
CANADA / JUDGMENT

R. v. Johnson

2001 BCCA 456

COURT

British Columbia Court of Appeal

DECIDED

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Citation:

R. v. Johnson

Date: 20011004

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Docket:

CA025295

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

JERIMIAH JOSIA JOHNSON

APPELLANT

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Braidwood

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Low

G.D. McKinnon, Q.C.

Counsel for the Appellant

R.C.C. Peck, Q.C. and N. Harris

Counsel for the Respondent

B.L. Josephy

Counsel for the Intervenor,

Adam Frank Laboucan

Place and Date of Hearing:

Vancouver, British Columbia

October 18, 2000

Place and Date of Judgment:

Vancouver, British Columbia

October 4, 2001

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Braidwood

The Honourable Mr. Justice Low

Dissenting Reasons by:

The Honourable Madam Justice Saunders (Page 84, para. 114)

Reasons for Judgment of the Honourable Madam Justice Ryan:

INTRODUCTION

- [1] On October 16, 1998 a Supreme Court justice found the appellant, Jeremiah Josia Johnson, to be a dangerous offender and sentenced him to detention in a penitentiary for an indeterminate period.

- [2] This is an appeal from the finding that the appellant was a dangerous offender. The appellant alleges jurisdictional error based on an alleged misinterpretation of the 1997 amendments to Part XXIV of the Criminal Code (the "Code"). He seeks a new hearing.

DANGEROUS OFFENDER PROCEEDINGS

- [3] On February 12, 1998 the appellant was convicted of one count of sexual assault after a re-trial in the Supreme Court of British Columbia by a judge and jury. The indictment alleged that the appellant:

On or about the 15th day of July, 1993, at or near Roche Lake, in the Province of British Columbia, did commit sexual assault of another person, [K.W.], contrary to Section 271 of the Criminal Code.

- [4] The appellant had earlier been tried and convicted of this offence in March 1995 and thereafter declared to be a dangerous offender on October 31, 1995. The verdict and sentence were set aside on appeal to this Court in 1997. (See 88 B.C.A.C. 134.)
- [5] The first dangerous offender hearing had proceeded under the dangerous offender provisions of the Code as they stood in October 1995. The second dangerous offender hearing took place in October 1998. However, on August 1, 1997 the provisions of the Code relating to dangerous offenders had been amended. The second dangerous offender proceedings were based on a combination of the repealed and new provisions of Part XXIV of the Code.
- [6] At the start of the second dangerous offender hearing, counsel for the Crown advised the sentencing judge that Part XXIV of the Code relating to dangerous offenders had been "significantly amended" since the commission of the offence and that "in keeping with established practice" the Crown would utilize the procedural sections of the new provisions but rely on the substantive sections of the former provisions. The former provisions provided the court with a discretion to impose an indeterminate sentence with a review to determine eligibility for parole after three years. It was thought that this provided for a lesser punishment than the 1997 amendments, which do not provide a discretion and delay the first review to seven years. Since s. 11(i) of the Canadian Charter of Rights and Freedoms and s. 44(e) of the Interpretation Act, R.S.C. 1985, c. I-21, mandate that where a punishment has been varied between the time of the commission of an offence and the time of sentencing a convicted person receive the benefit of the lesser punishment, counsel agreed that the court was thus required to proceed under the former provisions. In addition, the Crown and defence (who are not counsel on this appeal) also agreed that if the court declined to designate the appellant a dangerous offender the appellant would not be subject to being declared a "long-term offender," a new designation created by the amendments. Both counsel were of the view that providing for an offender to be designated as a long-term offender after having been found not to be a dangerous offender created a more severe scheme of punishment and thus s. 11(i) of the Charter prevented its application to Mr. Johnson.

- [7] The hearing took place as though the former provisions were still in place, with one exception. At the dangerous offender hearing, Crown counsel took the position that the 1997 amendments that permitted the preparation and filing of an expert's assessment report (s. 752.1 and s. 753(1)) were "procedural" and thus had prospective application. Counsel for the defence took no position. The sentencing judge accepted the Crown's argument that these sections of the new provisions were applicable to the hearing taking place under the former provisions.
- [8] Accordingly, the report of a psychiatrist, Dr. Coles was ordered and filed pursuant to ss. 752.1 and 753(1) of the new provisions.
- [9] With the consent of defence counsel, the Crown filed three volumes of transcripts of evidence and two volumes of exhibits from the first dangerous offender proceedings.
- [10] The sentencing judge concluded that the appellant was a dangerous offender. The judge had "no confidence that treatment during the appropriate length of determinate sentence would rehabilitate the appellant." The appellant was accordingly sentenced to an indeterminate period of incarceration.

THE GROUNDS OF APPEAL

- [11] On this appeal counsel for the appellant, Mr. McKinnon, took the position that the court should have proceeded under the former Part XXIV in its entirety as it relates to dangerous offenders. Mr. McKinnon analyzed s. 752.1 and s. 753(1) of the new provisions with a view to demonstrating that these sections were not procedural and should not have been incorporated as part of the hearing under the old provisions. However, he went on to argue that before finding the appellant to be a dangerous offender, the sentencing judge ought to have considered declaring the appellant a long-term offender instead. Counsel for the appellant submitted that the new long-term offender provisions created an advantage for the appellant of which he ought to have been given the benefit.
- [12] Counsel for the appellant also identified a number of procedural errors made by the sentencing judge that he said caused the court to lose the jurisdiction to declare the appellant a dangerous offender.
- [13] Counsel for the intervenor, Ms. Josephy, essentially supported the position of the appellant.

DANGEROUS OFFENDER LEGISLATION

- [14] Before dealing with the issues raised in this appeal it is necessary to examine the legislation in some greater detail.

A Brief History

- [15] Provisions for indeterminate sentences were originally enacted in Canada in 1947 and 1948. They were drawn largely from the English Prevention of Crime Act, 8 Edw. VII, c. 59. Sections 575A to 575H of the Code dealt with "habitual criminals" and s. 1054A dealt with an offender who was found to be a "criminal sexual psychopath."
- [16] In the 1955 revisions to the Code, these provisions were drawn together and enacted as Part XXI, entitled "Preventive Detention." If an offender was found to be either a "criminal sexual psychopath" or "habitual criminal" the court could impose detention in a penitentiary for an indeterminate period in addition to any sentence imposed for the offence of which he or she was convicted. In 1961, the term "criminal sexual psychopath" was replaced by "dangerous sexual offender"; however, the definition for this type of offender remained substantially unchanged.
- [17] A "dangerous sexual offender" was defined in Part XXI as "a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses." A "habitual criminal" was a person who has, "since attaining the age of eighteen years on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life."
- [18] In addition to the brief definitions of "dangerous sexual offenders" and "habitual criminals," Part XXI set out procedural requirements for notice to the accused and for his attendance at the hearing. It also provided that a court hearing an application to declare an offender a "dangerous sexual offender" was mandated to hear all relevant evidence, and, the evidence of at least two psychiatrists, one of which was to be nominated by the Attorney General. This evidentiary requirement did not apply to a habitual criminal hearing.
- [19] The first major amendments to Part XXI occurred on October 15, 1977 when s. 14 of the Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53 was proclaimed in force. Section 14 repealed Part XXI, "Preventative Detention," and replaced it with a new Part XXI entitled "Dangerous Offenders." Transitional provisions of the Criminal Law Amendment Act, 1977 provided:
15. (1) Where, on the day that section 14 comes into force, an application is pending before a court under Part XXI of the Criminal Code for the preventive detention of a dangerous sexual offender or an habitual criminal within the meaning of that Part as it read immediately before that day, all proceedings thereon shall be continued and disposed of in all respects as if section 14 had not been enacted. [20] The 1977 amendments replaced the dual concepts of "dangerous sexual offenders" and "habitual criminals" with one category, "dangerous offenders." To put it simply, a dangerous offender was one who had caused injury by the commission of violent sexual or non-sexual offences and was likely in the future to cause serious personal injury to others. The concept of "habitual criminal" was effectively

abolished. The focus narrowed from the offender's persistent criminal activity to his or her threat of personal harm to others.

- [21] The 1977 amendments set out in greater detail the criteria by which an offender was to be adjudged a dangerous offender. The amendments provided, for the first time, for the remand of the offender "for observation" where, supported by the evidence of a medical practitioner, the court was of the view that "there [was] reason to believe that evidence might be obtained as a result of such observation that would be relevant to the application." The legislation continued to require the court to hear the opinions of two psychiatrists but now the offender, not just the Attorney General, was obliged to nominate one of the psychiatrists. If the offender failed to nominate a psychiatrist, the court was directed to do so. The new sections defined "relevant evidence" as including the opinions of criminologists and psychologists. If, on finding the accused to be a dangerous offender, the court imposed an indeterminate sentence, the sentence was to operate in lieu of, rather than in addition to, any other punishment that might be imposed.
- [22] Between 1977 and 1997 the dangerous offender provisions of the Code underwent consequential amendments to reflect the migration from the old concepts of "rape" and "gross indecency" to the more encompassing notion of sexual assault. However, the provisions relating to sentencing of dangerous offenders did not experience any significant change until August 1, 1997 when Part XXIV (as it had come to be), still entitled "Dangerous Offenders," was repealed and replaced with a new Part XXIV now entitled "Dangerous Offenders and Long-Term Offenders."

A Comparison of the Pre-1997 and Post-1997 Dangerous Offender Provisions

- [23] I have reproduced, as an appendix to these reasons, Part XXIV of the Code, in full, both as it stood just before the 1997 amendments and as it stood after them. I will refer to them in these reasons as the "former provisions" and "new provisions" respectively.
- [24] The 1997 amending legislation contained no transitional provisions. The 1997 amendments marked notable, but as I will later posit, largely procedural change. The definition sections remained the same, as did the criteria that the Crown must meet to prove that the offender is a dangerous offender. Under the former provisions the court could declare an accused to be a dangerous offender but decline to sentence him or her to an indeterminate sentence. Under the new provisions once the offender is found to be a dangerous offender the court must impose an indeterminate sentence.
- [25] A new category of offender was introduced by the new provisions, the "long-term offender." To over-simplify, the long-term offender is a person who has been convicted of a serious personal injury offence or a listed sexual offence and is a substantial risk to reoffend, but for whom there is a reasonable possibility of eventual control in the community. In addition to any imprisonment of two years or more, the court must impose an order of up to 10 years' community supervision.

