

CANADA / JUDGMENT

R. v. Patel

2020 BCCA 92

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 92 R. v. Patel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Patel,

2020 BCCA 92

Date: 20200318

Docket: CA45215

Between:

Regina

Respondent

And

Jatin Patel

Appellant

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Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated
March 7, 2018 (R. v. Patel, 2018 BCSC 412, New Westminster Docket X078609).

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Place and Date of Hearing:

Vancouver, British Columbia

October 23, 2019

Place and Date of Judgment:

Vancouver, British Columbia

March 18, 2020

Dissenting Reasons by:

The Honourable Madam Justice MacKenzie

Written Reasons by:

The Honourable Mr. Justice Fitch (Page 55, para. 196)

Concurred in by:

The Honourable Mr. Justice Butler

Summary:

The appellant challenges her designation as a dangerous offender and the indeterminate sentence imposed upon her pursuant to s. 753(1)(b) and (4) of the Criminal Code. First, she argues the judge erred in varying his Kienapple ruling. The judge initially imposed conditional stays on the sexual assault counts, entering convictions on the sexual interference counts only. On Crown application, the judge reversed this, entering convictions on the sexual assault counts only. Sexual assault, and not sexual interference, is listed as a "serious personal injury offence" in

s. 752(b) of the Criminal Code, which is a prerequisite to a dangerous offender designation. Second, the appellant claims the judge misapplied *R. v. Boutilier*, 2017 SCC 64, erring at both the designation and the sentencing stages. At the designation stage, the appellant argues the judge erred by reading *Boutilier* as significantly expanding the scope of evidence considered in the prospective risk assessment. At the sentencing stage, she argues the judge erred by conflating intractability with manageability, failing to consider a lesser sentence, and imposing a disproportionate indeterminate sentence.

Majority (per Justice Fitch; Justice Butler concurring): Although there is agreement with the dissenting justice that most of the grounds of appeal have no merit, the Crown was wrong to submit that *Boutilier* fundamentally alters the prospective risk assessment at the designation stage by requiring consideration of the entirety of an offender's criminal behaviour, whether or not it is tied to the pattern of conduct that anchors the dangerous offender application. The judge was invited to consider the appellant's prior conviction for manslaughter -- a non-sexual violent offence -- in determining whether to declare her a dangerous sexual offender. He appears to have accepted the Crown's invitation to do so and, in the circumstances of this case, thereby erred in principle. At the very least, it cannot be said that the judge's prospective assessment of the appellant's risk to the community solely included offences that were tied to the appellant's past failure to control her sexual impulses. As a result, a new dangerous offender hearing is required.

Dissenting (per Justice MacKenzie): The dissenting justice respectfully disagrees that the judge misapplied *Boutilier* by considering the appellant's manslaughter conviction in the risk assessment at the designation stage. First, there is no indication whatsoever in the judge's reasons that he considered the manslaughter or any other non-sexual offence for any reason at the designation stage, and there is ample indication he did not do so. Second, the Crown's submissions when read as a whole and in context were not incorrect. The dissenting justice disagrees with the majority's interpretation of the Crown's submissions. The Crown merely submitted that an offender's past non-sexual offences could be considered at the designation stage if relevant to treatability. Thus, the Crown's submissions were consistent with the principle in *Boutilier* that matters pertaining to the treatability of an offender are relevant at the designation stage. The dissenting justice would dismiss the appeal.

