vancouver. He described the appellant as dependable, trustworthy and industrious. Dr. Bass was permitted to express the view that the appellant would be a good candidate for treatment and monitoring after his sentence was served. In cross-examination, it became apparent that Dr. Bass knew next to nothing about the offences the appellant committed. Upon reading the Agreed Statement of Facts, the judge noted that Dr. Bass "seemed clearly shocked" and "very much taken aback by the particulars of the underlying events." Dr. Bass testified that he found the offences shocking and entirely inconsistent with the person he

knew.

- [65] Evidence was also led on the dangerous offender hearing that the appellant has, for the most part, been a polite and cooperative inmate while in custody.
- (b) The Appellant's Version of Events as Related to Dr. Jack
- [66] The appellant told Dr. Jack that he had no memory of committing any of the offences until after his arrest in 2010 when he was advised by his lawyer of the nature of the allegations. Even now, the appellant says that he has only limited recall of the offences.
- [67] With respect to the 1995 offence, the appellant theorized in his interviews with Dr. Jack that seeing the victim in front of a stairwell triggered his own experience of childhood sexual abuse and caused him to act out the offence in an automatic state. He denied any sexual motivation for the offences and claimed that he was not sexually aroused while committing the 1995 offence.
- [68] The appellant also spontaneously advised Dr. Jack that none of his sexual offences were predatory.
- [69] With respect to the 2007 offences, the appellant told Dr. Jack that he was distraught from the breakdown of a relationship to the point of being suicidal and that he went into the woods with a plan to stab himself with a knife. He saw the two girls enter the woods and said, "they were happy I was in [emotional] pain." He explained that he has an aversion to teenagers and was scared by and frightened of his victims. He claimed that all he can recall about the 2007 offences are "intense swirling colours" and being in emotional distress. The appellant's unusual explanation that he was frightened of the young girls was noted by Dr. Jack to be inconsistent with the victims' account that he was calm and did not raise his voice during the assault.
- [70] With respect to the 2009 offences, the appellant told Dr. Jack that he saw the two boys walking in the forest and believed that they might attack him. He described his reaction as "fight or flight." Again, the appellant theorized in his interview with Dr. Jack that he "jumped in" and committed the offences to relive his own childhood sexual abuse trauma. When Dr. Jack asked him why he did not flee instead of abducting the victims, he responded that he had no choice because he experienced an "automatic" body movement which he linked to the subconscious.
- [71] The appellant told Dr. Jack he has never had a sexual interest in children. He said that he does not believe it is necessary for him to fully recall the offences he committed. He told Dr. Jack that his arrest and the personal losses he has suffered as a result are significant deterrents to reoffending. He claimed to have "unlocked" his "unresolved childhood sexual abuse" and expressed interest about writing a book about his experience and starting a website promoting altruism.

[72] In his interviews with Dr. Jack, the appellant acknowledged that child pornography was found on his computer but denied intentionally downloading or viewing it. He told Dr. Jack that he had attempted to download "Girls Gone Wild" files via a compressed .zip file which contained thousands of images, and did not realize until after his arrest that he must have, at the same time, inadvertently downloaded child pornography images. He told Dr. Jack that he had no interest in any kind of pornography and no interest in future sexual relationships. He told her he wanted to live in a "clean wholesome environment."

(c) The Child Pornography Found on the Appellant's Computer

[73] In light of what the appellant told Dr. Jack, it became apparent during the dangerous offender hearing that Crown and the appellant disagreed about the significance of the admission in the Agreed Statement of Facts that "a forensic analysis located thousands of photographic images [on the appellant's computer] of which 5,785 were child pornography."

[74] The appellant maintained that this did not constitute an admission that he knew child pornography was on his computer or that he had accessed it.

[75] The Crown's position was that the appellant had knowledge of the computer's contents and had accessed the images. In support of its position, the Crown called three VPD officers to give evidence about the contents of the computer. Detective Constable Greenwood, an expert in computer forensic analysis, testified that the material on the computer was organized into subfolders corresponding to subgenres of pornography. He explained that some of the images had been "unzipped" from a .zip file, a compressed file containing numerous images. When the file is unzipped, the compression is reversed and the contents are returned to their original state. Unzipping a file requires deliberate action by the user. After extracting the images on the hard drive using forensic software, Detective Constable Greenwood copied those images to an external hard drive for further review by experts in the categorization of child pornography.

[76] Detective Constable Caprarie performed that review. She located 560,724 image files on the computer, of which 314,005 were unique. She divided the total number of images into those that were accessible (available to be viewed by simple navigation such as pointing and clicking) and those that were inaccessible (deleted by the user but still present on the hard drive). She classified the images into seven categories corresponding to recognized standards used by child exploitation investigators in Canada. In her report, she classified the images as follows:

1. Child pornography (images which meet the definition of "child pornography" in s. 163.1 of the Code): 7,471 unique images (1,141 accessible out of 13,854 total images);
2. Child erotica (images in which a child is partially or fully clothed, but posing in a sexually suggestive or explicit manner): 2,653 unique images (402 accessible out of 4,749 total images);

3. Child nudity (images in which a child is nude, but not posing in a sexually suggestive or explicit manner or engaged in sexual activity): 6,157 unique images (7,552 accessible out of 9,034 total images);
 4. Child other (any other images of children): 11,403 unique images (5,278 accessible out of 20,742 total images);
 5. Adult pornography (nude or sexually explicit images of adults): 21,330 unique images (17,410 accessible out of 37,915 total images);
 6. Other (all other images that do not fall into any other category): 204,446 unique images (104,018 accessible out of 387,059 total images); and
 7. Age difficult (images in which the person depicted is likely a teenager but it is difficult to determine whether they are under the age of 18 years - often the case with individuals between the ages of 14 and 20): 18,434 unique images (9,180 accessible out of 31,871 total images).
- [77] Detective Constable Caprarie was unable to testify on the dangerous offender hearing due to injuries sustained in a motor vehicle accident, but her image classification report was filed as an exhibit. Detective Constable Shook reviewed her report and the reports prepared by Detective Constable Greenwood. He also examined some of the images on the hard drive himself. He testified that, in his experience, 7,471 images of child pornography is a very large collection.
- [78] Detective Constable Greenwood said that a sampling of images identified by Detective Constable Caprarie as child pornography were "ImageDB files" stored in a cached database. This type of file is automatically generated after an image has been viewed. The fact that an image exists as an "ImageDB" file means it must have been loaded into viewing software and accessed.
- [79] Both Detective Constable Shook and Detective Constable Greenwood were asked whether it was possible the appellant could have accidentally downloaded the child pornography images to his hard drive. Both testified that it was highly unlikely. Detective Constable Greenwood testified that his forensic software was capable of identifying images hidden within video files and there was no indication that other images had been downloaded and unzipped along with the "Girls Gone Wild" files. He testified that it is possible to accidentally download content, but that could not have been the case here largely due to the sheer volume of material. He also testified that it was highly unlikely that the appellant would not have been aware of the material as it was interspersed among his business and personal files.

- [80] Detective Constable Shook also testified that it was "very, very unlikely" that the appellant could have downloaded the child pornography unknowingly. He testified that the volume of material on the computer would have taken "a lot of time and effort to collect." He also testified that it was "very, very, very highly unlikely" that the images could have been downloaded as a result of malware or a computer virus.
- [81] The judge resolved this factual issue against the appellant, concluding that:
- [104] I am satisfied beyond a reasonable doubt that Mr. Hexamer had knowledge of the presence of the material on his computer that falls into the category of child pornography and that he had accessed that material. I am not prepared to find that he had accessed each and every item on the computer, and I accept that, given the complication that D.C. Caprarie was not available to testify at this hearing and her report was introduced through the medium of D.C. Shook, there may be some scope for dispute as to the nature of every single image. Nevertheless, I am resolute in my conclusion that Mr. Hexamer had more than sufficient knowledge of the contents of the computer, that the contents included many images that are child pornography, and that he had meaningfully accessed a good number of images constituting child pornography.
- (d) Uncharged Conduct in Relation to H.B.
- [82] H.B. testified that he had Fetal Alcohol Spectrum Disorder which affected his memory. He recalled that he was in Grade 8 at the time of the first alleged offence but could not recall the date. The judge estimated that it was between October 1999 and mid-2000, when H.B. was 12 or 13 years old.
- [83] With respect to the first incident, H.B. testified that he ran away from home and was walking along a street at around midnight. A man, who identified himself as Dimitri, approached him in a vehicle and asked if he wanted a ride. When H.B. refused, the man offered him money. H.B. agreed to go with him in exchange for \$160. He got into the vehicle. The man then picked up a sex-trade worker. He drove them back to his mother's house, telling them to be quiet because she was sleeping, and took H.B. and the sex-trade worker into his bedroom. He and the sex-trade worker removed their clothing and began having sexual intercourse on the bed. H.B. said that at one point the man told him to get into the bed. He complied. One of the adults then touched him in the genital area. H.B. subsequently clarified that it was the man who touched him. The three of them then left together in the vehicle. The man dropped off the sex-trade worker, then H.B. He paid H.B. the \$160.
- [84] H.B. had a second encounter with the same man some time later. He was unable to state precisely how much time had passed, but at one point stated that the two incidents occurred within about six months of each other. He also stated that it happened within a matter of weeks before October 2000. On that occasion, H.B. said that the man approached him in a different vehicle and asked him again if he wanted a ride. H.B. initially refused, then agreed to get in the car. The man asked him if he "wanted to go pick up hookers with him." H.B. responded that it was "up to you". They picked up two sex-trade workers and drove back to

the same house. The man went into the bedroom with one of the sex-trade workers and told H.B. to go into another bedroom with the other. H.B. said that man told him, "Go do it", meaning that he should have intercourse with the sex-trade worker. H.B. and the sex-trade worker went into the other bedroom and had intercourse. It was H.B.'s first time having intercourse. After about four hours, they all left the house. The man dropped the sex-trade workers off, then brought H.B. to a school and dropped him off there. He gave him \$20.