(i) Initiation of Proceedings

- [26] Under the former provisions it was open to the Crown, after conviction and before sentence, without anything more, to make an application to have the accused declared a dangerous offender.
- [27] The new provisions anticipate that, prior to filing the application for dangerous offender status, the prosecution will, under s. 752.1 apply to the court after conviction and before sentence for an order remanding the accused for an assessment. Section 752.1(1) allows the court to make such an order where it is of the opinion that, "there are reasonable grounds to believe that the offender might be found to be a dangerous . . . or long-term offender." The remand can be made for up to 60 days to the custody of a person "who can perform an assessment, or can have an assessment performed by experts." Section 752.1(2) requires the person to whom the offender was remanded to file a report with the court within 15 days of the assessment.
- [28] Section 753(1) implies that the s. 752.1 report must be filed before the prosecutor may make an application to have the offender declared a dangerous offender. Section 753(1) begins: "The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender. . . ."

(ii) The Hearing

- [29] Under s. 756 of the former provisions it was only after the application for dangerous offender status had been made by the Crown that an order could be obtained to remand the accused for observation. The application could be made by the Crown or by defence and was to be supported by a report in writing by a duly qualified medical practitioner that "there [was] reason to believe that evidence might be obtained as a result of the observation that would be relevant to the application."
- [30] The former provisions do not require the person who observes the offender to prepare a report, nor is there a requirement that the evidence gathered be used at the hearing. This is in contrast to the new s. 752.1(1), the last sentence of which states, "The assessment is to be used as evidence in an application under section 753 or 753.1" (the application for a declaration that the offender is a dangerous or long-term offender).
- [31] Under s. 755 of the former provisions the court was directed, on the hearing of the dangerous offender application, to hear the evidence of at least two psychiatrists, one to be nominated by the Crown, one to be nominated by the accused. As previously noted, if the accused failed to nominate a psychiatrist, the obligation fell to the court. Section 755 also required the court to hear "all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist" called by the Crown or defence.

[32] Under the new provisions, with the exception of the s. 752.1 assessment, there are no specific requirements for the calling of any psychiatric or other expert evidence. That decision is left to the parties.

(iii) The Decision of the Court

[33] As mentioned early on in these reasons, under the former provisions, once the court declared the accused to be a dangerous offender it retained a discretion whether to impose a determinate or indeterminate sentence. Under the new provisions the court must sentence a dangerous offender to an indeterminate sentence. The effects of this change will be discussed later.

(iv) Consequences of an Indeterminate Sentence

[34] Under the former provisions, an indeterminate sentence was initially reviewable by the parole board after three years, and every two years thereafter. Under the new provisions, the first review does not take place for seven years, and then every two years thereafter.

DO SOME OF THE NEW PROVISIONS APPLY RETROSPECTIVELY?

[35] Counsel for the appellant submitted that the sentencing judge was right to proceed under the former provisions, but he submitted that the sentencing judge erred in utilizing s. 752.1 of the new provisions to order the appellant's remand for assessment.

[36] The appellant's submission that the trial judge was right to proceed under the former provisions rests upon the operation of ss. 43(c),(d) and (e) of the Interpretation Act, which provide:

43. Where an enactment is repealed in whole or in part, the repeal does not . . .

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed, (d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or (e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment or forfeiture referred to in paragraph (d), and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed. [Emphasis added.]

[37] Counsel for the respondent accepted that the former legislation applied, but justified the application of s. 752.1 as a procedure established by the new provisions which could be adapted to a hearing under the former provisions in accordance with s. 44(d)(iii) of the Interpretation Act. This section provides:

44. Where an enactment, in this section called the "former enactment" is repealed and another enactment in this section called "new enactment", is substituted therefor, . . .

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto . . .

(iii) in a proceeding in relation to matters that have happened before the repeal;

[38] Mr. McKinnon submitted that s. 44(d)(iii) of the Interpretation Act does not apply in this situation because s. 752.1 of the Code is not an entirely procedural provision. Alternatively, relying on *R. v. LeSarge* (1975), 26 C.C.C. (2d) 388 (Ont. C.A.), he submitted that s. 752.1 is so "inextricably bound up with the substantive provisions creating the new penalty, that it was wrong to apply it in this case."

[39] In *LeSarge*, the question before the court was whether a section of the wire-tap provisions of the Code applied retrospectively. In 1974 the Protection of Privacy Act, S.C. 1973-74, c. 50 added Part IV.1 to the Code. Section 178.16(1)(a) provided that wire-tap evidence that had not been gathered in accordance with the provisions of Part IV.1 was inadmissible at trial. The question was whether this section, agreed to be procedural in nature, had retrospective application so as to make wire-tap evidence gathered before the coming into force of the Protection of Privacy Act inadmissible in a trial taking place after the Act came into force. The Ontario Court of Appeal held that the Protection of Privacy Act operated prospectively, and that evidence that had been gathered before it came into force was not affected by the new provisions. Houlden J.A. noted that the Protection of Privacy Act also created three substantive offences: wilful interception of a private conversation; possessing a device for surreptitious interception of a private conversation; and, wilful disclosure of information obtained by the interception of a private conversation. As a result, Houlden J.A. held (at p. 396):

Section 178.16 is so inextricably bound up with the substantive provisions of the Protection of Privacy Act that, in my opinion, it cannot be given a retrospective operation.

[40] In my view, the point in *LeSarge* was not so much that procedural sections of the Protection of Privacy Act were intertwined with substantive sections, but that a plain reading of the Act demonstrated that its provisions were meant to be read as a whole to form a scheme or approach to the protection of privacy from unwarranted wire-tapping.

[41] The goal of statutory interpretation is to understand the intent of the legislature. In my view, the examination and comparison of Part XXIV of the Code as it stood pre- and post-1997 that I have set out in the previous paragraphs reveal that it was designed both before and after 1997 to provide a cohesive regime for the definition, declaration, and management of dangerous offenders. Part XXIV operates as the sum of its provisions. Its sections cannot be dissected from its whole to operate independently or in conjunction with earlier or later provisions. While s. 752.1 may be said to be a procedural provision, the procedure it prescribes cannot, for purposes of s. 44(d)(iii) of the Interpretation Act, be grafted on to a dangerous offender hearing proceeding under the former provisions. It follows that if Part XXIV is to operate prospectively or retrospectively it must, with exceptions to comply with the Charter, do so in its entirety. I will return to this proposition presently.

DID THE TRIAL JUDGE ERR IN FAILING TO APPLY THE NEW LONG-TERM OFFENDER PROVISIONS?

[42] Counsel for the appellant next submitted that the sentencing judge was right to proceed under the former provisions, but that he erred in failing to turn to the long-term offender provisions of the new legislation to determine whether the appellant ought to have the advantage of a fixed sentence coupled with a community supervision order rather than an indeterminate sentence. This ground of appeal is based on s. 11(i) of the Charter and s. 44(e) of the Interpretation Act which state:

Canadian Charter of Rights and Freedoms, s. 11(i): 11. Any person charged with an offence has the right . . .

- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Interpretation Act, s. 44(e): 44. Where an enactment, in this section called the "former enactment" is repealed and another enactment, in this section called the "new enactment" is substituted therefore, . . . (e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

[43] The question then is whether the long-term offender provisions provide for a lesser or mitigated punishment.

[44] Mr. Harris, counsel for the Crown for this part of the appeal, submitted that the sentencing judge did not err in proceeding with the dangerous offender hearing without reference to the long-term offender proceedings. He submitted that the new provisions subject an offender to substantial penalties beyond those which he or she would have faced under the former provisions.

[45] Mr. Harris submitted that under the former s. 753 an offender who was not declared a dangerous offender would be sentenced according to the general sentencing scheme set out in Part XXIII of the Code. Unlike the new long-term offender provisions, the general sentencing provisions provide the court with a very limited jurisdiction to order supervision of an offender after the expiry of a sentence of incarceration. Unless an offender is declared a long-term offender under the new provisions, a term of probation cannot exceed three years and cannot be ordered at all for a sentence of incarceration over two years. Under the new long-term offender provisions (s. 753.1(3)(a) and (b)) in cases where there is a "substantial risk the offender will reoffend" in addition to imposing "a sentence for the offence for which the offender has been convicted" the court "shall impose" supervision pursuant to the Corrections and Conditional Release Act "for a period not exceeding ten years." Section 753.3 of the Code makes it an indictable offence to fail to comply with the community supervision order. A conviction under this section is punishable by imprisonment for a period not exceeding ten years.

- [46] Mr. McKinnon did not disagree with what Mr. Harris said about the consequences of being declared a long-term offender. But, he submitted, the new provisions for long-term offenders "are beneficial to the offender who is not so dangerous to require indeterminate detention but does require long-term community supervision."
- [47] Mr. Harris's submissions were based on the understanding that the new long-term offender category now catches offenders who would have escaped dangerous offender status under the former provisions. Mr. McKinnon's submissions were based on the premise that the new provisions give the court greater flexibility in dealing with some of the members of the group of persons who would otherwise have been categorized as dangerous offenders. In Mr. McKinnon's view, some of those who would have been categorized as dangerous offenders under the former provisions might, under the new provisions, be "reduced" to the less serious long-term offender status.
- [48] Thus, the question becomes whether the former provisions designate persons dangerous offenders, who under the new provisions might be designated long-term offenders.
- [49] To resolve this issue it is necessary to examine the criteria and tests required for dangerous offender status under both the former and the new legislation and to examine the criteria and tests to apply in determining long-term offender status under the new legislation.

Dangerous Offender Designation under the Former Provisions

(i) The Discretion

- [50] As I mentioned earlier the criteria that defines a dangerous offender has not changed under the new legislation. It remains as it stood since 1977. What has changed, however, is the discretion, or lack of it, given to the sentencing judge charged with making that designation.
- [51] Under the former provisions, once the criteria were found to be made out, s. 753 (and its other incarnations) provided:

... the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an determinate period, . . . [Emphasis added.]