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Reasons for Judgment of the Honourable Madam Justice MacKenzie:

Introduction

- [1] Jatin Patel appeals both her designation as a dangerous offender and the indeterminate sentence imposed pursuant to s. 753(1)(b) and (4) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] on March 7, 2018, in reasons for sentence indexed as 2018 BCSC 412. The appellant seeks orders under s. 759(3)(a)(i) or (ii) allowing the appeal, setting aside the dangerous offender designation and indeterminate sentence, and substituting a determinate sentence of time served, with or without a five-year long-term supervision order, or in the alternative, a new hearing. I will refer to her as female but at the time of the offences, she identified as male.
- [2] On April 1, 2016, a jury found the appellant guilty of two counts of sexual interference of N.K.J., a person under the age of 16, contrary to s. 151 of the Code and two counts of sexual assault of N.K.J., contrary to s. 271 of the Code. The charges arose from two encounters six weeks apart, on January 30, 2015, and March 14, 2015, in which the appellant sexually assaulted a 13-year-old girl to whom she first supplied crystal methamphetamine. The counts of sexual interference were conditionally stayed under *R. v. Kienapple*, [1975] 1 S.C.R. 729. I will refer to the two sexual assault convictions as the "index offences".
- [3] The appellant challenges her designation as a dangerous offender on several grounds. First, she says the sentencing judge erred in varying his *Kienapple* ruling, at the Crown's request, to lift the conditional stays on the sexual assault counts and instead to enter conditional stays on the sexual interference counts.
- [4] Second, she says the judge misapplied *R. v. Boutilier*, 2017 SCC 64, making errors at the designation and sentencing stages. First, the judge erred by agreeing with the Crown that Boutilier "expands the scope of the evidence that should be considered in assessing the future threat an offender poses." The appellant suggests it is unknown whether this alleged error influenced the judge at the designation stage to improperly consider the appellant's manslaughter conviction, and/or other offences unrelated to her sexual offending.
- [5] Second, the appellant submits the judge did not properly consider the separate inquiries required at each of the designation and penalty stages of the proceedings because he conflated intractability with manageability.

- [6] As to the indeterminate sentence, the appellant says the judge did not consider whether a lesser sentence would be appropriate, including a long-term supervision order.
- [7] Finally, the appellant contends that designating her a dangerous offender and imposing an indeterminate sentence were both unreasonable and disproportionate.
- [8] The appellant also applies to have this Court admit fresh evidence consisting of an affidavit attaching the "Inmate Copy" of her "Program Performance Report" at Pacific Institution in Abbotsford, British Columbia, respecting completion of a sex-offender program while in federal incarceration.
- [9] For the following reasons, I would not admit the fresh evidence and would dismiss the appeal.

The Index Offences

- [10] The two index offences occurred on January 30, 2015, and March 14, 2015, respectively. Significantly, the judge observed at para. 49 of his reasons that "a full analysis of whether [the appellant] meets the criteria to be designated a dangerous offender requires a detailed recounting of the facts of the offences." I agree with this observation. Although what follows is only a summary of the judge's recounting of those facts, I refer the reader to the detailed facts set out in the reasons for sentence at paras. 49-74. They are important to the judge's finding that the appellant meets the criteria for designation as a dangerous offender.
1. First Index Offence
 - [11] The first index offence arose from an encounter on January 30, 2015. At the time, the appellant was bound by a probation order. The appellant initiated contact with N.K.J. through a Facebook message. The two had not previously met. They exchanged a number of Facebook messages. The appellant told N.K.J. she was coming out to Surrey, British Columbia and thinking of getting a motel room.
 - [12] Although the appellant told her probation supervisor she was residing at a treatment centre in Vancouver, British Columbia, the appellant went to Surrey and rented a motel room; a place where she was not permitted to stay. Later on January 30, 2015, N.K.J. and her friend, C.J., also 13 years old, met the appellant at the motel. N.K.J. had previously told the appellant she was 13 years old. The appellant supplied the two young people with crystal methamphetamine. The appellant attempted penile vaginal intercourse with N.K.J. and digitally penetrated her (at the time the appellant identified as male). N.K.J. offered to masturbate the appellant if she would stop. The appellant agreed, so N.K.J. masturbated her.
 2. Additional Offence of Sexual Interference between the Index Offences
 - [13] The appellant was convicted of a further sexual offence which occurred on February 6, 2015, between the two index offences and while the appellant was still on probation. She was found guilty of sexual assault and sexual interference by grabbing or pinching the buttocks