- [85] H.B. also testified that before picking up the two sex-trade workers, Dimitri took him to a parking lot, opened H.B.'s pants, and touched and licked H.B.'s penis.
- [86] H.B. did not see Dimitri again. He testified, however, that before dropping him off at the end of their second encounter, the man asked him where he lived and how many siblings he had. He said the man threatened to kill him. H.B. gave him the information he wanted. Sometime later, H.B.'s sisters told him that a man named Dimitri came to their house and tried to lure them out on the pretext of taking them to youth group. H.B. said that he felt "very uncomfortable" and unsafe knowing that the man had been at his house.
- [87] H.B. identified the appellant in court as the man he knew as Dimitri.
- [88] The Crown also led evidence from a police witness, Constable Heather Brown. Constable Brown worked at the school H.B. attended and was on familiar terms with him and his family. When H.B. reported the incidents to a youth worker, Constable Brown was alerted. She met with H.B. to talk about the incidents. Constable Brown testified that she took H.B. for a ride in her police car and he pointed out the house where he said Dimitri brought him. Evidence was adduced that the appellant lived in that house at the relevant time.
- [89] The sentencing judge made the following factual findings with respect to H.B.'s evidence:
- [66] The issue with which this Court must deal is whether the evidence proves beyond a reasonable doubt the sexual assaults by Mr. Hexamer upon Mr. B.
- [67] My first observation would be to state that, for the most part, I was impressed by Mr. B. as a witness. He was serious and sincere. It was apparent that the events he described were very troubling for him.
- [69] My conclusion is that Mr. B. was essentially a truthful witness. At the same time, I must concede that I have certain reservations that impact upon the ultimate conclusions I take from his evidence.
- [70] With respect to the first incident, I am satisfied that there was an occasion where events took place generally as described by Mr. B.--that is, I am satisfied that Mr. Hexamer picked him up on the street and took him to the home where he lived with other members of his family, together with a sex trade worker. I am however left with some doubt as regards the specific allegation that, on that occasion, Mr. Hexamer sexually assaulted him by touching his genitals. I note that in the description of events he provided to Cst. Brown, there was no mention made of that having occurred. While I do not disbelieve his description of events, I

have sufficient reservation that it constitutes a reasonable doubt that must be resolved in Mr. Hexamer's favour.

- [71] As for the second incident, again, I am satisfied that the events occurred generally as described by Mr. B. As for the critical event, that is, his allegation that Mr. Hexamer touched his genital region while the two were in the automobile, I have no specific reason to disbelieve that. Nevertheless, given the concern I have with respect to the sexual assault in the first transaction, I have some lingering concern that the basis for my reservation there impacts this allegation as well.
- [72] I wish to make clear that I do not find Mr. B to be an untruthful witness, nor am I saying that his allegations are false. Nevertheless, for the reasons I have articulated, I decline to find that sexual assaults have been proven to the requisite high standard. I am satisfied beyond a reasonable doubt, though, that on two separate occasions, Mr. Hexamer picked Mr. B. up from the street and that he took him in his automobile to his home. I am satisfied that, in the first incident, there was a sex trade worker there who had been recruited at the instance of Mr. Hexamer, that Mr. B. was present, and that he was deliberately exposed to sexual conduct between Mr. Hexamer and the sex trade worker.
- [73] As for the second incident, again I am satisfied that Mr. Hexamer picked Mr. B. up, that he initiated a series of events whereby two sex trade workers were taken to Mr. Hexamer's house, and that sexual events took place there.
- [74] In each of these instances, Mr. Hexamer was the instigator of the events.
- [75] Notwithstanding that I have concluded no criminal conduct has been proven to the requisite standard, as I have indicated, I do find the transactions generally have been proven beyond a reasonable doubt. To my mind, the proven evidence is relevant to this hearing in that it is indicative of Mr. Hexamer's character and his proclivities, which are shown by the evidence to be strikingly at odds with accepted social values. The evidence an adult instigating activities with a child. In each instance, the tenor of events was explicitly sexual. In the first, Mr. B. was exposed to the sexual activities of two adults; in the second, Mr. Hexamer actively facilitated and encouraged Mr. B. to undertake a sexual interaction with the sex trade worker.
- [90] The judge did not consider either the appellant's possession of child pornography or his conduct in relation to H.B. as part of the pattern analysis. This evidence was restricted to the following uses: (1) the appellant's character (s. 757 of the Code expressly permits the reception of evidence respecting an offender's character on a dangerous offender application); and (2) to assess the appellant's contention that none of his behaviour underlying the offences to which he pleaded guilty was sexually motivated.
- (e) The Evidence of Dr. Jack

[91] Dr. Jack was qualified as an expert witness in the fields of forensic and clinical psychology, including with respect to the administration of psychological risk assessments and the treatability of high-risk offenders.

[92] In preparing her report, she interviewed the appellant and two individuals whom the appellant had identified as collateral contacts: his sister and Mr. Shamsian.

(i) Risk Assessment

[93] Dr. Jack prefaced her report by noting that she had little background information about the appellant which limited her conclusions and opinions.

[94] Dr. Jack noted that the appellant is "fully committed to conceptualizing his offences" as not being sexually motivated. He exhibited what she described as "a rigid adherence to his stance his offences are not sexual, indicating some of his offences represented an 'acting out' of his childhood trauma." She rejected the appellant's contention that his conduct was not sexually motivated:

I view Mr. Hexamer's pattern of sexual offending as a key risk factor. He is capable of sexual arousal to/interest in a young female child and female adolescents. Mr. Hexamer offended sexually against four victims; these offences spanned [14 years]. I do not accept his assertion the offences were not sexually motivated.

[95] Dr. Jack considered that the appellant was lacking in self-awareness, in denial about his sexual motivation for the offences and "not presently able to identify and discuss the factors that placed him at risk for sexual violence."

[96] Dr. Jack concluded that there was not enough information to definitively diagnose the appellant with pedophilia. She did, however, conclude that his history of sexual offending is consistent with the presence of sexually deviant interests. If the appellant targeted the victims specifically because of their ages, this would suggest a more stable underlying deviant sexual preference. She also noted that the appellant reoffended in 2007 and 2009 despite the existence of stabilizing factors, including positive family relationships, an intimate relationship and steady employment.

[97] Dr. Jack noted that the evidence of planning associated with the commission of the offences (the possession of a knife, the tactics used to surprise and engage the victims, and, on two occasions, the movement of victims to a forested area where a mat or mattress was located) suggested the presence of risk factors "including sexual fantasy, and a more enduring deviant (e.g., non-consenting individuals) sexual interest."

[98] Dr. Jack also noted that the appellant offended against both pre-pubescent and pubescent females. She expressed concern about the diversity and enduring nature of the appellant's offending behaviour and said that "[a] broader age range of victims combined with the victims being strangers is associated with a larger potential victim pool."

[99] Dr. Jack did not rule out the possibility that the appellant recovered memories of childhood sexual abuse but viewed his claim with "upmost caution", noting that emphasizing childhood sexual abuse permitted the appellant to deny sexual motivation for his offending behaviour. She concluded:

I do not view the [childhood sexual abuse] as sufficient to explain his sexual offending. Additionally, I do not view his explanations in this regard as plausible; specifically his assertion his sexual offences represent him reliving his own [childhood sexual abuse], and acting automatically without sexual motivation.

[100] With respect to the appellant's contention that he had no memory of the incidents, Dr. Jack said this:

Based on available information I do [not] accept Mr. Hexamer's assertion of complete amnesia for the sexual offences. In my opinion Mr. Hexamer's stance is self-protective (i.e., deflects responsibility because he reports he did not know he had offended), and likely helps maintain his support circle. Acknowledging he had awareness he offended would result in questions about why he did not seek help to avoid future offences, as well as how he managed to maintain a persona so contrary to his offences (i.e., a successful work life, and long-term intimate and family relationships). In my opinion the latter has implications for monitoring, supervision, and risk management.

[101] In her evidence, Dr. Jack agreed the appellant was firmly committed to a narrative in which he was a victim of childhood sexual abuse and of the legal system. She stated that this mindset would make it difficult for him to make progress in treatment. She also agreed that the appellant expressed very little remorse for or acknowledgment of the harm he had done to his victims, and mainly focused on harm to himself due to his arrest.

[102] I would add on this point that the appellant addressed the court before sentence was imposed and expressed remorse for his actions and the harm he caused. He apologized to the victims. He asked for their forgiveness. He explained that his actions were a reflection of unresolved childhood trauma. He expressed the view that long periods of incarceration often defeat the purpose of protecting society. He claimed, through a process of self-reflection while in prison, to have "deleted all that was including the viruses and reprogrammed my psyche with a foundation that will not malfunction or fail like it has in the past." He said to the court, "I am not at any risk to reoffend."

[103] Dr. Jack employed a number of risk assessment tools in evaluating the appellant. In doing so, Dr. Jack emphasized that she had limited data with which to work and relied largely on the appellant's self-reporting. She acknowledged that the lack of background information from collateral sources (the appellant had, for example, never been subject to any community supervision) would detract from the reliability of the actuarial tools she used. Dr. Jack said she was cautious about over-relying on the appellant's self-reports given his refusal to acknowledge any sexual motivation for the offences.