- [52] Under the new s. 753, s-s. (1) begins:

The court may, on application made under this Part . . . find the offender to be a dangerous offender if it is satisfied. . . . [thereafter follow the criteria] [Emphasis added.] Section 753(4) then states:

If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period. [Emphasis added.] [53] In developing his argument Mr. McKinnon urged us to find that the former provisions relating to the designation of dangerous offenders were more beneficial than the new provisions because the former provisions created two areas of discretion for the sentencing judge. First, in deciding whether or not to declare the accused a dangerous offender in spite of concluding that the statutory criteria

had been met. Second, if the declaration was made, in deciding whether to impose a indeterminate or determinate sentence.

[54] Mr. McKinnon recognized that this submission is contrary to the decision of this Court in *R. v. Dow* (1999), 134 C.C.C. (3d) 323. In *Dow*, the court followed the decision of the Ontario Court of Appeal in *R. v. Moore* (1985), 16 C.C.C. (3d) 328. In *Dow*, Lambert J.A., for the court, wrote (at para. 13):

In this case the application that was made by the Crown before the sentencing judge was made on the basis that the evidence established the requirements of each of subpara. (i), subpara. (ii) and subpara. (iii) of para. (a) of s. 753, though evidence establishing any one of them would have required the judge to find *Dow* to be dangerous offender. (I use the word "required" because I would follow the decision of a very strong division of the Ontario Court of Appeal in *R. v. Moore* [citation omitted] to the effect that the first "may" after para. (b) confers a power and not a discretion, and that if the circumstances set out in subparas. (i), (ii) or (iii) of para. (a) are established then the sentencing judge must make a finding that the offender is a dangerous offender.) [55] In *Moore*, supra, MacKinnon A.C.J.O set out the section of the Code as it then stood and said (at p. 329):

The concluding words of s. 688 [s. 753 just before the 1997 amendments], which are the relevant words for our purposes of the section dealing with "Dangerous Offenders", read as follows:

688. ... the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted. [Emphasis added.]

A few paragraphs later, MacKinnon A.C.J.O. referred to the concurring reasons for judgment of Clement J.A. in *R. v. Carleton* (1981), 69 C.C.C. (2d) 1 (Alta. C.A.), aff'd [1983] 2 S.C.R. 58, and said (at pp. 330-31):

Mr. Justice Clement in *R. v. Carleton* wrote separate reasons, concurring in the result. He was the only member of the court to deal directly with the issue now before us (at pp. 20-2):

It is contended that even if the factual issues are established to the satisfaction of the court, the court now has a discretion to decline to find the offender to be a dangerous offender; and that even if it finds the offender to be dangerous it has a discretion to decline to impose a sentence of detention. These two contentions must be considered separately. The first use of the word "may" is in the opening phrase of the empowering part of the section: "the court may find . . .". In my opinion, the discretion here given to the court relates to the evaluation by the court of the evidence upon which his conclusion must be based. Once the judge is satisfied that a psychiatric condition exists in the offender such that there is a likelihood in the future of him causing injury, pain or evil to others from failure to control his sexual impulses, I do not think that there is a discretion left to refuse to pronounce the finding. The public interest, the protection of the public, intervenes. I apply the statement of Earl Cairns L.C. in *Julius v. Lord Bishop of Oxford* et

al. (1880), 5 App. Cas. 214, in which he discussed the operation of the permissive phrase "it shall be lawful": a phrase which bears the same permissive connotation as does the word "may". He said at pp. 222-3:

"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." In such cases the exercise of the power depends not upon the court's discretion, but upon proof of the circumstances in respect of which the power is given, and "may" relates to the contingency of proof. This principle was discussed in some detail and affirmed by Allen J.A. in *Re Buzunis* (1974), 48 D.L.R. (3d) 567, [1975] 1 W.W.R. 233. I will not review the authorities upon which he relied except the passage from 36 Hals., 3rd ed., p. 433, which is in the nature of summary: "The terms in which the provision is framed are not, however, conclusive, for there may be something in the surrounding circumstances to show that words of request were in fact intended to operate by way of command. If, therefore, the purpose for which a power is conferred is such as to lead to the inference that its exercise was not intended to be at the discretion of the donee, the provision will be construed as obligatory notwithstanding that its language is of a permissive character; and it has been said that the inference will arise in all cases where the purpose is to effectuate legal rights and, in particular, rights of individuals rather than rights vested in the public generally." In short, the conclusion to be reached here is stated succinctly by Jervis C.J., in *Macdougall v. Paterson* (1851), 11 C.B. 755, 138 E.R. 672 [at p. 733]: "... the word 'may' is not used to give discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises." I am of opinion that an imperative interpretation of "may" in this first context is reinforced by the second use of that word, to which I now come. The context in which "may" is next used is different. The discretion there given is exercisable only after the court is satisfied that the offender is dangerous. The discretion is then directed to a choice between, on the one hand, detention for an indeterminate period, and on the other the sentence that might be imposed for the offence from which the proceeding arose. The one may take the place of the other.

We are in agreement with Mr. Justice Clements's persuasive and thoughtful analysis of the issue.

[56] The Moore case has been followed not only by this Court, but by the Courts of Appeal of Nova Scotia and Newfoundland (*R. v. J.H.B.* (1995), 101 C.C.C. (3d) 1 (N.S.C.A.); *R. v. D.E.D.* (1996), 150 N.S.R. (2d) 378 (C.A.); and *R. v. R.C.* (1996), 145 Nfld. & P.E.I.R. 271, [1996] N.J. No. 260 (QL) (C.A.)).

(ii) Should Dow be overruled?

- [57] Counsel for the appellant submitted that Dow should be considered to be wrongly decided. Mr. McKinnon submitted that the question of how to interpret the two 'mays' in the former section was finally determined two years after the Moore case by the Supreme Court of Canada in *R. v. Lyons*, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1. This decision was not drawn to the attention of the court in Dow.
- [58] In *Lyons* the Supreme Court of Canada was asked to declare the 1987 dangerous offender provisions unconstitutional as offending ss. 7, 9, 11(f), and 12 of the Charter. In dealing with the s. 12 argument, the court concluded that the provisions of the dangerous offender legislation, when read as a whole, did not constitute cruel and unusual punishment within the meaning of s. 12. La Forest J., speaking for the court, wrote (at pp. 337-39.):

Let us first consider the substantive ways in which the present legislation itself seeks to accommodate the conflicting interests, on the one hand, of society in seeking to protect itself from dangerous criminals and, on the other, of the offender in not being subjected to punishment grossly disproportionate to the offence and the circumstances of the individual case. It seems to me that the legislative criteria embodied in s. 688 for designating offenders as dangerous and for sentencing such persons tend, although not conclusively, to sustain the legislation as not constituting a violation of s. 12. I say "not conclusively" for, as will be seen, it is only when s. 688 is read in the context of the scheme as a whole that the legislation can be upheld. First, the legislation applies only to persons convicted of a "serious personal injury offence" as defined in s. 687. These offences all relate to conduct tending to cause severe physical danger or severe psychological injury to other persons. Significantly, the maximum penalty for all these offences must be at least ten years' imprisonment. Secondly, it must be established to the satisfaction of the court that the offence for which the person has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct, or a failure to control sexual impulses. Thirdly, it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subparagraph of s. 687 is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. Finally, the court has the discretion not to designate the offender as dangerous or to impose an indeterminate sentence, even in circumstances where all of these criteria are met. It seems to me that having concluded that the legislative objectives embodied in Part XXI [now Part XXIV] are not only of substantial importance to society's well-being, but, at least in theory, sufficiently important to warrant limiting certain rights and freedoms, one must equally conclude that the legislative classification of the target group of offenders meets the highest standard of rationality (and I use the word not as a term of art) and proportionality that society could reasonably expect of Parliament. Not only has a diligent attempt been made to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration, but it would be difficult to imagine a better tailored set of criteria that could effectively accomplish the purposes sought

to be attained. [Emphasis added.] [59] This statement of the law was recently accepted as definitive of the issue by the Alberta Court of Appeal in *R. v. Neve* (1999), 137 C.C.C. (3d) 97. In *Neve* the court said this, at paras. 227-28:

We now turn our attention to the last step in the dangerous offender analysis. As noted earlier, even if a court should find that all the statutory criteria for designating someone a dangerous offender have been met, there remains in the sentencing judge a discretion whether to make the designation. As noted earlier, the core question on this appeal is whether the sentencing judge's decision to designate *Neve* a dangerous offender was reasonable. Even assuming that *Neve* satisfies all the statutory criteria, we have concluded that it was not. The existence of this final review, giving to the sentencing judge an overriding discretion, indeed a duty, to decide whether to designate a person as dangerous, recognizes that the statutory criteria, if applied literally, could sometimes lead to an unjust result. It is precisely because this legislation is applied not on the basis of rigid classifications but accepted standards of rationality and proportionality that Charter challenges have failed. Indeed, it is the existence of the various layers of judicial discretion, including this layer at the very end, which, in part, shield the dangerous offender proceedings from Charter challenges. As explained by La Forest J. in *Lyons*, *supra* at 361-362:

Finally, it is not insignificant that ... the judge at such a hearing does retain a discretion whether or not to impose the designation ...

[60] Mr. McKinnon submitted that this Court should recognize the binding nature of the *Lyons* decision and overrule *Dow*.

[61] I agree with Mr. McKinnon's submission that the decision of the court in *Lyons* that the dangerous offender provisions did not offend s. 12 of the Charter, was based, in part, on the premise that the legislation provided a residual discretion to the sentencing judge "not to designate the offender as dangerous or to impose an indeterminate sentence, even in circumstances where all three of these criteria are met." This language seems to confer a discretion both at the designation stage and again in determining whether to sentence the offender to determinate or indeterminate time. From the perspective of the issues raised in the case at bar, however, this aspect of the *Lyons* decision is problematical. The court in that case did not set out the principles on which to exercise the two discretions.

[62] As noted in many of the cases where the discretion is said to lie only in determining whether to impose a determinate or non-determinate sentence, it is difficult to conceive of a situation where a person meets all of the statutory criteria and yet would still not be declared a dangerous offender. This is especially so where the legislation provides the sentencing judge with the option of sentencing a dangerous offender to either a determinate or indeterminate sentence. After all, it is not the designation of dangerous offender that is important under the former provisions, what really matters is the indeterminate sentence that may result from the finding.