of a 13-year-old girl who was shopping with her mother and brother in a Safeway store. A conviction was entered only on the s. 151 offence by application of the rule in Kienapple. The appellant received a one-day jail sentence, including 90 days credit for pre-sentence custody. She also received an 18-month probation term and a 10-year order under the Sex Offender Information Registration Act, S.C. 2004, c. 10. Her summary conviction appeal was dismissed (R. v. Patel, 2017 BCSC 1596). Leave to appeal to this Court was refused (R. v. Patel, 2017 BCCA 459).

3. Second Index Offence

- [14] Immediately after the s. 151 offence on February 6, 2015, the appellant was arrested and remained in custody until about March 3, 2015, when she was released, having perfected bail. The court order required abstention from drugs and alcohol and prohibited her from leaving the recovery house except with the written permission of her probation supervisor and in the physical presence of an authorized representative.
- [15] The same day the appellant arrived at the recovery house, she sent a Facebook message to N.K.J. The appellant left the recovery house to attend a relapse prevention class, but failed to return. The appellant reported to her probation supervisor, who warned her about complying with bail. Unbeknownst to her probation supervisor, at this time she had already breached bail by leaving the recovery house.
- [16] On March 5, 2015, a warrant was issued for the appellant's failure to appear in court and for an allegation of breaching a condition of bail. She turned herself in the next day and was released to a recovery house with a condition that she not leave without a staff member. The appellant's bail order again required her to abstain from drugs. While at the recovery house, the appellant had Facebook contact with C.J., asking her to meet, offering her drugs, and requesting naked photographs. The appellant also messaged N.K.J. about meeting up.
- [17] The second index offence arose on March 14, 2015, when the appellant invited N.K.J. to her room in the recovery house, provided directions on how to sneak in and offered her crystal methamphetamine. N.K.J. asked whether, if she stayed at the recovery house, the appellant would "do anything" to her. The appellant replied that she would try not to. She told N.K.J. to say she was 19. The appellant snuck N.K.J. and C.J. into her room after they hid from a police officer conducting a curfew check on the appellant.
- [18] The appellant began to massage N.K.J.'s back and tried to take off her pants. The appellant then pulled up N.K.J.'s shirt, undid her bra, and started to kiss her breasts. The appellant had consumed crystal methamphetamine and had also provided it to N.K.J. who was high from smoking it. She could not stop the appellant's actions. N.K.J. fell asleep and woke up with the appellant touching her buttocks. At some point, the appellant pulled down N.K.J.'s pants. The appellant put her finger in N.K.J.'s vagina. N.K.J. offered to masturbate the appellant in order to stop the digital penetration. N.K.J. ended up masturbating the appellant. The two young people hid in the appellant's room and closet the next day, leaving in the evening.

- [19] On March 19, 2015, the appellant reported to a bail supervisor. She said she had last used crystal methamphetamine when she was ejected from the previous recovery house. She was still sending messages to N.K.J. and C.J. at this time.

The Appellant's Background

- [20] The background is largely derived from the reasons for sentence, the accurate summary in the Crown's factum of the undisputed factual foundation in the assessment report dated February 27, 2017, prepared by Dr. Todd Tomita, a forensic psychiatrist, and ordered by the judge, as clarified or qualified in his testimony, with its accompanying appendix. The facts are also amplified by other parts of the record. The appellant's background was well documented in the material before the court and reviewed by Dr. Tomita.

1. Circumstances of the Appellant

- [21] The appellant was born on September 9, 1974, in Toronto, Ontario. She had congenital defects, including a closed anus and a tumour outside the back of her head. She spent some months in the hospital because of difficulty breathing and for the surgical creation of an anus.
- [22] The appellant lived in Canada for a few years before moving with her family to the southern United States in the 1970s. The family moved a number of times while living in the southern United States.
- [23] When the appellant was 10 years old, her father was shot and killed by an employee during a financial dispute. The employee then committed suicide. The appellant was devastated and said that at 12 years old, she attempted suicide by taking pills.