- [104] Dr. Jack did not score the Psychopathy Checklist Revised ("PCL-R") with respect to the appellant. She testified that accurate scoring of the PCL-R requires reliable collateral data, which was not available in the appellant's case. She was of the view that a PCL-R score might not be valid.
- [105] Dr. Jack completed the Static-99-R, an actuarial tool. The Static-99-R is composed of ten static (or unchangeable) variables that are strongly associated with sexual recidivism. Dr. Jack explained that the Static-99-R has two sets of recidivism rates: one for high-risk/high-needs sexual offenders and one for average sexual offenders. The tool does not assign a recidivism rate to an individual, but places an individual in a group associated with a particular recidivism rate. The individual's unique recidivism rate might be higher or lower than that of the group.
- [106] Dr. Jack noted that the high-risk/high-needs offender group included offenders referred for services at forensic psychiatric facilities, including "offenders referred to as Mentally Disordered Sex Offenders, Sexually Violent Predators/Sexually Dangerous Persons, [or] Not Guilty by Reason of Insanity", as well as those referred for treatment of a mental disorder (sexual or otherwise), those referred to intensive treatment programs reserved for the highest-risk offenders, and "[o]ffenders identified as high risk through a quasi-judicial or administrative process examining a range of risk relevant characteristics such as sentence extensions for dangerousness". Dr. Jack used the recidivism rate associated with the high-risk/high-needs offender group "given Mr. Hexamer is before the Courts for a Dangerous Offender Hearing."
- [107] The appellant received a score of 2 on the Static-99-R. This score placed him in the low-moderate risk category. On average, offenders in the high-risk/high-needs group with this score have been found to sexually reoffend at a rate of about 12% over five years and 19.7% over ten years. Dr. Jack opined, however, that the appellant's score did not fully represent his risk as the tool did not permit her to factor in the number of prior offences for which he had not previously been convicted, the number of victims, or the persistence of his offending over 14 years.
- [108] Dr. Jack also completed the Stable-2007, a risk assessment tool which is composed of 13 dynamic (or changeable) risk factors associated with sexual offending. The appellant's score fell within the range associated with a "[m]oderate level of stable dynamic needs." Again, however, Dr. Jack cautioned that she did not have high-quality information with which to score the tool, and the results were unlikely to fully capture the appellant's risk.
- [109] Dr. Jack used the appellant's scores on the Stable-2007 and the Static-99-R to place him in the low-moderate priority category for supervision and intervention in comparison with other sexual offenders.
- [110] Finally, Dr. Jack completed the Risk for Sexual Violence Protocol ("RSVP"), a set of structured professional guidelines for use in the practice of sexual violence risk assessment. The RSVP is composed of 22 risk factors grouped under the headings Sexual

Violence History, Psychological Adjustment, Mental Disorder, Social Adjustment, and Manageability. Dr. Jack explained that the RSVP allowed her to emphasize the risk factors she considered most significant, which included: the appellant's sexual violence history, particularly the persistent nature of his offending; the diversity of victims, particularly with respect to their ages, which created a wider victim pool; and the appellant's minimizations, denial of sexual motivation, and lack of self-awareness.

- [111] In conclusion, Dr. Jack opined that, based on all the available information, the appellant posed a moderate risk to reoffend sexually against a female stranger or acquaintance, relative to other men convicted of sexual offences. She again qualified her opinion by emphasizing that it was based on known risk factors, for which she relied to a great extent on the appellant's self-reporting.
- [112] Dr. Jack concluded that the appellant required substantial levels of intervention to address his risk for sexual offending. She noted four factors that were significant to this conclusion: (1) the lack of complete data regarding the appellant's dynamic risk factors, which would make it more difficult to supervise him; (2) the lack of overt indicia of the risk he posed at the time of committing the offences, which allowed his risk to go undetected by those close to him; (3) the recent escalation in the frequency of his offences and change in victim type; and (4) the nature of the risk he posed (the use of physical coercion against vulnerable stranger victims).
- [113] Dr. Jack concluded that should the appellant's risk escalate in the future, the most likely risk scenario would involve the sexual assault of a pre-pubescent or adolescent female stranger. The sexual assault might include forced fellatio and sexual touching and threats. A weapon might be used to overcome the victim's resistance. She noted that there might be more than one victim and that the presence of young males was unlikely to be a deterrent. She also noted that this scenario would result in significant physical and psychological harm to the victim(s).
- [114] When Dr. Jack completed her report, she did not have the benefit of the judge's factual findings in relation to the appellant's possession of child pornography, nor did she have any information about the appellant's conduct in relation to H.B. The appellant told her (falsely) that the forensic report indicated that the child pornography on his computer was not viewed.
- [115] The Crown put a number of hypotheticals to Dr. Jack regarding the appellant's use of pornography and the incidents involving H.B.

- [116] Dr. Jack agreed that her risk assessment would increase if the appellant was aware, at the time of his arrest, that his computer contained thousands of images of child pornography, child erotica and child nudity. If he had been actively viewing those images, particularly the child pornography, it would suggest a diagnosis of paraphilia. Paraphilia is a mental disorder featuring recurrent, intense, sexually arousing fantasies, urges, or behaviours. Pedophilia is a type of paraphilia focused on pre-pubescent children.
- [117] Dr. Jack stated that the appellant's assessed risk would also be elevated if the appellant was found to have picked up H.B., taken him home along with a sex-trade worker, and had intercourse with the sex-trade worker in H.B.'s presence. Such behaviour would reflect the appellant's capacity to engage a greater diversity of victims.
- [118] Dr. Jack testified that the appellant's risk would increase even further if the appellant was found to have picked up H.B. on a second occasion and encouraged him to have intercourse with a sex-trade worker. Such behaviour would indicate "a whole different realm of sexual interest and deviancy than [Dr. Jack] had considered." Dr. Jack said that it "would be very troubling to [her] if he had chosen the [same] boy twice". The following exchange took place:

Q So the fact that he has gone after the same victim, this young boy, twice, would increase his risk just on the basis of that fact alone? Possibly?

A Again it's a different scenario. So, the more victim scenarios an offender has, the more opportunity there is for offending.

Q Okay.

A And so I would be concerned that we might be getting into some kind of grooming or planning if you're choosing the same victim again, versus the stranger victims which, as we talked about, are one probably opportunistic offence. So it's just like a broader realm of -- of sexual interest and sexual behaviour, which is of concern, of course.

(ii) Treatability

- [119] Two significant themes emerged in Dr. Jack's evidence regarding the appellant's treatability. One was his denial that his offences were sexually motivated. The other was his claim that he had little memory of the offences and no memory of them prior to his post-arrest meeting with counsel.
- [120] Dr. Jack had concerns about the appellant's ability to benefit from correctional programming due to his reported amnesia regarding the offences and his unwillingness to consider that he had a sexual motivation for the offences. She acknowledged the appellant's stated motivation to complete programs but said that his present stance would make treatment intervention more challenging and that he would need to acknowledge the sexual motivation behind his offending behaviour, move away from focusing on his own childhood sexual abuse, and work to understand his offence cycle.

- [121] Dr. Jack opined that the appellant would be able to understand and apply the material taught in the correctional program. Her concern was the extent to which he would be able to identify and discuss the sexual motivation for his offences. She viewed the appellant's complete understanding of his dynamic risk factors as being the key to his self-management and to the community-based management of the risk he poses.
- [122] Dr. Jack noted the appellant had no experience with community supervision, having never before been convicted or sentenced for a criminal offence. She found that the appellant was motivated to engage with professionals, did not exhibit negative attitudes towards supervision or monitoring, and was likely to follow rules such as a curfew or attending appointments. Dr. Jack cautioned again that "the central issue" was whether the appellant would tell others should his risk for sexual offending increase. To do so he would have to understand his dynamic risk factors and acknowledge the sexual motivation for his offences. She also underscored the lack of "reliable and overt indicators of increased risk" and that the appellant successfully concealed his risk while actively offending. However, she opined that through correctional programming, overt risk factors might be identified, and the appellant might become more open in discussing his internal risk factors.
- [123] Dr. Jack concluded that "[i]t is difficult to determine how effective monitoring and community supervision will be for Mr. Hexamer given he is early in the process of understanding his sexual offending, and he has not yet had an opportunity to complete correctional programming."

IV. Reasons for Sentence

1. Judicial Consideration of s. 753(1) at the Time of Sentencing

- [124] The judge began by setting out the legislative scheme. Citing *R. v. Johnson*, 2003 SCC 46 at para. 23, he noted that a dangerous offender hearing forms part of the sentencing process and, as such, must be guided by the fundamental purpose and principles of sentencing set out in ss. 718-718.2 of the Code.
- [125] When the Reasons for Sentence were released, s. 753(1) had been found to be overbroad and thus in violation of s. 7 of the Charter in *R. v. Boutilier*, 2014 BCSC 2187 [Boutilier 2014].
- [126] The judge acknowledged that the extent to which an offender's treatment prospects should be factored in at the designation stage was "somewhat uncertain" following the 2008 amendments to the Code and some of the authorities that considered those amendments: at para. 15. Despite this uncertainty, the sentencing judge initially said that he considered himself bound by Boutilier 2014: at para. 26. Later in his reasons, the judge noted that the effect of the judgment had been suspended for one year and that it was not binding when Reasons for Sentence were given in the case at bar: at para. 213.
- [127] In Boutilier 2014, the judge held that s. 753(1) precluded consideration of an offender's treatment prospects at the designation stage of a dangerous offender proceeding. He found that the inability to consider treatment prospects resulted in some offenders being

permanently labelled as dangerous despite the existence of evidence that the offender, with treatment, would pose no risk or a manageable risk to the public. He declared s. 753(1) invalid but suspended the declaration of invalidity for one year. He dismissed a constitutional challenge to s. 753(4.1).