[63] In *R. v. R.C.*, *supra*, Steele J.A. concluded at para. 77:

I have already made reference to the word "may" appearing twice in the latter part of s. 688 in the context that if the Crown establishes the three conditions just mentioned, "the court may find the offender to be a dangerous offender, and may thereupon impose a sentence of detention ... for an indeterminate period." Whether the "may" first appearing in s. 688(b) gives the trial judge a discretion not to declare an offender to be a dangerous offender . . . is still unclear.

Steele J.A. next referred to the Lyons decision, case-law to the contrary (e.g., *R. v. J.H.B.*, *supra* and *R. v. Moore*, *supra*), and two criminal procedure texts and concluded (para. 81):

I am uncertain how far-reaching the point is or if it is of any practical significance. If the Crown proves beyond a reasonable doubt the statutory criteria, it is difficult to imagine circumstances that negate a declaration of dangerous offender. If that prospect for some reason concerns the trial judge hearing the application he has the discretion - option - to forego an indeterminate sentence and simply sentence the offender for the offence for which he has been convicted. In this connection, the cases have consistently held that upon a finding of dangerous offender the trial judge does have the discretion not to impose an indeterminate sentence. . . . The question of whether an offender will respond to treatment and, in time, be cured, is frequently difficult to resolve. The cases however, have settled the point that the trial judge in determining whether an accused is a dangerous offender is not entitled to take into account the probability of a cure. Response to treatment and probability of a cure is, nevertheless, a relevant consideration in the exercise of a judge's discretion to impose a fixed term or an indeterminate sentence. [Emphasis added.] [64] In *R. v. Carleton*, *supra*, a case that pre-dates *R. v. Neve*, *supra*, *McGillivray C.J.A.*, writing for the majority, expressed the same concerns (at pp.6-7):

The first "may" comes into operation only after it has been established to the satisfaction of the court that the three criteria earlier mentioned exist. It is difficult to envisage a case where after being satisfied that an offender has been convicted of a serious personal injury offence and that he has, by his conduct, shown a failure to control his sexual impulses and by his conduct has shown a likelihood of causing injury or pain or other evil to other persons through his failure in the future to control his sexual impulses, a court could refuse to find the offender to be a dangerous offender. Whether, however, the first "may" is to be imperative in all cases, it is not necessary to decide. It is clear here that the court found the offender to be a dangerous offender. . . . In the light of this conduct, I have no doubt that the finding of "dangerous offender" is entirely justified in this case.

[65] In its recent decision in *Neve*, the Alberta Court of Appeal felt itself bound by the statement in *Lyons* I quoted earlier in these reasons. The court attempted to set out the principles upon which a discretion to refuse to declare an offender a dangerous offender even though all of the statutory criteria have been met could be exercised.

[66] Although *Neve's* appeal came on for hearing after the 1997 amendments, her dangerous offender hearing had taken place under the former provisions. After an exhaustive analysis of the criteria set out in ss. 753(a)(i) and (ii), the court turned to the residual or overriding discretion (paras. 229-31):

Accordingly, it is at this stage of the dangerous offender proceedings that the sentencing judge, even though satisfied that all the statutory prerequisites have been met, should step back and reassess the evidence having regard to this consideration: Does this offender fall within that relatively small group of criminals in respect of whom preventative incarceration is warranted? What considerations should properly influence the court in answering this question and deciding, therefore, whether to designate a person a dangerous offender? In other words, what then goes on the scale given that at this point all the other thresholds have been crossed and the person has been found to constitute a threat to the life, safety or physical or mental well-being of others? At this stage, at least three considerations potentially loom large: first, the offender's treatment prospects; second, the relative degree of seriousness of the criminal conduct and the extent of the offender's moral blameworthiness; and third, the offender himself or herself. This said, we are bound to point out that there is another possible interpretation of the Supreme Court's decision in *Lyons*, supra, dealing with the sentencing judge's discretion not to designate an offender as dangerous. It may be argued that this discretion is an integral part of the threat analysis. And it is before finding the offender to be a threat, and not thereafter, that the sentencing judge should take into account the additional considerations we have identified. This approach would avoid the conceptual difficulties some find inherent in the proposition that the discretion arises only after the threat finding. The difficulty is this. After having reached the point of concluding that someone is a threat of the kind defined in s.753, what would justify the sentencing judge's resiling from this designation? The answer is those factors which we have outlined above, including treatment prospects, seriousness of conduct and blameworthiness. The point therefore, as we see it, is that there must be some stage in the dangerous offender analysis before designating someone a dangerous offender where the sentencing judge considers the additional factors we have identified. Hence, if we are wrong that a residual discretion exists not to designate someone a dangerous offender even if the formal criteria are met, then at the very least, we are of the view that these factors must be taken into account at the threat evaluation stage. [Emphasis added.]

[67] Noting the conceptual difficulties posed by *Lyons*, supra, the Alberta Court of Appeal struggled to define the principles upon which a residual discretion might be exercised. As set out above, the court held that the factors to consider would be treatment prospects, seriousness of conduct, blame-worthiness, and the personal circumstances of the offender. I am of the view that three of the factors - treatment prospects, seriousness of the offence, and the personal circumstances of the offender are matters taken into account at earlier stages of the proceedings. It would therefore be unhelpfully repetitive to require re-consideration of these factors as part of an overriding discretion. As for the blameworthiness of an offender, I am of the view that it is an irrelevant consideration in what is essentially a risk analysis. Furthermore, I am unable to identify any principles or factors that a court could take into account in applying an overriding discretion not to find an offender to be a dangerous offender that are not already taken into account at different points in the proceedings. Thus, for the reasons which I will attempt to explain in more detail, I am not persuaded by the *Neve* decision that there exists a residual discretion to

refuse to declare a person a dangerous offender once all of the statutory criteria have been met.

- [68] Prior to the Lyons decision the Supreme Court of Canada had made it clear that prospects for treatment and cure were to be considered only in determining whether to impose a determinate or indeterminate sentence. In *R. v. Carleton* supra, McGillivray C.J.A. said this (pp. 8-9):

I am ... of the view that a trial judge is entitled to take into account any psychiatric information that a cure is probable within a determinable time in determining whether a sentence of indeterminate detention is required. So, by way of example, if a psychiatrist attributed the cause of the offender's past conduct in sexual matters to, say, a brain tumor, which was operable, and that an operation was forthcoming, the court, in my view, could certainly conclude that an indeterminate sentence was not appropriate. * * * For the reasons I have already expressed, I am of the opinion that the learned trial judge was quite correct in saying that he could not take into account the probability of a cure in making his determination of whether the accused was a dangerous offender. On the other hand, he was entitled to take into account the probability of cure in determining whether a sentence of indeterminate detention was required.

- [69] In a short judgment reported at [1983] 2 S.C.R. 58, the Supreme Court of Canada dismissed Carleton's appeal. The court adopted the reasons of Chief Justice McGillivray.

- [70] However, three years later in the Lyons decision La Forest J. noted that, "explicit in one form or another in each subparagraph of s. 687 [the 1987 section number setting out the criteria] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable." (p. 338, emphasis added.) This passage from Lyons makes it clear that unless it can be said that a pattern of conduct is intractable; that is, deep-seated or difficult to cure, it cannot be said that a person is dangerous. In my view, Lyons has altered the Carleton approach to some degree. As I will suggest later in these reasons, the altered approach had no practical effect under the former provisions, but it now plays a significant role in interpreting the new provisions.

- [71] The court in Neve accepted that treatment prospects should be considered both before designating the offender a dangerous offender; i.e., in determining the "threat requirement," and again in determining sentence, but the court concluded that it should also be considered by the sentencing judge as part of the "residual discretion" possessed by the sentencing judge in determining whether to make the designation at all. The court said at para. 241:

Therefore, regardless of the role which treatment prospects may play in deciding the length of sentence, we have concluded that the question of possible treatment and cure is directly relevant before designating a person a dangerous offender. It has potential relevance at two stages: when considering whether an offender meets the threat requirement in terms of future dangerousness; and in any event, when considering whether a dangerous offender designation should be made. The point is that regardless of where considered, either at the threat stage or at the residual

discretion stage, this consideration should be placed on the scale.

[72] I agree with the Alberta Court of Appeal that the decision in Lyons dictates that under the former legislation treatment prospects must be considered in determining whether a person poses a threat to society and therefore should be considered at the designation stage. Lyons made it clear that a sentencing judge must consider treatment prospects in determining whether a pattern of conduct is intractable or difficult to unseat. But if it can be said that the pattern of conduct is intractable and that the offender meets the other criteria, it is not illogical to require the sentencing judge to designate the offender a dangerous offender and thereafter examine the prospects of treatment in determining the type of sentence to impose. The case-law already requires treatment to be considered at the designation and sentence stage; I do not accept that under the former legislation it is necessary to examine it yet again as part of a residual discretion in determining whether the offender is a dangerous offender.

[73] Under the former provisions, the seriousness of the offence is considered in determining whether the offender constitutes a formidable risk to others. This was made clear in the judgment of McGillivray C.J.A. in Carleton, supra, at p. 8:

Certainly as my brother Moir has pointed out, the Criminal Code requires a court to have the benefit of psychiatric evidence before making a determination of whether a man is a dangerous offender, and before determining what is the appropriate sentence. That psychiatric evidence may bear on whether the nature of the past sexual conduct may give rise to the likelihood of the offender causing injury in the future. It should be quite plain to a judge that if a man has been convicted of rape on five occasions that that conduct clearly shows a likelihood of injury to others. Yet, if the offences consisted of, say, kissing, pinching or fondling, psychiatric evidence might be valuable in enabling a judge to determine whether this conduct shows a likelihood of the offender causing injury, pain or other evil to others through his failure in the future to control his sexual impulses. [Emphasis added.] [74] In my view it would be unnecessary and perhaps confusing to consider seriousness of the offence once again as part of an overriding or residual discretion.

[75] Next, the Alberta Court of Appeal in Neve suggested that "the extent of the offender's moral blameworthiness and . . . the offender himself or herself" should be considered in determining whether to refuse a dangerous offender designation even though the offender has met the statutory criteria. (para. 230.)