2. Criminal History for Non-Sexual Violent Offences

- [24] When in Grade 12, the appellant was incarcerated for forging signatures on cheques from her mother and hotel guests.
- [25] At age 17, the appellant was sentenced to a five-year prison term for two counts of burglary. After serving 2 1/2 years in prison, she attempted to escape, which resulted in further charges and an additional five years in prison. The appellant served another 2 1/2 years in prison and was deported to Canada. Within approximately a month, with the intention of rejoining her family, the appellant attempted to re-enter the United States. Upon doing so, she lied to an immigration officer and was charged under United States immigration laws, resulting in a five-year prison sentence. She was deported to Canada again on May 27, 2003.
- [26] In late May 2003, the day after the appellant arrived in Canada, she committed manslaughter. She had hired a sex-trade worker in downtown Vancouver. They went to a motel in North Vancouver where the appellant said she discovered the worker was transgender. Upset with this discovery, the appellant killed the worker by striking her throat. She placed the body in a closet and left it there for days. The appellant said to another

sex-trade worker that she was thinking about dismembering the deceased worker's body, which the other worker dissuaded her from doing. The appellant eventually moved the body to a shopping cart near the motel. The sentencing judge referred to the appellant's behaviour as brutal and callous. As the sentencing judge noted, at this point the appellant had spent most of her life in jail. The appellant received a nine-year jail sentence, excluding credit for time served.

- [27] The appellant was charged on May 19, 2011, with attempted robbery. She entered a bank, gave a slip of paper to a teller that said she had a gun, wanted money and warned against activating alarms. The teller left the window and the appellant fled without obtaining any money. She received a jail term of one year less time served and three years' probation. The appellant was found to be taking steps to deal with her drug addiction both before and after the offence. The sentencing judge noted the offender had committed the attempted robbery while on bail for a Vancouver incident and had violated parole twice with respect to the manslaughter. She was living in a recovery house at the time of the attempted robbery.
- [28] On March 20, 2012, the appellant was charged with breach of probation (imposed on the attempted robbery offence). She received a one-day jail sentence.
- [29] On October 2, 2012, the appellant was again charged with breach of probation. She received a five-day jail sentence.
- [30] On October 5, 2012, the appellant was charged with possession of a weapon dangerous to the public peace. She received a jail term of 150 days, not including credit for pre-sentence time in custody.
- [31] On October 24, 2012, the appellant was charged with breach of undertaking or recognizance. A 14-day jail sentence was imposed.

3. Treatment, Institutional Functioning and Functioning on Supervision

a. Courses Completed and Attempted during the Appellant's Federal Sentence

- [32] The appellant's attempts to address her substance abuse while in prison on the manslaughter conviction were unsuccessful. The only substance abuse program she completed was the Moderate Intensity National Substance Abuse Program between September 2006 and October 2006. Less than one month after completing that program, the appellant was charged with failing a urine test which was positive for opioids and cannabis.
- [33] The appellant was also suspended from the Anger and Emotions Management Program for missing six days. Between 2013 and 2014, the appellant completed the first module of 90 days in the Path to Freedom Treatment Program (for substance abuse). She completed no other program and continued to use narcotics in prison following each of the noted programs.

b. Institutional Functioning during the Appellant's Federal Sentence

[34] While serving her sentence for manslaughter, the appellant was placed in segregation status as a result of her behaviour. Due to her drug use, tobacco and gambling debts in custody, the appellant repeatedly sought out administrative segregation status. The appellant failed to integrate into the general population at several institutions.

c. Functioning on Conditional Release

[35] While on conditional release from her federal (manslaughter) sentence, the appellant was suspended and had her conditional release revoked twice for breaching conditions not to use alcohol or drugs and for associating with sex-trade workers.