- [128] The Crown appealed the declaration of invalidity in relation to s. 753(1). Mr. Boutilier appealed the judge's decision upholding the constitutional validity of s. 753(4.1) as well as his dangerous offender designation and indeterminate sentence.
- [129] When the Reasons for Sentence were released in the case at bar in February 2016, this Court had not yet heard the appeals. In reasons for judgment indexed as 2016 BCCA 235 [Boutilier 2016], this Court held the sentencing judge erred in finding s. 753(1) to be unconstitutional due to overbreadth. This Court concluded that treatment prospects have a limited role to play at the designation stage, but that full consideration of treatment prospects at the sentencing stage precluded the imposition of indeterminate sentences on offenders who may be manageable in the community in the future. This Court upheld the sentencing judge's decision regarding s. 753(4.1) and Mr. Boutilier's sentence. Mr. Boutilier appealed to the Supreme Court of Canada.
- [130] In reasons for judgment indexed as 2017 SCC 64, the Supreme Court dismissed Mr. Boutilier's appeal. Most importantly, for present purposes, the Supreme Court found that s. 753(1) was not overbroad because it does require the consideration of treatment prospects at the designation stage.
- [131] Writing for the majority, Justice Côté affirmed that, like the 1977 regime discussed in *R. v. Lyons*, [1987] 2 S.C.R. 309 at 323, 339, the 2008 amendments target "a small group of persistent criminals with a propensity for committing violent crimes against the person": Boutilier SCC at paras. 3, 75. The careful tailoring of the legislation to limit its reach was held to be fundamental to its constitutionality: see *Lyons* at 339; Boutilier SCC at paras. 28, 34.
- [132] Second, Boutilier SCC holds that an offender cannot be designated a dangerous offender unless the sentencing judge concludes that he or she is a future "threat" having conducted a prospective assessment of risk: at para. 23. Accordingly, sentencing judges must consider an offender's treatment prospects at the designation stage. Before designating a person 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 substantially or pathologically intractable: Boutilier SCC at para. 27. Although the focus of the Court's attention in Boutilier SCC was on s. 753(1)(a), not s. 753(1)(b), as was noted in *R. v. Skookum*, 2018 YKCA 2 at para. 57, the language of s. 753(1)(b) and Côté J.'s analysis leave little room for doubt that the need to consider an offender's treatment prospects also applies on dangerous offender applications premised on s. 753(1)(b): see paras. 16, 36, 38.

[133] The appellant conceded that the predicate offences relied upon by the Crown -- the unlawful confinement of C.M. and B.M. and the sexual assault of J.M. with a weapon -- were serious personal injury offences. The judge identified the remaining issues to be decided as: (1) whether the evidence established that the appellant was a dangerous offender pursuant to any of the grounds set out in s. 753(1)(a)(i), (ii), (iii) or (b); and (2) if so, whether the evidence established that there was a reasonable expectation that a lesser measure than an indeterminate sentence would adequately protect the public from the risk he posed.

2. Findings at the Designation Stage

[134] The judge began his analysis by reviewing the requirements of each of s. 753(1)(a)(i), (ii), (iii) and (b) in what appear to me to be unobjectionable terms. I do not understand the appellant to take issue with the judge's articulation of the legislative framework and governing law. Rather, he takes issue with the manner in which the judge applied those provisions to the evidence and circumstances of this case.

[135] The judge noted that s. 753(1)(a)(i) required the Crown to prove (1) a pattern of repetitive behaviour of which the predicate offences formed a part, and (2) that the pattern contained two elements: a failure to restrain the repetitive behaviour in the past and a likelihood of death, injury, or severe psychological damage through the offender's failure to restrain the behaviour in the future (at para. 190). Citing *R. v. Dow*, 1999 BCCA 177 at paras. 24-26, leave to appeal ref'd [1999] S.C.C.A. No. 302, the judge concluded that the behavioural pattern need not be precisely the same; what is required is that the "conduct contains sufficient of the same elements of dangerousness to be able to predict that the offender will likely offend in a similar fashion in the future": at para. 191. The judge's approach to this issue appears to me to be consistent with *R. v. Pike*, 2010 BCCA 401. The judge noted that two offences are sufficient to establish a pattern, but the fewer the offences, the more similar they must be. He recognized that he must be satisfied beyond a reasonable doubt that it is likely the appellant will inflict future harm: at para. 194.

[136] The judge noted that s. 753(1)(a)(ii) required the Crown to prove (1) a pattern of persistent aggressive behaviour of which the predicate offences formed a part, (2) that the pattern showed a substantial degree of indifference by the offender respecting the reasonably foreseeable consequences of his behaviour, and (3) a likelihood that the persistent aggressive behaviour would continue in the future. He stated that indifference is to be measured broadly by examining the offender's attitude before, during, and after the events in question: at paras. 195-96.

[137] The judge observed that s. 753(1)(a)(iii) did not rely on a pattern analysis to predict future behaviour. Rather it was concerned with whether the behaviour demonstrated in the predicate offences was so brutal that it compelled, on its own, a conclusion that the offender was unlikely to be inhibited by normal standards of behavioural restraint in the future. The judge concluded that the requirement of "brutality" may be satisfied by conduct

which is "coarse, savage and cruel and which is capable of inflicting severe psychological damage on the victim": R. v. Langevin (1984), 45 O.R. (2d) 705 at 718 (C.A.).

[138] The judge said that s. 753(1)(b) required the Crown to prove (a) a demonstrated failure to control sexual impulses, and (b) a likelihood of causing injury, pain, or other evil to persons through failure to control sexual impulses in the future.

[139] The judge noted that there was "overlap among and between" s. 753(1)(a)(i), (ii), (iii) and (b). He summarized the relevant criteria at para. 203:

- A pattern of repetitive behaviour.
- Failure to restrain the repetitive behaviour in the past.
- Likelihood of death, injury or severe psychological damage through a failure to restrain the behaviour in the future.
- The pattern of behaviour is persistent and aggressive.
- The offender has displayed a substantial degree of indifference with respect to the reasonably foreseeable consequences of the behaviour.
- A likelihood that the behaviour will continue.
- The behaviour of the offender 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 restraint.
- The offender has shown a failure to control his sexual impulses and there is a likelihood of causing injury, pain, or other evil to others through a failure in the future to control his sexual impulses.

[140] I understand the appellant to argue that the judge's summary of the criteria set out in s. 753(1) demonstrates that he conflated the elements of the four different ways in which an offender may be designated a dangerous offender.

[141] The judge said he had considered the appellant's conduct underlying the offences to which he had pleaded guilty as against these criteria. He concluded that a pattern of repetitive behaviour was established. Although the three incidents were not close to each other in time, they were repetitive. The pattern contained the following similar elements: the victims were children, strangers to the appellant, who were walking on the street in broad daylight; the appellant approached the victim or victims, made an innocuous comment, then grabbed them and took them to a private or secluded area; all the sexual assaults were perpetrated against females; the appellant's demeanour was calm; the appellant had or represented that he had a knife in all of the incidents and made threats to kill or hurt the victim(s); the appellant was unresponsive to the victims' pleas to be released; the nature of the sexual assaults was similar - in all of the incidents the appellant forced his victim(s) to perform fellatio and ejaculated into their mouths; the appellant then ran away and, in two incidents, instructed the victims to wait a period of time before leaving; and the appellant

was unmasked and did not use a condom in any of the incidents. Although not specifically addressed by the judge, I would add that all of the offences demonstrate a degree of planning, a point noted by Dr. Jack.

- [142] The judge concluded that the appellant's behaviour was persistent and aggressive and reflected a substantial degree of indifference. He was satisfied that each of the victims sustained severe psychological damage which was attributable to the appellant's failure to restrain his behaviour.
- [143] He also found that the behaviour in each incident was brutal and reflected the appellant's failure to control his sexual impulses.
- [144] He found it was more likely than not that the appellant would engage in similar behaviour in the future.
- [145] He concluded that each of the criteria in s. 753(1)(a)(i), (ii), (iii) and (b) were met.
- [146] After coming to this conclusion, but before making a dangerous offender designation in relation to the appellant, and before turning to the sentencing phase of the application, the judge turned to consider the appellant's treatment prospects.
- [147] He began his analysis of the appellant's treatment prospects in the following way:
- [214] As I will explain, in the matter at bar, it is my conclusion that the factor of treatability is of no practical import.
- [148] The appellant submits that it is clear from this statement that the sentencing judge did not consider his treatment prospects at the designation stage, contrary to Boutilier SCC, and found him to be a dangerous offender without concluding either that he poses a high likelihood of harmful recidivism or that his conduct is intractable.
- [149] In addressing whether the appellant should be designated a dangerous offender, the judge acknowledged that he did not "fit at all with the usual stereotype of the dangerous sexual offender" as he had no criminal record and had apparently functioned well in society up to the time of his arrest, including being involved in long-term, marriage-like intimate relationships: at paras. 215-222. The offences committed by the appellant stood in stark contrast to his "apparent persona and the seeming normalcy and stability of his life": at para. 225. The judge concluded that the appellant was "a man with other facets to his character--that there is a dark, dangerous and duplicitous nature to him": at para. 226. The judge noted that virtually nothing is known about why these offences were committed and that they did not appear to be the product of any identifiable triggering event.
- [150] The judge rejected the appellant's explanation for his offending in its entirety, including that the offences were motivated by his childhood sexual abuse, that the appellant was acting as an automaton and could not recall the offences until after his arrest and that the offences were not sexually motivated: at paras. 233-38.

- [151] The judge found it "gravely worrying" that the appellant refused to "meaningfully recognize the true nature of his offending and to accept real responsibility for it, or to genuinely understand the need for effective treatment": at para. 240. He noted in particular the appellant's insistence that the offences were not sexually motivated, that he had pursued "misguided" counselling focussed on his victim narrative, that he insisted he had limited recall of the offences, and that in the course of the proceedings he had minimized or disputed responsibility for the offences notwithstanding the existence of an Agreed Statement of Facts (the judge did make it clear that the appellant's failure to take responsibility would not be considered an aggravating factor). Despite the appellant's in-court apology to the victims and expression of remorse, the judge was "not persuaded the real hard part of that process, understanding and addressing the real causes of his offending [or] taking responsibility, has been embraced by Mr. Hexamer": at para. 240(5). The judge found that even if the appellant's explanation for the offences were to be accepted, there was no reason to have any confidence that similar offences would not be committed in the future without any warning or ability to predict or prevent them: at para. 251(a).
- [152] The judge concluded his analysis of the issues that arose at the designation stage with the following observations:
- [243] I have also taken into account that Mr. Hexamer is before this Court with no prior record. His counsel urges this Court to find he is "a low-risk, first-time offender".
- [244] While it is true that he has no prior record of other offences, the enormity of these offences--those from 1995, from 2007, and from 2009--and the fact he avoided detection for all of them until 2010, takes the force from that argument quite emphatically. While there are but three offences, the relatively small number is offset by the high level of harm, intrusion, and risk that the conduct entailed. These were enormously serious offences: young and vulnerable children were taken in broad daylight, by physical force or threat of harm with a weapon, from the supposed safety of their community--they were sexually assaulted and terrorized.
- [245] As for the matter of low risk, I simply cannot accept that to be a fair characterization of Mr. Hexamer. It is true that the assessment performed by Dr. Jack, using standard tools and measurements, led to a risk evaluation in the moderate range. However, my own view is that the ability of the test procedures is not without limits. In this case, the assessment was conducted with a modest amount of hard information. To some extent, that paucity of reliable history and information impacts the effectiveness of the process. I note also that Dr. Jack's assessment did not take into account the HB Matter or the possession of the computer's contents.