[76] I cannot agree that moral blameworthiness is a consideration in dangerous offender legislation. As La Forest J. said in Lyons at p. 329:

It is thus important to recognize the precise nature of the penological objectives embodied in Part XXI. It is clear that the indeterminate detention is intended to serve both punitive and preventive purposes. Both are legitimate aims of the criminal sanction. Indeed, when society incarcerates a robber for, say, ten years, it is clear that its goal is both to punish the person and prevent the recurrence of such conduct during that period. Preventive detention in the context of

Part XXI, however, simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased. Part XXI merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person. In such circumstances it would be folly not to tailor the sentence accordingly. [Emphasis in text]

[77] The central purpose of the legislation is to assess the risk of reoffending. To repeat the words of La Forest J., if the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person, it follows that the person ought to be dealt with as a dangerous offender. At this stage of the process we are assessing the risk to the community posed by the offender. In my view, the offender's relative blameworthiness or culpability is not a factor to take into account.

[78] Finally, the Alberta Court of Appeal in Neve said that the circumstances of the offender ought to be taken into account in determining whether or not to designate him or her a dangerous offender. The court discussed Neve's personal circumstances, her age, immaturity, difficulty with substance abuse, family home and support, and history of treatment. The court saw these as factors affecting the likelihood of rehabilitation and treatment efforts (paras. 283-88).

[79] In my view these are factors that ought to be considered as part of the "intractability" analysis or in deciding whether to impose a determinate sentence. It would be redundant to consider the factors once again as part of an overriding discretion to refuse to declare a person a dangerous offender in spite of the fact that the offender has met all statutory criteria. In my view, given the language of the former provisions, there are no identifiable principles that are not already embodied in the statutory criteria, or in the discretion as to type of sentence, upon which to exercise an overriding discretion to refuse to designate a person as dangerous when he or she meets the statutory criteria. In my view Dow, supra, correctly interpreted the first "may" in s. 753 as imperative and the second as discretionary.

(iii) Conclusion

[80] To summarize the operation of the former provisions:

1. Explicit in one form or another in each subparagraph of s. 753 is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable.
2. Psychiatric evidence about the prospects of treatment is admissible in determining the degree of intractability of an offender's conduct.
3. The prospects of treatment for an offender who otherwise meets the dangerous offender criteria may be considered in determining whether to sentence the offender to a determinate or indeterminate sentence.
4. The question of moral blameworthiness is not a factor to consider apart from the criteria imposed by the statute in s. 753.
5. The personal

circumstances of the offender may be relevant to the issues in determining whether an offender meets the statutory criteria, but they do not form an independent consideration beyond the statutory criteria. 6. There is no residual discretion to decline to declare a person a dangerous offender if all of the statutory criteria have been met. The first "may" in s. 753 relates to the contingency of proof of the criteria, while the second "may" relates to the choice to be made between a determinate and indeterminate sentence.

[81] It follows that I would not overrule the decision of this Court in Dow.

Dangerous Offender Designation under the New Provisions

[82] The new provisions retain the same criteria for dangerousness, but, as noted earlier, s. 753(1) now begins: "The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied" (Emphasis added.) Section 753(4) states: "If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period." (Emphasis added.)

[83] What follows from this change is that it is no longer open to a sentencing judge, having designated a person a dangerous offender, to choose to sentence the offender to a determinate rather than an indeterminate sentence. The offender must be sentenced to an indeterminate sentence. As Mr. McKinnon submitted, on the face of it, this creates a difficulty. As I mentioned earlier, part of the reason that the Supreme Court of Canada found that the former dangerous offender provisions met Charter scrutiny was the presence of this discretion in sentencing. Under the former provisions the only basis upon which a sentencing judge might choose a determinate sentence over an indeterminate sentence was on a finding that a cure for the offender's behaviour was probable within the parameters of a fixed sentence, thus eliminating the necessity for life-time control of the offender under an indeterminate sentence. (*R. v. Carleton*, supra; *R. v. Putsoungas* (1989), 49 C.C.C. (3d) 388 (Ont. C.A.); and *R. v. Bakker* (1999), 133 C.C.C. (3d) 75.) In my view the ability to protect the offender from over-incarceration must be maintained in the new provisions if compliance with the Charter is to be sustained. As noted in the recent decision in *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33, there is a presumption that Parliament intended to enact legislation in conformity with the Charter. If a legislative provision can be read both in a way that is constitutional and a way that is not, the former reading should be adopted. The new dangerous offender provisions must be read with this in mind.

[84] I have mentioned the different approaches to prospects of treatment and cure found in *Carleton*, supra, and in *Lyons*, supra. To repeat, *Carleton* stated that prospects of treatment or cure should not be considered by a trial judge in determining whether the offender was dangerous. *Lyons* put treatment prospects in a different place in the analysis. It made the point that the offender's pattern of conduct must be substantially or pathologically intractable before he or she could be designated a dangerous offender. A pattern of conduct will be intractable if it is deep-seated and difficult to treat. Under the former provisions the

difference in approach between Carleton and Lyons was of no practical effect. This is because it was open to a sentencing judge to sentence a dangerous offender to a fixed term if the judge was satisfied that the offender could overcome his or her tendencies within the time frame of a determinate sentence. Thus the level of intractability in determining dangerousness was of less importance under the former provisions than it is now under the new.

[85] As discussed earlier in these reasons, under the new provisions a determinate sentence is not available for a person who meets the statutory criteria. It follows that if there is evidence of a prospective treatment or cure it must now play a prominent role in determining dangerousness; that is, whether the pattern of conduct exhibited by the offender may be said to be substantially or pathologically intractable. That is what this Court said in *R. v. Poole* (2000), 142 B.C.A.C. 151, [2000] B.C.J. No. 1787 (QL); leave to appeal refused [2000] S.C.C.A. No. 608 (QL). At para. 16 Lambert J.A. said:

Under the previous version of the Code, a finding that the person was a dangerous offender did not necessarily result in the imposition of an indeterminate sentence. So treatment possibilities entered into a consideration of the appropriate sentence following a finding that a person was a dangerous offender. But now the finding that a person is a dangerous offender requires the imposition of an indeterminate sentence. So it is argued that since treatment possibilities must always be an important consideration in dangerous offender proceedings, that possibility and the potentiality for treatment must now form a part of the consideration of the circumstance of "the likelihood of causing death or injury to other persons...through failure in the future to restrain his behaviour". The Crown agreed with that submission. So do I. [86] The last point in the overall analysis under the former provisions was whether the offender was likely to be cured within the length of a fixed sentence. I am of the view that to ensure compliance with the Charter, the last point in the analysis under the new provisions must be whether the offender is likely to be cured within the length of a determinate sentence, or whether the offender will eventually be controllable under a long-term offender sentence. If the sentencing judge concludes that it is a reasonable possibility that a cure or control would be effected within either of those time frames, it cannot be said that the offender's pattern of conduct is substantially or pathologically intractable. The sentencing judge should decline to make the dangerous offender designation and go on under s. 753(5) to sentence the offender to a fixed sentence, find the offender to be a long-term offender, or hold a hearing to determine whether the offender is a long-term offender.

[87] This brings me to the long-term offender provisions.

The Operation of the Long-Term Offender Provisions

[88] Section 753(5) provides:

(5) If the court does not find an offender to be a dangerous offender,

- (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or (b) the court may impose sentence for the offence for which the offender has been convicted.

[89] Section 753.1(1), (2), (3) and (6) are the relevant sections dealing with the criteria and consequences of a declaration that an offender is a long-term offender:

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

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted; (b) there is a substantial risk that the offender will reoffend; and (c) there is a reasonable possibility of eventual control of the risk in the community. (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and (b) the offender
- (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
- (3) Subject to subsections (3.1), (4) and (5), if the court finds an offender to be long-term offender, it shall (a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and (b) order the offender to be supervised in the community, for a period not exceeding ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act. * * * (6) If the court does not find an offender to be a long-term offender, the court shall impose a sentence for the offence for which the offender has been convicted.

[90] An offender who has been convicted of a serious personal injury offence, as defined in s. 752 of the Code, may qualify as a long-term offender if he or she falls short of dangerous offender status. A person may also qualify for long-term offender status if he or she has been convicted of a sexual offence described in s. 753.1(2). These last provisions were obviously intended to add to the control of sexual offenders who have not necessarily committed a personal injury offence but remain a threat to the safety of the community. I will not deal with this type of offender as it is beyond the scope of this appeal. The question for

discussion on this appeal is how the long-term offender provisions fit into the overall scheme of control of those who commit serious personal injury offences and remain a threat to the community.

- [91] As can be seen, s. 753.1(1) sets out the criteria that must be satisfied before an offender may be designated a long-term offender:
1. The appropriate sentence of incarceration must be two years or over; 2. There must be a substantial risk that the offender will reoffend; and 3. There must be a reasonable possibility of eventual control of the risk in the community.
- [92] Section 753.1(2) applies to offenders convicted of a serious personal injury offence which is sexual in nature. It provides that the court shall be satisfied that there is a substantial risk if the offender has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender causing death or injury to other persons or inflicting severe psychological damage on other persons. This section follows the wording of s. 753(1)(a)(i) of the dangerous offender provisions but omits the requirements that the pattern show "a failure to restrain his or her behaviour" and that the likelihood of damage to other persons be as a result of a "failure in the future to restrain his or her behaviour." Section 753.1(b)(ii) provides that the court shall be satisfied that there is a substantial risk if the offender by conduct in any sexual matter, including that involved in the commission of the offence, for which he or she was convicted has shown a likelihood of causing injury, pain, or other evil to other persons in the future through similar offences. This section follows the wording of s. 753(1)(b) of the dangerous offender provisions but omits the requirements that the conduct "has shown a failure to control his or her sexual impulses," and, that the likelihood of causing injury in the future be through the "failure in the future to control his or her sexual impulses."
- [93] As I read them, what distinguishes the long-term offender provisions from the dangerous offender provisions is the absence of the requirement that the pattern or conduct of the offender be substantially or pathologically intractable, and that if the offender has any treatable condition it will be of such a kind that it must be, if not curable, at least eventually controllable in the community.
- [94] Thus the long-term offender provisions may apply to an offender who does not meet the dangerous offender criteria because his or her pattern of conduct is not so intractable that it will not eventually be controllable in the community within the time frame established by a fixed sentence accompanied by a 10-year period of probation.