- [246] Ultimately, in a matter such as this, it is for the trier of fact to reach his or her own conclusion, acting fairly and reasonably and taking into account all the available evidence. Here, for the reasons I have endeavoured to explain, I am convinced that Mr. Hexamer represents a very significant risk.
- [247] To the extent treatability may be a factor which weighs into the analysis, as matters stand today, I see very little reason to be optimistic that Mr. Hexamer will be meaningfully engaged in treatment in any way that would impact upon the issue of whether he should be designated.
- [252] Mr. Hexamer represents the same danger today that he did on the day in April 1995 that he assaulted AK, that he represented on August 30, 2007, when he assaulted CR and KC and on July 2, 2009, the day of the assault upon the three children
- [253] On that analysis, when the criteria of the Criminal Code dangerous offender provisions are applied, the outcome is the same.
- [254] The time may come--I truly hope it does--that Mr. Hexamer will be able to meaningfully engage in treatment that will address the causes of his offending. It is clear that requires him to be honest about his issues.
- [255] My sense is that when and if that occurs, Mr. Hexamer might well be a candidate for successful treatment leading to an eventual reintegration into the community, in a way that the public will not be at risk.
- [256] However, circumstances are by no means at that stage now, and I would not be prepared to guess when that might be, if ever.
- [257] Accordingly, the notion of treatability in this case does not bear upon the Court's conclusion as to designation.
- [258] I find the Crown has proven that Mr. Hexamer is a dangerous offender.

[Emphasis added.]

3. Findings at the Sentencing Stage

- [153] In determining whether to impose something less than an indeterminate sentence, the judge recognized that the issue was whether the nature and severity of the risk the appellant posed could be sufficiently contained within the context of a determinate sentence or a determinate sentence and long-term supervision order. He accepted that there must be evidence that the offender can be treated within a definite period of time and that the evidence of treatability must amount to something more than a mere expression of hope.
- [154] The judge was unable to identify a basis to reasonably expect the appellant was on track to address his risk factors through treatment: at para. 269. He also found "considerable reason to doubt that Mr. Hexamer could be supervised in the community in a way that would

provide an acceptable measure of confidence that the public would not be at substantial risk": at para. 270. That conclusion was based on the appellant's denial of any sexual motivation for his offences, his lack of a recognizable crime cycle, and his ability to mask his behaviour for a lengthy period of time while apparently leading a normal life.

[155] The judge concluded that the appellant would "require a highly intensive level of treatment to address the issues that drive his offending and that effective supervision in the community will be quite challenging": at para. 272. Release, even on stringent conditions, without treatment would be "markedly dangerous for the public": at para. 274. There was no evidence of treatability that was more than an expression of hope and no evidence the appellant could be treated within a definite period of time.

[156] In the result, the judge was satisfied that no measure less than an indeterminate sentence would adequately protect the public from the risk the appellant posed: at para. 275.

V. The Grounds of Appeal

1. Standard of Review

[157] In *R. v. Malakpour*, 2018 BCCA 254 the standard of review applicable on appeals of this kind was restated:

[46] Section 759(1) of the Criminal Code permits an offender who is found to be a dangerous offender to appeal "on any ground of law or fact or mixed law and fact". This right of appeal applies to both the designation and the sentence: *R. v. Bragg*, 2015 BCCA 498 at para. 21.

[47] Appellate review in this context is concerned with legal errors and whether the dangerous offender designation was reasonable: *R. v. Currie*, [1997] 2 S.C.R. 260 at para. 33; *R. v. Sipos*, 2014 SCC 47 at para. 23; *Boutilier* at para. 85. Appellate review of a dangerous offender designation is somewhat more robust than "regular" appellate review of a sentence, but the appellate court must still give deference to the sentencing judge's findings of fact and credibility. Thus, the standard of review for errors of law is correctness and for errors of fact, reasonableness: *Sipos* at para. 26; *Boutilier* at para. 81; *Bragg* at para. 22; *R. v. Walsh*, 2017 BCCA 195 at para. 23.

2. Overview and Summary Determination of Specific Grounds of Appeal

[158] In his factum, the appellant framed his grounds of appeal as follows:

(Designation)

A. The sentencing judge erred in failing to acknowledge that the purported "consent" to participate in s. 752.1 psychological assessments was not informed consent and was given by counsel acting independently, against instructions; and further erred in advancing the dangerous offender proceedings of his own initiative without a formal application by the prosecutor as required by s. 752.1(1), and s. 753(1).

B. The sentencing judge erred in interpreting the absence of evidence as evidence that the appellant is a dangerous offender, contrary to the requirement that the application be based on evidence beyond a reasonable doubt.

C. The sentencing judge erred upon grounds involving errors of law, mixed law and fact, and fact alone in designating the appellant a dangerous offender under sections 753(1) (a) (i), (ii) and (iii) and (b), without principled analysis of the applicability of each subparagraph, even though the appellant has no prior criminal record.

D. The judge erred in treating the 1995 and 2007 offences as the second part of the pattern requirement of section 753(1)(a)(i) and (ii), and by considering the earlier offences as "prior" offences for the purposes of sentencing on the 2009 offence.

(Indeterminate Sentence)

E. In all the circumstances, an indeterminate sentence for a first conviction is demonstrably unfit.

[Emphasis in original.]

[159] Under several of these grounds of appeal the appellant raised a large number of procedural and substantive sub-issues. Some were raised for the first time on appeal. Some were advanced for the first time in the appellant's reply factum. Some were abandoned in oral argument.

[160] We did not call on the Crown to respond to some of the appellant's grounds of appeal. I will deal with these grounds first in a more summary fashion.

[161] The appellant's allegations that: (1) he did not know the consequences of resiling from the plea agreement and joint submission; (2) the Crown exploited defence counsel's confusion about what a s. 752.1 assessment was; and (3) his counsel consented to the making of an order under s. 752.1 contrary to his instructions, were all dealt with on the appeal from conviction. As no leave application was brought from the decision of this Court, these issues have been conclusively resolved against the appellant. They cannot be recycled for litigation on the appeal from sentence.

[162] The appellant's contention that the s. 752.1 application was initiated and driven by the sentencing judge, who "took over the reins" from the Crown and "enthusiastically pressed the Crown" to advance the application is unsupported by anything in the record. I will return to this issue at the conclusion of these reasons.

[163] The appellant's contention, raised for the first time on appeal, that the Crown never made an application for an assessment remand order under s. 752.1 is incorrect. The Crown made an oral application under s. 752.1. By prior agreement, the appellant, through his counsel, consented to the application. There is nothing in the language of s. 752.1 that requires such an application to be made in writing, although it would, in my view, be preferable in the vast majority of cases for the Crown to make the application in writing.

Further, the appellant was unable to point to any authority imposing such a requirement.

- [164] There is no merit in the appellant's contention that the judge failed to provide adequate reasons for making the assessment remand order. As I have noted, the appellant consented to the application. In my view, the judge was not required to give reasons in support of this uncontested order, particularly in a case where the offences are so heinous and the behaviour so persistent that the presence of reasonable grounds to believe that the appellant "might" be found to be a dangerous offender or a long-term offender -- the fairly minimal test s. 752.1 establishes -- was obvious to all of the participants.
- [165] The appellant's argument that the judge's order under s. 752.1 was never reduced to writing is simply wrong. When the order remanding the appellant for assessment under s. 752.1 was produced at the hearing of the appeal, the ground was abandoned.
- [166] The appellant's argument that the images on his computer do not meet the definition of "child pornography" was advanced for the first time on appeal. It was an agreed fact on sentencing that child pornography was found on the appellant's computer at the time of his arrest. The issues on the dangerous offender hearing were whether the appellant knew that child pornography had been downloaded onto his computer and whether he viewed these images. The appellant cannot resile on appeal from a fact he admitted below. In any event, there was abundant evidence before the sentencing judge that thousands of images found on the appellant's computer constituted child pornography within the meaning of s. 163.1 of the Code.
- [167] The appellant's suggestion that the judge erred by relying on the evidence of H.B. in conducting the pattern analysis is contrary to what the judge actually did with that evidence. It was not used to determine whether the appellant's conduct displayed a pattern of repetitive behaviour or a pattern of persistent aggressive behaviour. In light of the judge's findings, it could not properly be used for that purpose. The judge used this evidence to illuminate the appellant's character and to evaluate the appellant's contention that he was not sexually motivated to commit the offences. In my view, the judge limited his use of this evidence to permissible purposes.
- [168] The appellant sought to rely on *R. v. Currie* (1984), 12 C.C.C. (3d) 28 (Ont. C.A.) in support of an argument that the Crown failed to give proper notice of the application pursuant to s. 754(1)(b). This issue was raised for the first time on appeal and only in the appellant's reply factum. In the court below, the appellant conceded that proper notice had been given and that the requirements of s. 754(1)(b) had been met. When this was brought to the attention of the appellant's counsel in oral argument, the ground of appeal was abandoned.
- [169] The appellant argued that the judge dismissed the risk assessment evidence of Dr. Jack and relied on his own "biased" and "predetermined" view of the risk he poses to the community. He also asserted that Dr. Jack "fudged" the data, "beef[ed] up" the test results, "arbitrarily elevat[ed]" and "artificially inflated" the appellant's scores to move him from a low-moderate to moderate range for risk of sexual re-offence. We did not find it necessary

to hear from the Crown on these issues. To be clear, there is no support in the record for any of these contentions. Again, I will return to this issue at the conclusion of these reasons.