Which Provisions are More Beneficial to the Offender the New Provisions or the Former?

- [95] It follows from all of this that the test for dangerousness in the former dangerous offender provisions and in the new ones, although expressed differently, should yield the same result. While the factors to consider are weighed at different stages in the former and in the new provisions, the substance of the test has remained the same. The new provisions may be seen as an attempt to re-state the case-law which had developed around the former provisions, to rationalize those provisions, and to eliminate redundancy.
- [96] It has been argued that the new legislation is harsher than the former because it now provides that the dangerous offender's first parole review does not arise until seven years after sentencing rather than the three years stipulated by the former provisions. This change may simply highlight the level of risk the offender poses before the court will be satisfied that he or she meets the dangerous offender criteria and may also recognize how improbable it is that a high-risk offender would be sufficiently rehabilitated in three years to be released on parole. In Lyons, supra, La Forest J. made this observation (pp. 339-40):

Indeed, in view of the provisions regarding parole it is possible, at least theoretically, that a dangerous offender could be released consequent on his first review, three years after the detention was imposed and well in advance of the seven or so years and offender serving a life sentence must serve before his or her first such review. This is, however, rather unrealistic. Evidence before the Court indicated that between 1980-86, only six dangerous offenders were granted day parole, two of whom had served 10-15 years, three, 15-20, and one, more than 20 years.

- [97] Nevertheless, it cannot be said that the punishment in that sense, is not harsher.
- [98] In summary then, the dangerous offender designation under the new provisions is designed to ensure that those offenders who are truly dangerous, whose behaviour is unlikely to be modified or controlled, will be sentenced to an indeterminate sentence for the highest degree of state control. An offender whose conduct or behaviour is not pathologically intractable, in the sense that the offender can at least reach a stage where, though not curable, he or she can be safely controlled in the community and who would likely have been found to be a dangerous offender under the former provisions, may now qualify for long-term rather than dangerous offender status. This offender would have at least the possibility, when the offender is no longer a risk to the community, to one day be free of state control.
- [99] I have concluded that the new provisions are, when viewed in this context, more beneficial than the former provisions to an offender for whom a dangerous offender application has been made. With the addition of the long-term offender designation, the new provisions narrow the scope of the former provisions and provide more options to a sentencing judge to deal with a person who is found to pose a risk of offending in the future.

[100] In my view Mr. Johnson should have been dealt with under the new Part XXIV. He should have been given the opportunity to persuade the court that he was a long-term rather than a dangerous offender.

The Lesser Punishment Provided to Dangerous Offenders Under the Former Provisions

[101] Although the new provisions provide an overall benefit in the sense that I have just described, those who are found to be dangerous offenders and sentenced under the new provisions would lose the benefit of the earlier parole hearing provided by the former legislation. In accordance with s. 11(i) of the Charter and s. 44(e) of the Interpretation Act, the offender is entitled to the benefit of the lesser punishment as well. Thus, Mr. Johnson was entitled to be sentenced in accordance with the provisions of the new Part XXIV of the Code, but he ought to retain the benefit of the early parole hearing.

Should R. v. Turley be Overturned?

[102] As I mentioned earlier the position of the Crown on this appeal was that that the long-term offender provisions put a person who is not found to be a dangerous offender into a more precarious position than he or she would have been in under the former provisions. Since this position was contrary to the decision of this Court in R. v. Turley (1999), 136 C.C.C. (3d) 426, the Crown submitted that Turley should be overruled.

[103] R. v. Turley was a Crown appeal taken under the former provisions. The sentencing judge found the accused to be a dangerous offender but then declined to impose an indeterminate sentence. This Court was doubtful that the accused would be rehabilitated at the conclusion of a determinate sentence but, rather than re-visit that decision, it found that the new long-term offender provisions permitted imposition of a sentence under that regime. The Court concluded that although Mr. Turley might not be rehabilitated, he could eventually be controlled in the community and thus declared him to be a long-term offender. This result is in accordance with the decision in the case at bar. I would decline to overrule the Turley case.

Summary of Conclusions on the Applicable Law

[104] To summarize:

1. This Court's decision in R. v. Dow, *supra*, correctly states the law in British Columbia. The decision of the Alberta Court of Appeal in R. v. Neve, *supra*, should not be followed. Once a court determines that an offender meets the dangerous offender criteria, the offender should be declared a dangerous offender. There is no residual discretion not to declare the offender a dangerous offender. This reasoning applies to both the former and the new provisions of Part XXIV of the Code. 2. R. v. Carleton, *supra*, has been overruled by R. v. Lyons, *supra*. Before a court may declare a person to be a dangerous offender, it must find that the offender's condition is "substantially or pathologically intractable." This means that

the question of treatability must be examined in determining whether the offender is dangerous. Under the former s. 753, treatability was generally considered in determining whether a person who had been found to be a dangerous offender should be sentenced to a determinate or indeterminate sentence. If it was likely that the offender would be cured within the limits of a determinate sentence, the offender would be sentenced accordingly. Thus, under the former provisions, the timing of the treatability analysis made no real practical difference. As amended, the present s. 753(1) has eliminated the ability of the court to sentence a person found to be a dangerous offender to a determinate sentence. It is essential that the treatability analysis be done under these new provisions at the designation stage. 3. Under the new provisions, if an offender is likely to be cured of his or her condition within the parameters of the appropriate determinate sentence, the condition cannot be said to be intractable and he or she ought not to be declared a dangerous offender. If the offender may not be cured, but may be controlled in the community within the limits defined by a long-term offender sentence, the offender should not be declared a dangerous offender, but a long-term offender instead. The long-term offender provisions of Part XXIV of the Code are thus more beneficial to an offender than the former provisions. An offender who has been convicted prior to the amendments but is being sentenced after the amendments ought to have the benefit of the long-term offender provisions if appropriate. 4. Offenders convicted prior to the amendments to Part XXIV but sentenced after the amendments should be proceeded with under the amendments insofar as they are more beneficial than the former provisions. If these offenders are found to be dangerous offenders they ought to receive the benefit of the former provisions in that they are entitled to a parole review three years (the former s. 761) rather than seven years (the present s. 761(1)) after being designated a dangerous offender. 5. *R. v. Turley*, supra, was correctly decided.

Did the Sentencing Judge Err in Utilizing the "Hybrid Procedure"?

[105] As set out at the beginning of these reasons, Mr. Johnson's dangerous offender hearing was based on a combination of the former and new provisions of the Code. At the outset of the dangerous offender hearing, Crown counsel took the position that Mr. Johnson should be proceeded with under s. 753 of the former provisions as far as the actual sentence to be imposed was concerned, but that s. 753(1) and s. 752.1 of the new provisions ought to apply as they are procedural in nature. Rather than utilize only the procedure set out in the new provisions, the Crown advanced the position that some of the new procedural provisions should be incorporated with, or sit alongside the procedure set out in the former provisions. In accordance with this theory of matters, the Crown filed the Notice of Application and the Attorney General's consent both of which were required to be filed under the former provisions.

- [106] With the consent of defence counsel, the Crown filed three volumes of transcripts of evidence given at Mr. Johnson's previous dangerous offender hearing and two volumes of exhibits that had been filed in the proceedings. The transcripts contained the direct and cross-examinations of two psychiatrists nominated by the Crown and defence under the former provisions and of two psychologists who had dealings with the offender as an inmate. The exhibits contained the written reports of two of the psychiatrists.
- [107] The Crown called two witnesses, Dr. Coles, who had prepared the s. 752.1 report, and Dr. Semrau, who was the psychiatrist nominated by the Crown under the former legislation.
- [108] Mr. McKinnon submitted that this curious admixture resulted in a hearing for which the sentencing court had no jurisdiction. He submitted that s. 754 of the Code, which requires the Attorney General's consent and notice to the offender, was not complied with. Mr. McKinnon submitted that dangerous hearing proceedings require strict compliance with the procedures set out in the Code, and that any deviation from those procedures results in a loss of jurisdiction.
- [109] In this case Mr. McKinnon complained that the notice to the offender and the consent of the Attorney General were flawed as they were based on the former provisions of the Code. As I have concluded, on another basis, that there ought to be a new hearing, I need not deal with those submissions. The real difficulty is not with the documents filed in support of the application, but the fact that the court was persuaded that the long-term offender provisions were not available to a person in Mr. Johnson's position. I will return to this problem presently.
- [110] Mr. McKinnon submitted that the documentary errors were compounded by the procedure adopted by counsel at the hearing of the dangerous offender application. Mr. McKinnon submitted that the court did not have the authority under the former much less the new provisions to permit the filing of the transcripts and exhibits from Mr. Johnson's first dangerous offender proceedings.
- [111] I do not agree. As I understand it, neither the content of the psychiatric and psychological opinions and reports nor the qualifications or sincerity of the witnesses were in issue in this case. If counsel choose to shorten a dangerous offender proceeding by arguing the weight to attach to accepted opinion, I can find nothing in Part XXIV that would forbid it. As Mr. Peck pointed out in the factum for the Crown, the new provisions do not require expert psychiatric evidence, nor do they preclude it. The defence chose not to call evidence. However, it was not prevented from calling witnesses if it was not satisfied with the state of the evidentiary record. I would dismiss this ground of appeal. The "hybrid" proceeding did not result in a loss of jurisdiction.

CONCLUSION

[112] The real problem posed by the case at bar is that it proceeded on the basis that the long-term provisions were closed to Mr. Johnson. Although the question of whether Mr. Johnson might eventually be controllable in the community was touched upon and mentioned by the trial judge, it was not fully canvassed at the hearing. In my view it ought to have been. Mr. Johnson should have the opportunity to argue this aspect of his case fully.

[113] On an appeal against a finding that a person is a dangerous offender this Court may, under s. 759(3), allow the appeal, find the person to be a long-term offender and impose sentence; find that the offender is not a dangerous offender and impose sentence for the offence for which the offender was convicted; or, order a new hearing. The provisions do not permit us to return this matter to the sentencing judge to determine only whether the offender is a long-term rather than a dangerous offender. In these circumstances I would set

aside the designation of dangerous offender and order a new hearing.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Braidwood"

I AGREE:

"The Honourable Mr. Justice Low"

APPENDIX

THE FORMER DANGEROUS OFFENDER PROVISIONS

Dangerous Offenders

APPLICATION FOR FINDING.

753. [688] Where, upon an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court

- (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 has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour, (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he 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 behaviour, or (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his 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 conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,

the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted.

HEARING OF APPLICATION - By court alone - When proof unnecessary - Proof of consent.

754. [689] (1) Where an application under this Part has been made, the court shall hear and determine the application except that no such application shall be heard unless
- (a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application; (b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and (c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be. (2) An application under this Part shall be heard and determined by the court without a jury.
- (3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.
 - (4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

EVIDENCE OF DANGEROUS OFFENDER STATUS - Nomination of psychiatrists - Nomination by court - Saving.

755. [690] (1) On the hearing of an application under this Part, the court shall hear the evidence of at least two psychiatrists and all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender.
- (2) One of the psychiatrists referred to in subsection (1) shall be nominated by the prosecution and one shall be nominated by the offender.
- (3) If the offender fails or refuses to nominate a psychiatrist pursuant to this section, the court shall nominate a psychiatrist on behalf of the offender.
- (4) Nothing in this section shall be construed to enlarge the number of expert witnesses that may be called without the leave of the court or judge under section 7 of the Canada Evidence Act.

DIRECTION OR REMAND FOR OBSERVATION - Idem.

756. [691] (1) A court to which an application is made under this part may, by order in writing,
- (a) direct the offender in relation to whom the application is made to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or (b) remand the offender in such custody as the court directs, for a period not exceeding thirty days, for observation, where in its opinion, supported by the evidence of, or where the prosecutor and the offender consent, supported by the report in writing of, at least one duly qualified medical practitioner, there is reason to believe that evidence might be obtained as a result of the observation that would be relevant to the application.
- (2) Notwithstanding subsection (1), a court to which an application is made under this Part may remand the offender to which that application relates in accordance with that subsection
- (a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the offender and give evidence or submit a report; and (b) for a period of more than thirty but not more than sixty days where it is satisfied that observation for that period is required in all the circumstances of the case and its opinion is supported by the evidence of, or where the prosecutor and the offender consent, by the report in writing of, at least one duly qualified medical practitioner.

EVIDENCE OF CHARACTER.

757. [692] Without prejudice to the right of the offender to tender evidence respecting his character and repute, evidence of character and repute may, if the court thinks fit, be admitted on the question whether the offender is or is not a dangerous offender.

PRESENCE OF ACCUSED AT HEARING OF APPLICATION - Exception.

758. [693] (1) The offender shall be present at the hearing of the application under this Part and if at the time the application is to be heard
- (a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or (b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XVI relating to summons and warrant are applicable with such modifications as the circumstances require. (2) Notwithstanding subsection (1), the court may
 - (a) cause the offender to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or (b) permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper.

APPEAL - Appeal by Attorney General - Disposition of appeal - Idem - Effect of judgment - Commencement of sentence - Part XXI applies re appeals.

759. [694] (1) A person who is sentenced to detention in a penitentiary for an indeterminate period under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.
- (2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.
 - (3) On an appeal against a sentence of detention in a penitentiary for an indeterminate period, the court of appeal may
 - (a) quash such sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or order a new hearing; or (b) dismiss the appeal. (4) On an appeal against the dismissal of an application for an order under this Part, the court of appeal may
 - (a) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of detention in a penitentiary for an indeterminate period, or order a new hearing; or (b) dismiss the appeal. (5) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.
 - (6) Notwithstanding subsection 721(1), a sentence imposed on an offender by the court of appeal pursuant to this section shall be deemed to have commenced when the offender was sentenced by the court by which he was convicted.
 - (7) The provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this section.

DISCLOSURE TO SOLICITOR GENERAL

760. [695] Where a court, pursuant to section 753, finds an offender to be a dangerous offender and imposes a sentence of detention in a penitentiary for an indeterminate period, the court shall order that a copy of all reports or testimony given by psychiatrists, psychologists or criminologists and any observations of the court with respect to the reasons for the sentence, together with a transcript of the trial of the dangerous offender, be forwarded to the Solicitor General of Canada for his information.

REVIEW FOR PAROLE - Idem.

761. [695.1] (1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, forthwith after the expiration of three years from the day on which that person was taken into custody and not later than every two years thereafter, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the Corrections and Conditional Release Act and, if so, on what conditions.
- (2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before October 15, 1977, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the Corrections and Conditional Release Act and, if so, on what conditions.

THE NEW DANGEROUS OFFENDER PROVISIONS

Dangerous Offenders and Long-Term Offenders

- 752.1 (1) Application for remand for assessment - Where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and, before sentence is imposed on the offender, on application by the prosecution, the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court may, by order in writing, remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under section 753 or 753.1.
- (2) Report - The person to whom the offender is remanded shall file a report of the assessment with the court not later than fifteen days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.
753. (1) Application for finding that an offender is a dangerous offender - The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
- (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour, (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of 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.
- (2) Time for making application - An application under subsection (1) must be made before sentence is imposed on the offender unless
 - (a) before the imposition of sentence, the prosecution gives notice to the offender of a possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and (b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecution at the time of the imposition of sentence became available in the interim. (3) Application for remand for assessment after imposition of sentence - Notwithstanding subsection 752.1(1), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply.
- (4) If offender found to be dangerous offender - If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period.
 - (4.1) If application made after sentencing - If the application was made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, the sentence of detention in a penitentiary for an indeterminate period referred to in subsection (4) replaces the sentence that was imposed for the offence for which the offender was convicted.

- (5) If offender not found to be dangerous offender - If the court does not find an offender to be a dangerous offender,
- (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or (b) the court may impose sentence for the offence for which the offender has been convicted. (6) Victim evidence - Any evidence given during the hearing of an application made under subsection (1) by a victim of an offence for which the offender was convicted is deemed also to have been given during any hearing under paragraph (5)(a) held with respect to the offender.

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

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted; (b) there is a substantial risk that the offender will reoffend; and (c) there is a reasonable possibility of eventual control of the risk in the community. (2) Substantial risk - The court shall be satisfied that there is a substantial risk that the offender will reoffend if
- (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and (b) the offender
- (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
- (3) If offender found to be long-term offender - Subject to subsections (3.1), (4) and (5), if the court finds an offender to be a long-term offender, it shall
- (a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and (b) order the offender to be supervised in the community, for a period not exceeding ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act. (3.1) Exception - if application made after sentencing - The court may not impose a sentence under paragraph (3)(a) and the sentence that was imposed for the offence for which the offender was convicted stands despite the offender's being found to be a long-term offender, if the application was one that

- (a) was made after the offender begins to serve the sentence in a case to which paragraphs 753(2)(a) and (b) apply; and (b) was treated as an application under this section further to the court deciding to do so under paragraph 753(5)(a). (4) Exception-life sentence - The court shall not make an order under paragraph (3)(b) if the offender has been sentenced to life imprisonment.
- (5) Exception to length of supervision where new declaration - If the offender commits another offence while required to be supervised by an order made under paragraph (3)(b), and is thereby found to be a long-term offender, the periods of supervision to which the offender is subject at any particular time must not total more than ten years.
- (6) If offender not found to be long-term offender - If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

753.2 (1) Long-term supervision - Subject to subsection (2), an offender who is required to be supervised by an order made under paragraph 753.1(3)(b) shall be supervised in accordance with the Corrections and Conditional Release Act when the offender has finished serving

- (a) the sentence for the offence for which the offender has been convicted; and (b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a). (2) Non-carceral sentences - A sentence imposed on an offender referred to in subsection (1), other than a sentence that requires imprisonment of the offender, is to be served concurrently with the long-term supervision ordered under paragraph 753.1(3)(b).
- (3) Application for reduction in period of long-term supervision - An offender who is required to be supervised, a member of the National Parole Board, or, on approval of that Board, the parole supervisor, as that expression is defined in subsection 134.2(2) of the Corrections and Conditional Release Act, of the offender, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.
- (4) Notice to Attorney General - The applicant must give notice of an application under subsection (3) to the Attorney General at the time the application is made.

753.3 (1) Breach of order of long-term supervision - An offender who is required to be supervised by an order made under paragraph 753.1(3)(b) and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

- (2) Where accused may be tried and punished - An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place

where the accused is found, is arrested or is in custody, but if the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.

753.4 (1) Where new offence - Where an offender who is required to be supervised by an order made under paragraph 753.1(3)(b) commits one or more offences under this or any other Act and a court imposes a sentence of imprisonment for the offence or offences, the long-term supervision is interrupted until the offender has finished serving all the sentences, unless the court orders its termination.

(2) Reduction in term of long-term supervision - A court that imposes a sentence of imprisonment under subsection (1) may order a reduction in the length of the period of the offender's long-term supervision.

754. (1) Hearing of application - Where an application under this Part has been made, the court shall hear and determine the application except that no such application shall be heard unless

(a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application; (b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and (c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be. (2) By court alone - An application under this Part shall be heard and determined by the court without a jury.

(3) When proof unnecessary - For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.

(4) Proof of consent - The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

755. [Repealed, 1997, c. 17, s. 5]

756. [Repealed, 1997, c. 17, s. 5]

757. Evidence of character - Without prejudice to the right of the offender to tender evidence as to his or her character and repute, evidence of character and repute may, if the court thinks fit, be admitted on the question of whether the offender is or is not a dangerous offender or a long-term offender.