[170] The appellant argued that the "Coke rule" (derived from the writing of 17th century lawyer Sir Edward Coke, found for example in Coke's Institutes of the Laws of England, vol. 2 (London: W. Clarke & Sons, 1817) at 468) should have precluded the initiation of dangerous offender proceedings against the appellant, a first-time offender. Once again, the issue appears to have been raised for the first time on appeal.

[171] The Coke rule is a common law rule applicable to sentencing proceedings unless ousted by a clear statutory provision or by necessary implication: *R. v. Skolnick*, [1982] 2 S.C.R. 47 at 58. The rule is most often engaged when the Crown seeks the imposition of a harsher penalty for a subsequent offence. The rule was summarized by Chief Justice Laskin in *Skolnick* at 58-59:

The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be.

[172] The rationale behind the Coke rule rests in the expectation that the conviction and penalty for the initial offence, and the peril of a more severe penalty for a subsequent offence, should be present in the mind of the offender and guide his future conduct: *R. v. Cheetham* (1980), 53 C.C.C. (2d) 109 at 114 (Ont. C.A.) per Justice Blair, for the majority.

[173] The Coke rule was most recently discussed by this Court in *R. v. Pete*, 2019 BCCA 244. The Court found that the sentencing judge erred in principle by failing to treat as a first offender a young Indigenous man who, after the date of the offence for which he was being sentenced but before the trial, had been arrested, convicted of and sentenced for other offences. The Court described the Coke rule as a general principle which recognizes that a first offender bears less moral culpability than someone who has been convicted and sentenced for other offences at the time of the commission of the offence: at para. 40. It is important to note, however, that *Pete* arose in the context of an ordinary sentencing proceeding, which does not engage the same kind of detailed statutory scheme that governs dangerous offender proceedings. There was no question in that case of the rule being ousted by statutory language or necessary implication.

[174] In my view, the Coke rule has no application in dangerous offender proceedings. It has been displaced by the comprehensive statutory scheme set out in Part XXIV of the Code. I know of no case in which the Coke rule was applied to prevent the Crown from instituting dangerous offender proceedings in a case where the offender had not previously been convicted of a criminal offence. I note that the appellant was unable to bring to our attention any authority in support of his contention that the rule applies to dangerous offender proceedings. As the Crown points out, importing the rule to this context would

preclude the institution of dangerous offender proceedings for an offender who, after decades of violent behaviour, is finally apprehended and convicted of a serious personal injury offence. It would also frustrate achievement of the public protection goals underlying the legislative regime.

- [175] The position of the Crown on this issue finds judicial support in *R. v. Young (G.)* (1998), 159 Nfld. & P.E.I.R 136 (Nfld. C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 122. In that case, the accused was convicted of 15 offences committed within a four-and-a-half year period against seven women. The judge refused to designate the accused a dangerous offender, finding that the Crown could not rely on a pattern evidenced by the predicate offences in circumstances where convictions had not previously been entered. The Court of Appeal allowed the appeal for the following reasons:
- [47] [N]either of those sub-paragraphs [s. 753(1)(a)(i) and (ii)] requires behavioural patterns to be detected or subjected to convictions prior to the predicate offence. This was recognized in *R. v. Crosby* (1983), 1 C.C.C. (3d) 233 (Ont. C.A.) where the Crown was held to have properly invoked the dangerous offender legislation against an individual with no prior convictions who had been found guilty in a single trial of some twenty-five serious arson-related offences. It was also recognized in *R. v. Yanoshewski* (1996), 104 C.C.C. (3d) 512 (Sask. C.A.) where the absence of a criminal record was not viewed as a bar to confirming an indeterminate sentence on a dangerous offender for serious sexual offences.
- [48] The outcomes in both of those cases bespeaks the logic of not allowing individuals immunity from the operation of the dangerous offender provisions of the Code where offenders, who had succeeded in escaping the consequences of their criminal actions, are subsequently brought to justice and are convicted on a multi-count indictment at the trial. A patent anomaly would result if a lack of detection of a series of criminal acts threatening the safety, well-being and lives of their victims prevented identification of patterns of behavioural conduct upon which a finding of dangerousness could be founded. It would mean, before any finding of dangerousness under ss. 753(a)(i) and 753(a)(ii) could be made, that one more opportunity would have to be given to offenders such as the arsonist in *Crosby* to set fire to yet another occupied apartment, or as the sexual offender in *Yanoshewski* to add one more rape or deviant act to his path of undetected violence. Such a result must be viewed as the antithesis of the Code's dominant purpose of protection of the public. It is also inconsonant with the plain meaning of the language of the legislation which makes a single serious personal injury "offence" an essential triggering event to invoking either of ss. 753(a)(i) or 753(a)(ii).
- [49] In *R. v. Newman* (1994), 115 Nfld. & P.E.I.R 197 a majority of this court described that triggering event, or predicate offence, as the "last straw in a series of dangerous violence". There is nothing to preclude the legislation being interpreted as allowing that "last straw", or "serious personal injury offence", invoking consideration of a dangerous offender designation, as the last in a series of acts detected in the course of one investigation, all of which resulted in criminal convictions pronounced in the same trial. Therefore, the correct

approach in the circumstances at bar would have been to treat Mr. Young's last criminal act of unlawful assault with a weapon which qualifies as a "serious personal injury offence", as the predicate offence. Under a proper construction of s. 753 the requisite behavioural pattern is established by the nine separate incidents, involving the fifteen offences, of which the predicate conviction formed a part.

[176] I accept that the absence of a prior conviction and the fact that the offender has not previously been treated may be highly relevant at both the designation and sentencing stages. I would, however, reject the appellant's unsupported assertion that the Coke rule applies to prevent the Crown from initiating a dangerous offender proceeding in the circumstances that exist in this case.

[177] I will turn next to consider the issues the Crown was called on to address. For clarity, I have reframed these grounds of appeal in the subheadings that appear below.

3. Remaining Grounds of Appeal

(a) Did the Judge Err in Principle by Improperly Merging the Criteria in s. 753(1)(a) and (b)?

[178] The appellant's submission on this point rests entirely on the manner in which the judge summarized the criteria under s. 753(1) as set out in paragraph 139, herein.

[179] The appellant's submission ignores the fact that before summarizing the dangerous offender criteria, the judge set out in painstaking detail the four distinct ways in which an offender may be designated "dangerous". I note that the appellant takes no issue with the judge's separate articulation of the criteria set out in s. 753(1)(a) and (b). The appellant's submission also ignores the fact that the judge made specific and distinct findings that the appellant met each of the criteria for designation as a dangerous offender: at paras. 204-209. In summing up, the judge said, "I am satisfied that all of the criteria and the requirements of the four provisions are met": at para. 210. I see no merit in this ground of appeal.

(b) Did the Judge Err in His Application of the Criteria Under s. 753(1)?

[180] The appellant submits that the sentencing judge erred in his application of certain of the criteria set out in s. 753(1). I understand the appellant to assert that the judge erred in finding him to be a dangerous offender: (1) under s. 753(1)(a)(i) by focusing on the severe psychological damage he caused in the past rather than on the likelihood that he would cause severe psychological damage in the future by failing to restrain his behaviour; (2) under s. 753(1)(a)(ii) by examining the "substantial degree of indifference" criterion with reference only to the events surrounding the commission of the offences; and (3) under s. 753(1)(a)(iii) in the absence of evidence that his behaviour was unlikely to be inhibited by normal standards of behavioural restraint in the future.

[181] I see no merit in any of these points. In addressing the requirements of s. 753(1)(a)(i), the judge was well aware that the established pattern of repetitive behaviour had to demonstrate not only a failure to restrain the behaviour in the past but also a likelihood of

death, injury or severe psychological damage through failure by the appellant to restrain the behaviour in the future: at para. 190. With respect to s. 753(1)(a)(ii), the judge expressly acknowledged that "indifference" must be measured broadly by examining the attitude of the offender before, during and after the events in question: at para. 196, citing *R. v. Allan*, 2009 BCSC 1245 at para. 218, aff'd 2015 BCCA 229. Finally, with respect to s. 753(1)(a)(iii), the judge appreciated that the focus of the inquiry was not solely on whether the underlying conduct was "brutal", but extended to whether the brutality associated with the commission of the offences compelled, on its own, a conclusion that the appellant's behaviour was unlikely to be inhibited by normal standards of behavioural restraint in the future: at para. 197. On this latter point, I see no merit in the appellant's related submission that because Dr. Jack concluded that the appellant did not exhibit negative attitudes towards supervision and would follow specific community supervision rules like observing a curfew and attending appointments, there was no evidence upon which the judge could find that the criteria in s. 753(1)(a)(iii) had been established. In my view, it was open to the judge to conclude from the brutality associated with the commission of the offences and the appellant's stance in relation to the offences that his behaviour was unlikely to be inhibited in the future by normal standards of behavioural restraint.

- (c) Did the Judge Err in Finding That the Offences Formed Part of a Pattern of Behaviour Within the Meaning of s. 753(1)(a)(i) and (ii)?

[182] The judge approached the pattern analysis guided by this Court's judgment in *Dow* at paras. 22-25. I do not understand the appellant to take issue with the judge's articulation of what is meant by a "pattern" of repetitive behaviour or persistent aggressive behaviour, except insofar as he argues that a pattern may not be found where an offender has not previously been convicted of an offence. I would not accede to this argument for the reasons given above at paragraphs 170-175. In my view, there was an ample evidentiary foundation upon which the judge could reasonably conclude that the offences shared "many significant, relevant similarities": at para. 206. Those similarities were also noted by Dr. Jack. They are discussed herein at paragraph 141. I see no error in principle in the judge's approach to this issue and no basis upon which this Court could properly intervene in relation to this ground. Indeed, on the evidence before him, I do not see how the judge could have come to any other conclusion.

- (d) Did the Judge Err in Principle by Equating the Existence of the Pattern Contemplated by s. 753(1)(a)(i) and (ii) with a Finding of Future Risk?

[183] The appellant submits that the judge wrongly "merged the pattern analysis and the threat analysis" and thereby failed to address in a principled way the likelihood that the appellant would reoffend in the future. In essence, he asserts that proof of the likelihood of re-offence was considered by the judge to have been established upon demonstration of the pattern required by s. 753(1)(a)(i) and (ii). I do not accept the appellant's position on this point.

- [184] The pattern analysis required by s. 753(1)(a)(i) and (ii) is inextricably linked to the ultimate threat assessment. In determining whether an offender constitutes a threat to the life, safety or physical or mental well-being of other persons, the judge must be satisfied beyond a reasonable doubt that it is likely the established pattern of conduct will continue: Pike at paras. 80-90.
- [185] In my view, the Reasons for Sentence do not support a conclusion that the judge considered the appellant's threat to be established upon proof of the pattern of offending behaviour. Rather, having found the required patterns to have been established beyond a reasonable doubt, the judge said this:
- [209] Based on the pattern of conduct, I find it more likely than not that Mr. Hexamer will continue to engage in similar behaviour in the future.
- [186] I see no error in the judge's analysis. He found beyond a reasonable doubt both a pattern of repetitive behaviour and a pattern of persistent aggressive behaviour of which the predicate offences formed a part. He then turned to consider whether, based on the patterns, it was likely that the appellant would continue to offend in ways consistent with the pattern. In my view, the judge's approach to the issue did not merge the pattern analysis with the threat assessment; rather, it is entirely consistent with this Court's judgment in Pike.
- (e) Did the Judge Err in Principle by Failing to Consider Treatment Prospects at the Designation Stage in Accordance with Boutilier SCC?
- [187] In support of his position, the appellant relies on two paragraphs in the Reasons for Sentence that bookend the judge's discussion of the appellant's treatment prospects. They are as follows:
- [214] As I will explain, in the matter at bar, it is my conclusion that the factor of treatability is of no practical import.
- [257] Accordingly, the notion of treatability in this case does not bear upon the Court's conclusion as to designation.
- [188] Relying on these paragraphs, divorced from context, the appellant submits that the judge erred in principle by failing to consider his treatment prospects at the designation stage. I do not agree.
- [189] I begin my analysis of this ground of appeal by making three preliminary observations about these paragraphs.
- [190] First, the judge's consideration of the appellant's treatment prospects between paras. 214 and 257 falls under the subheading "1. Dangerous Offender Designation" and his analysis of whether the appellant should be declared a dangerous offender. It is not until after the judge completed that analysis that he formally declared the appellant to be a dangerous offender: at para. 258. The judge then turned to consider under the separate subheading "2. Sentence", the issue that arises at the second stage of the proceedings -- the sentence that

should be imposed.

- [191] Second, the judge's assessment of the appellant's treatment prospects at the designation stage is extensive -- it spans 43 paragraphs of his reasons for sentence.
- [192] Third, the judge made clear that he was not saying treatability considerations had no legal relevance at the designation stage. Rather, he concluded only that, in the circumstances of this case, evidence of the appellant's treatment prospects was of "no practical import" in determining whether to designate him a dangerous offender.
- [193] All of these contextual factors support a conclusion that treatment prospects were fully considered at the designation stage despite the fact that the judge did not have the benefit of Boutilier SCC when the Reasons for Sentence were given.
- [194] The judge's conclusion that treatment prospects were of "no practical import" in this case followed his factual finding that the appellant has little insight into what has motivated his pattern of offending behaviour. The judge rejected the appellant's evidence that his conduct was an involuntary response to long-buried memories of his own sexual abuse (at para. 231), was "highly doubtful" of the appellant's "contriv[ed]" assertion that he acted as an automaton in committing the offences, all the while being unaware of what he had previously done (at paras. 235, 240(3)), and dismissed as incredible the appellant's contention that he was not sexually motivated when he committed the offences (at para. 236). The judge found that the offences were sexually motivated and that the appellant has a deviant sexual interest in younger females.
- [195] Against this background, the judge noted the many obstacles to treatment the appellant has not even started to address:
- [240] It is, in my view, gravely worrying that Mr. Hexamer is deeply committed to what I characterize as a view of himself and the events in which he refuses to meaningfully recognize what I consider to be the true nature of his offending and to accept real responsibility for it, or to genuinely understand the need for effective treatment. In that regard, I would refer to the following:
1. His insistence that his conduct is not sexually motivated, but rather some subconscious form of acting out his own trauma.
 2. The fact he has engaged in counselling on the basis that he is a victim, dismissing the possibility that his conduct is sexually motivated. Notwithstanding the testimony of Mr. Shamsian, I am quite convinced that this counselling is misguided.
 3. In persisting in his position that he has no real recollection of the details of the offences he perpetrated on his child victims in the 1995, 2007, and 2009 events. While I obviously cannot say to an absolute certainty that [this] is feigned, I am quite staunchly of the view that this is a contrivance.

4. In the course of this legal proceeding, Mr. Hexamer has, on occasion, pursued positions where he disputes or minimizes responsibility for the offences, notwithstanding having agreed to a series of admissions that constitutes acceptance of responsibility for the offences. I accept, unreservedly, that a fundamental principle of our criminal justice model is that a defendant need not admit any allegation, and is entitled to require the prosecution to prove each and every element of its case against him, beyond a reasonable doubt. However, in this matter, I believe that Mr. Hexamer has pursued a course of conduct strategically designed to minimize his responsibility, whether seeking to withdraw his guilty plea or seeking to avoid the effect of admissions made in the agreed statement of facts.

Now it must be understood, none of that can or will be taken to work against Mr. Hexamer in terms of this Court's determination or disposition. It will not be considered an aggravating factor. However, to the extent that a genuine acceptance of responsibility weighs in an offender's favour, these considerations undermine Mr. Hexamer's claim that he has taken full responsibility for his conduct.

5. Finally, with respect to the address that Mr. Hexamer made to this Court and to those present when we last assembled, I have examined with care what he had to say. While I accept his apology was eloquently spoken and while I accept he wants to change himself in the future, I am not persuaded the real hard part of that process, understanding and addressing the real causes of his offending [or] taking responsibility, has been embraced by Mr. Hexamer.

[246] I am convinced that Mr. Hexamer represents a very significant risk.

[247] To the extent treatability may be a factor which weighs into the analysis, as matters stand today, I see very little reason to be optimistic that Mr. Hexamer will be meaningfully engaged in treatment in any way that would impact upon the issue of whether he should be designated.

[248] To be clear, I find he has not accepted responsibility in the sense of honestly seeking to understand why he committed these offences. He does not acknowledge that he was sexually motivated in his offending and he subscribes to an alternate theory: that he is a victim and that was the driving force behind his conduct. In furtherance of that approach, he is involved in counselling, treatment, if you will, that I believe is not geared to the reality of the matter and is probably having no real benefit for him in terms of addressing the actual issues at play.

[249] In fact, it could be argued that his current approach is counterproductive in that counselling energy and resources are being spent on an issue that is not the root cause of his offending, and the counselling is supporting his belief or position that he is not a sex offender (in the sense that his offending was not sexually motivated) but rather that he is a victim himself.

[Emphasis added.]

- [196] While the judge expressed hope the appellant would be honest about his issues and meaningfully engage in treatment in the future, he concluded that matters had not progressed to that point and was not "prepared to guess when that might be, if ever": at para. 256 (emphasis added).
- [197] In short, the judge found the appellant to be lacking in self-awareness or candour and, in either event, entrenched in a treatment-resistant stance. There was an abundance of evidence before the judge that it is difficult for an offender to benefit from programming if they refuse to accept responsibility for their behaviour. Dr. Jack also testified that paraphilia -- a diagnosis she said would be appropriate in the event the appellant was found to have viewed images of child pornography -- is much more difficult to treat than opportunistic sexual offending. As she explained, "what you're trying to treat is an underlying persistent sexual desire and interest in children [s]o you're trying to shift a person's orientation towards sexuality." She acknowledged that it would be a "very difficult road" to treat someone with sexual urges towards children who was in denial about their behaviour and motivations.
- [198] In my view, the judge gave extensive consideration to the appellant's treatment prospects at the designation stage but concluded that his treatment-resistant stance and the expert evidence did not permit a conclusion that the appellant could surmount his past behaviour with the benefit of therapeutic intervention. Although the judge did not use the word "intractable", his findings are to the effect that there is no reason to expect the appellant will be able to overcome his deviant sexual interest in children given his failure to understand or accept his motivations or risk factors.
- [199] In my view, the appellant's treatment prospects were considered at the designation stage in a way that accords with the decision in Boutilier SCC. I would not give effect to this ground of appeal.
- (f) Was It Open to the Judge to Find That the Appellant Represented a High Likelihood of Harmful Recidivism?
- [200] The appellant advances a number of related submissions under this ground of appeal. He says that the judge either misapprehended or ignored the results of risk assessments undertaken by Dr. Jack, all of which suggested he was at a low to moderate risk to reoffend. He submits that the judge came to the conclusion that he was at a high risk to reoffend in the absence of supporting evidence. He says the judge questioned the accuracy of the risk assessment measures and dismissed the test results without justification. He argues that the judge gave too much weight to what he characterizes as "irrelevant considerations", including his possession of child pornography and the evidence of H.B. Finally, he alleges that the judge improperly engaged in a "psycho-judicial diagnosis", by finding him to have what amounted to a "[Jekyll] and Hyde" personality.
- [201] I would not give effect to any of these submissions.