758. (1) Presence of accused at hearing of application - The offender shall be present at the hearing of the application under this Part and if at the time the application is to be heard
- (a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or (b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XVI relating to summons and warrant are applicable with such modifications as the circumstances require. (2) Exception - Notwithstanding subsection (1), the court may
 - (a) cause the offender to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or (b) permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper.
759. (1) Appeal - dangerous offender - An offender who is found to be a dangerous offender under this Part may appeal to the court of appeal against that finding on any ground of law or fact or mixed law and fact.
- (1.1) Appeal - Long-term offender - An offender who is found to be a long-term offender under this Part may appeal to the court of appeal against that finding or against the length of the period of long-term supervision ordered, on any ground of law or fact or mixed law and fact.
- (2) Appeal by Attorney General - The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part, or against the length of the period of long-term supervision of a long-term offender, on any ground of law.
 - (3) Disposition of appeal - dangerous offender - On an appeal against a finding that an offender is a dangerous offender, the court of appeal may
 - (a) allow the appeal and
 - (i) find that the offender is not a dangerous offender, find that the offender is a long-term offender, impose a minimum sentence of imprisonment for two years, for the offence for which the offender has been convicted, and order the offender to be supervised in the community, for a period that does not, subject to subsection 753.1(5), exceed ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act, (ii) find that the offender is not a dangerous offender and impose sentence for the offence for which the offender has been convicted, or (iii) order a new hearing; or (b) dismiss the appeal.
- (3.1) Disposition of appeal - long-term offender - On an appeal against a finding that an offender is a long-term offender, the court of appeal may
- (a) allow the appeal and
 - (i) find that the offender is not a long-term offender and quash the order for long-term supervision, or (ii) order a new hearing; or (b) dismiss the appeal.

(3.2) Disposition of appeal - long-term offender - On an appeal by a long-term offender against the length of a period of long-term supervision of the long-term offender, the court of appeal may

- (a) allow the appeal and change the length of the period; or (b) dismiss the appeal. (4)

Disposition of appeal by Attorney General - On an appeal against the dismissal of an application for an order that an offender is a dangerous offender under this Part, the court of appeal may

- (a) allow the appeal and
- (i) find that the offender is a dangerous offender, (ii) find that the offender is not a dangerous offender, find that the offender is a long-term offender, impose a minimum sentence of imprisonment for two years, for the offence for which the offender has been convicted, and order the offender to be supervised in the community, for a period that does not, subject to subsection 753.1(5), exceed ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act, or (iii) order a new hearing; or (b) dismiss the appeal.

(4.1) Disposition of appeal by Attorney General - On an appeal by the Attorney General against the length of a period of long-term supervision of a long-term offender, the court of appeal may

- (a) allow the appeal and change the length of the period; or (b) dismiss the appeal. (4.2)

Disposition of appeal by Attorney General - On an appeal against the dismissal of an application for a finding that an offender is a long-term offender under this Part, the court of appeal may

- (a) allow the appeal and
- (i) find that the offender is a long-term offender, impose a minimum sentence of imprisonment for two years, for the offence for which the offender has been convicted, and order the offender to be supervised in the community, for a period that does not, subject to subsection 753.1(5), exceed ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act, or (ii) order a new hearing; or (b) dismiss the appeal.
- (5) Effect of judgment - A judgment of the court of appeal finding that an offender is or is not a dangerous offender or a long-term offender, or changing the length of the period of long-term supervision ordered, has the same force and effect as if it were a finding by or judgment of the trial court.
- (6) Commencement of sentence - Notwithstanding subsection 719(1), a sentence imposed on an offender by the court of appeal pursuant to this section shall be deemed to have commenced when the offender was sentenced by the court by which he was convicted.
- (7) Part XXI applies re appeals - The provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this section.

760. Disclosure to Correctional Service of Canada - Where a court finds an offender to be a dangerous offender or a long-term offender, the court shall order that a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding, together with a transcript of the trial of the offender, be forwarded to the Correctional Service of Canada for information.
761. (1) Review for parole - Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, as soon as possible after the expiration of seven years from the day on which that person was taken into custody and not later than every two years after the previous review, review the condition, history and circumstances of that person for the purpose of determining whether he or she should be granted parole under Part II of the Corrections and Conditional Release Act and, if so, on what conditions.
- (2) Idem - Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before October 15, 1977, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the Corrections and Conditional Release Act and, if so, on what conditions.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [114] I have had the benefit of reading the draft reasons for judgment of my colleague Madam Justice Ryan, and while I agree with much of her analysis of the jurisprudence and statutory provisions, I respectfully differ in the result. I would find that the long-term offender provisions now in the Criminal Code were not available to Mr. Johnson in the circumstances of this case.
- [115] I have reached this conclusion on the basis of three propositions which I draw from Madam Justice Ryan's reasons, and additional considerations which I describe below. I agree with Madam Justice Ryan that:
1. Part XXIV is a package which should apply to a person entirely or not at all. It is not a bundle of provisions that can be turned into an amalgam, mixed and matched to create a hybrid procedure. This result flows inexorably, in my view, from the inextricable linkage of the procedural provisions with the substantive penalty provisions. 2. The former provisions were correctly interpreted in *R. v. Dow* (1993), 134 C.C.C. (3d) 323 (B.C.C.A.). For the reasons of Madam Justice Ryan, I, too, conclude that the first "may" in the former s. 753 was empowering, providing no discretion to decline to designate a person a dangerous offender when the statutory criteria were met, and the second "may", which applied to the imposition of a determinate or indeterminate sentence, was discretionary. 3. The new s. 753(1) requires a sentencing judge to designate a person a dangerous offender when the statutory criteria for such a designation are met. That assessment requires consideration of the level of intractability present in the case to a degree not required under the former provisions

because of the then available alternative of a determinate sentence. [116] From these propositions I conclude that the dangerous offender designation under the two regimes is not interchangeable. While one can say with certainty that a dangerous offender under the new provisions would have been so designated under the former regime, one cannot say the converse is true. Proceedings under the two regimes will not always produce the same dangerous offender designation result. (One would say dangerous offenders under the new provisions are a sub-set of dangerous offenders under the former provisions, a wheel within a wheel.)

- [117] On the conclusion that the procedures under the two schemes are different and that "dangerous offender" under the two is not synonymous, it appears to me that a sentencing judge must know at the commencement of the dangerous offender hearing which provisions apply, and hence which designations may be engaged in the court's considerations. Although it may not be apparent at the commencement of the proceeding which provisions will ultimately yield the lesser penalty for the particular offender before the court, this is not a case such as *R. v. Anderson* (1996), 104 C.C.C. (3d) 215 (B.C.C.A.), in which one can await the outcome of the proceeding before determining which sentencing options are open to the Court. The vantage point for the analysis must be the front-end of the proceeding: at that time, what jeopardy will the offender face under the two statutory regimes?
- [118] Madam Justice Ryan has stated the question as whether the new provisions provide for a lesser or mitigated punishment. As the question must be asked at the beginning of the proceeding, I consider from that statement that the former provisions will apply in the event that the new provisions carry a realistic possibility of a greater punishment.
- [119] Were the dangerous offender designation the only consideration, I would agree with my colleague that the new provisions provide for no greater penalty than the former provisions because anyone designated a dangerous offender under the new provisions would have been so designated under the former provisions. However, there is the further question: can proceedings under the new provisions produce a greater penalty for those not designated a dangerous offender than would have been produced in proceedings conducted under the former provisions? I see this as the critical question.
- [120] The answer, as is apparent in the reasons of Madam Justice Ryan, is not obvious on reading the section and Parliament has failed to include transitional provisions.
- [121] Under the former scheme Mr. Johnson faced the possibilities of: no designation; dangerous offender designation sentenced to a fixed term; or dangerous offender designation sentenced to an indeterminate term. Under the new scheme he would have faced: the possibility of no designation; designation as a long-term offender sentenced to a fixed term over two years and a period of probation; or designation as a dangerous offender sentenced to an indeterminate term.

- [122] On reflection, I have concluded that the new provisions would have exposed Mr. Johnson, at the commencement of the hearing, to the potential for a more severe penalty than would the former provisions, in two ways.
- [123] First, and by far the less serious of the two, was the possibility that instead of a designation as a dangerous offender sentenced to a fixed term under the former provisions, he could have been designated a long-term offender sentenced to a fixed term and a period of probation under the new provisions, potentially lengthening the period of state control over his behaviour. This is a less serious result than my concern which follows, considering that the possibility of a longer period of probation under the new provisions may result in a shorter fixed term than would have resulted from the former regime.
- [124] Second, and most significantly, the new provisions, in my view, permit designation of persons as long-term offenders who may not have satisfied the statutory criteria of dangerous offender under the former provisions. The dangerous offender provisions deal with those whose behaviour is substantially and pathologically intractable, as Madam Justice Ryan has concluded. The dangerous offender criteria, both past and present, invoke the requirement that the offender "constitutes a threat to the life, safety or physical or mental well-being of other persons"
- [125] In contrast, the new long-term offender provisions speak of "risk" of reoffending, in terms somewhat reduced from the language of "dangerous offender". All that is required in the long-term offender provisions is conviction of a serious personal injury offence, a substantial risk the offender will reoffend and a reasonable possibility of eventual control. And "substantial risk" is not defined. Section 753.1(2) describes circumstances in which the court must conclude that there is a substantial risk of reoffending. The section lists certain sexual offences including sexual assault, the predicate offence in this case, and echoes aspects of the criteria for dangerous offender designation. However, I do not read the provisions of s. 753.1(2) as an exhaustive definition of "substantial risk of reoffending", for that would preclude long-term offender designation following conviction of those serious personal injury offences which are not referred to in that section. Nor do I read the degree of risk referred to in the "substantial risk" criteria as identical to the risk referred to in either the former or new dangerous offender provisions.
- [126] In the result, I conclude that the sentencing judge in this case could not say with certainty, at the time the hearing commenced, that the new provisions would provide the same or lesser punishment for Mr. Johnson. That being so, the sentencing judge was correct, in my view, in looking to the former provisions when he commenced the hearing.
- [127] In reaching this result, I recognize that it is inconsistent with this Court's decision in *R. v. Turley* (1999), 136 C.C.C. (3d) 426, in which the Court substituted a sentence under the long-term offender provisions, for a determinate sentence imposed under the former regime, thus lengthening the period of state control from that imposed by the sentencing judge. To the extent that the court utilized the new provisions for an offence that occurred while the

old provisions were in force, I would disagree with its application of the new provisions, for the reasons I have set out.

[128] Finally, I agree with my colleague that in the circumstances of this case the hybrid proceeding was not a basis on which to interfere with the decision.

[129] I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

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