- [202] Dr. Jack's conclusion that the appellant represented a moderate risk to reoffend sexually against a female stranger or acquaintance (relative to other men convicted of sexual offences) was the product of both actuarial and other risk assessment tools and the application of structured professional judgment. Dr. Jack's composite risk assessment opinion was subject to a number of caveats and limitations.
- [203] First, she acknowledged that the absence of background information limited the reliability of her conclusions and forced her, to some extent, to rely on the appellant's self-reporting. For example, she was at pains to emphasize in her report that her opinion "is based on known risk factors, which to a great extent are based on Mr. Hexamer's own reports about his functioning and internal processes." As is apparent from the foregoing discussion, the judge rejected the appellant's explanations concerning the genesis of and motivation for his behaviour. It was open to the judge to consider that these factual findings undermined the weight that could be placed on Dr. Jack's risk assessment.
- [204] Second, Dr. Jack explained that there were limitations inherent in an actuarial tool like the Static-99-R when applied to a case of this kind. Specifically, she testified that in scoring the Static-99-R she could not consider the appellant's prior offences because he was not caught and sanctioned for them at the time. In the result, the appellant received a score of zero for prior sexual offences. Dr. Jack agreed that this is one of the problems with a mechanical scale and that the test results do not always accord with common sense. She also agreed that the Static-99-R does not fully capture the appellant's risk because it treats him as a first-time sexual offender. Dr. Jack expressed similar concerns about the application of the Stable-2007 to the appellant's case. She testified that she did not have a sufficient body of high-quality information to give her confidence in scoring the test. For example, she testified that in scoring the appellant's sex drive and sexual preoccupation under the Stable-2007, she was obliged to give him a zero even though she did not believe that was an accurate score.
- [205] More importantly, Dr. Jack's risk assessment took no account of the appellant's possession of child pornography or his conduct in relation to H.B. as the judge had not made factual findings on either issue when Dr. Jack prepared the assessment report. She testified that adding possession of child pornography to the mix would elevate her assessment of the appellant's risk and justify a diagnosis of paraphilia, a treatment-resistant disorder. Dr. Jack also testified that the appellant's conduct in relation to H.B. would have increased her assessment of his risk. She noted that because the conduct involved the sexual initiation and exploitation of a male victim, it would suggest a greater diversity in the appellant's capacity to offend. She said that such conduct would reveal "a whole different realm of sexual interest and deviancy than [she] had considered." Again, it was open to the judge, in light of his factual findings on these issues, to question the reliability of Dr. Jack's opinion which rested on an incomplete factual foundation.

- [206] At the end of the day, the judge had a responsibility to determine the weight he was prepared to give Dr. Jack's opinion taking into account the entirety of the evidence and the factual findings he made. Whether an offender is a high risk to reoffend or is treatable are matters that require judicial determination. As explained in *R. v. J.W.R.*, 2010 BCCA 66 at para. 40, sentencing courts are greatly assisted by expert evidence and statistics with respect to recidivism and should not, as a general rule, depart from opinion evidence without good reason to do so. In the case at bar, the self-acknowledged limitations inherent in Dr. Jack's written opinion, coupled with the fact that her risk assessment did not take account of the full range of the offender's conduct, required the judge to engage in a judicial assessment of the appellant's risk informed by all relevant factors.
- [207] That is what the judge did in this case. He recognized that the appellant had no prior record but properly emphasized the enormity of the offences and the enduring nature of his deviant behaviour. He had to take into account the brazen nature of the attacks, the appellant's limited insight and self-protective account that he was acting as an automaton without sexual motivation at the time of the offences -- accounts the judge rejected. In addition, he had to take into account the extent to which Dr. Jack's opinion changed when she was presented with additional evidence which the judge accepted. Taking these considerations into account, the judge concluded:
- [245] As for the matter of low risk, I simply cannot accept that to be a fair characterization of Mr. Hexamer. It is true that the assessment performed by Dr. Jack, using standard tools and measurements, led to a risk evaluation in the moderate range. However, my own view is that the ability of the test procedures is not without limits. In this case, the assessment was conducted with a modest amount of hard information. To some extent, that paucity of reliable history and information impacts the effectiveness of the process. I note also that Dr. Jack's assessment did not take into account the HB matter or the possession of the computer's contents.
- [246] Ultimately, in a matter such as this, it is for the trier of fact to reach his or her own conclusion, acting fairly and reasonably and taking into account all the available evidence. Here, for the reasons I have endeavoured to explain, I am convinced that Mr. Hexamer represents a very significant risk.
- [208] I see no basis upon which we can, or should, interfere with this conclusion.
- [209] I would also reject the appellant's contentions that the judge gave too much weight to "irrelevant considerations", namely, the appellant's possession of child pornography and his conduct with H.B. Neither of these considerations can properly be regarded as irrelevant. As demonstrated by Dr. Jack's evidence, both considerations were highly relevant to an assessment of the appellant's risk. Further, the judge did not engage in judicial diagnosis of the appellant. He simply observed that the appellant has "a dark, dangerous and duplicitous nature". This was not a judicial diagnosis but an observation rooted in common sense and compelled by the circumstances of the case.

(g) Did the Judge Err in Principle by Not First Considering Whether a Determinate Sentence Would Meet Public Protection Concerns, and If Not Satisfied with That, Then Considering Whether a Long-Term Offender Designation Would Satisfy Public Protection Concerns Before Imposing an Indeterminate Sentence?

[210] Although not clearly articulated by the appellant in his factum or in oral argument, we called on the Crown to address whether the approach of the judge at the sentencing stage is consistent with the holding in Boutilier SCC (at paras. 60, 65) that an indeterminate sentence should only be imposed if it is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level.

[211] In my view, the judge's analysis at the sentencing stage is, in substance, consistent with the "ladder approach" recommended in Boutilier SCC: at para. 70.

[212] As noted earlier, the judge defined one of the two contentious issues on the application as being whether the evidence establishes a reasonable expectation that a lesser measure than an indeterminate sentence will adequately protect the public from the risk the appellant poses: at para. 28(b).

[213] The judge clearly recognized that treatment prospects are also important at the sentencing stage. Before imposing an indeterminate sentence, the judge said he was obliged to determine whether the appellant could be supervised in the community in a way that would provide an acceptable measure of confidence that the public would not be at substantial risk: at paras. 266-67, 270. After analyzing the appellant's risk factors and taking into account his ongoing denial of any sexual motivation for the offences, the judge came to the following conclusion:

[274] I am certain that release, even on quite stringent conditions, without treatment would be markedly dangerous for the public.

[275] I find no basis to believe that there is evidence of treatability that is more than an expression of hope; that there is evidence that Mr. Hexamer can be treated within a definite period of time; and that there is evidence of [treatability] which applies to him specifically. Accordingly, I find no basis to support the idea that any measure, other than an indeterminate sentence, will adequately protect the public from the risk that Mr. Hexamer poses.

[Emphasis added.]

[214] I am satisfied that the judge considered whether a less intrusive sentence would provide adequate protection to the public. Although the judge did not have the benefit of Boutilier SCC, I see no error in principle in the analytical framework he applied at the sentencing stage.

(h) Is the Indeterminate Sentence Unreasonable?

[215] Applying the more robust review contemplated by *R. v. Sipos*, 2014 SCC 47, but with due regard to the factual findings of the judge, I am unable to say that the indeterminate sentence was unreasonable. The appellant's conduct was egregious by any measure and persisted over two decades. His "explanation" for the second and third groups of offences -- that he was frightened of his child victims -- is self-serving, inconsistent with the appellant's contention that he can remember virtually nothing about the incidents, and bizarre in the extreme. The appellant was found by the judge to have very limited insight into his offending behaviour or what motivates him to sexually abuse children. The appellant's dogged commitment to his victim narrative does not augur well in terms of his treatment prospects and the judge was well-justified in coming to that conclusion. There was nothing in the evidence before the judge to indicate that successful treatment is possible, let alone within the timeframe of a fit determinate sentence or a determinate sentence followed by long-term supervision. In my view, the judge's conclusion that there is no basis to support a finding that any measure, other than an indeterminate sentence, would adequately protect the public is not unreasonable.

4. Conclusion

[216] As I am unable to give effect to any of the grounds of appeal advanced by the appellant, I would dismiss the appeal from the dangerous offender finding and indeterminate sentence.

VI. The Allegations of Bias

[217] I cannot leave this appeal without addressing the appellant's unsupported allegations that the judge displayed bias or a reasonable apprehension of bias in the course of this proceeding, and that Dr. Jack "fudged" the data to elevate his risk assessment scores.

[218] The test on appellate review where a reasonable apprehension of bias is alleged was addressed in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paras. 109-115, per Justice Cory. A two-fold objective inquiry is required: the person considering the apprehension of bias contention must be reasonable and informed as to context, and the apprehension of bias itself must be reasonable in the circumstances. The onus rests on the proponent of the claim to establish a real likelihood or probability that the conduct of a judicial officer gave rise to a reasonable apprehension of bias. Mere suspicion is not enough. The totality of the circumstances must be considered. Given the seriousness of the allegation, the threshold test for a finding of perceived bias is high. In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20, the Court endorsed the test first articulated in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 394, per Justice de Grandpré (dissenting):

"what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[219] Allegations of bias or reasonable apprehension of bias on the part of a judge, or what amounts to professional misconduct on the part of an expert witness, are extremely serious. Such allegations should not be made cavalierly in the absence of some foundation that could reasonably support the claim. There is, in my view, nothing in the record of this proceeding that warranted the making of these allegations.

[220] In S. (R.D.), Cory J. offered some reflections that are pertinent to this issue:

113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See [R. v. Stark, [1994] O.J. No. 406 (C.J. (Gen. Div.))], supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[Emphasis added.]

[221] It is regrettable that neither the restraint nor the professional care and attention with which S. (R.D.) advises counsel to act before advancing such arguments is evident in this case.

VII. Disposition

[222] I would dismiss the appeal from the dangerous offender designation and indeterminate sentence.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Griffin"

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