[36] After her first statutory release on July 24, 2008, the appellant had the opportunity to reside in a recovery house treatment centre. Because of the requirement for a one-year commitment, she walked away after being interviewed and accepted into the program. She was not willing to commit to one year of treatment. The appellant felt she did not need that type of treatment and would rather be working and making money. In this same time frame, a urinalysis tested positive for cocaine and cannabis. The appellant's parole was suspended and later revoked.

[37] During a revocation hearing in November 2008, the Parole Board noted the appellant's unwillingness to work cooperatively with her case management team and her low motivation to participate in relevant programming.

[38] On July 30, 2009, the appellant was again released. One of her release conditions was to abstain from intoxicants. During the first week of her release, she used cocaine. Her release was maintained. She was placed in a community residential facility and referred to individual substance abuse counselling.

[39] In August 2009, the appellant tested positive for cocaine. Later that month, her parole officer learned from the appellant that she had used heroin. She was accepted into a 90-day treatment program. During intake, the appellant admitted using heroin daily since her statutory release. She was also observed in the company of a sex-trade worker and entering the sex-trade worker's apartment, contrary to her release terms. Her parole was again eventually revoked.

[40] On December 23, 2009, the appellant was paroled for the third time on statutory release. The appellant participated in one-on-one substance abuse counselling but did not complete the program. A urinalysis followed her disclosure of ongoing substance abuse. It returned positive for opiates, amphetamine, methamphetamine and marijuana. The appellant was maintained in the community until January 25, 2010, her warrant expiry date.

d. Functioning After the Federal (Manslaughter) Sentence

- [41] Between November 2010 and March 2015, when she was arrested for the index offences, the appellant could not control her addiction. She either left or was evicted from numerous recovery houses and drug treatment programs. She generally disclosed her drug use and self-reported a few periods of abstinence lasting up to four months.
- [42] Between 2010 and 2012, the appellant was chronically unstable as a result of her drug use with a pattern of cycling through recovery houses or treatment programs, spending relatively short periods in pretrial remand custody or serving sentences, associating with drug-using peers, and relapsing to methamphetamine use.
- [43] In August 2013, the appellant reported her steady use for almost 10 years of crystal methamphetamine.
- [44] In November 2014, the appellant reported that she was struggling with crystal methamphetamine addiction, but had recently had her longest period clean in several years, from December 2013 to May 2014, when she relapsed. The relapse occurred when she met up with a woman who was using the drug. As a result of using crystal methamphetamine, the appellant lost a new job after a few weeks. It had been her first in 13 years.
- [45] It is noteworthy that the appellant was referred to, or attended 31 or 32 recovery houses or residential treatment programs to attempt to address her drug use. At times she left programs she felt were too strict or because she did not want to pay a high fee.
- [46] The appellant was released on bail on about March 3, 2015, for charges later stayed. It appears this bail was on a charge of failing to appear in court and breaching a condition of bail, with a condition that she reside at a recovery house. On March 5, 2015, the appellant admitted drinking alcohol to her bail supervisor who noted she breached bail by leaving the residence without permission the previous night. The appellant was back in custody on March 6, 2015.
- [47] Shortly after her release on bail for the sexual interference of February 6, 2015, the appellant committed the second sexual assault of N.K.J., the second index offence.
- [48] I turn now to the relevant provisions governing these proceedings.

Relevant Dangerous Offender Provisions

- [49] The judge designated the appellant a dangerous offender under s. 753(1)(b) which provides:
- 753 (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied:

- (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.

Sexual assault pursuant to s. 271 of the Code is a serious personal injury offence as listed under s. 752(b) of the Code.

[50] At the first stage of the two-stage dangerous offender scheme, the judge determines whether the statutory criteria for a dangerous offender designation have been proven beyond a reasonable doubt. If so, the judge must make the designation. There is no discretion to do otherwise.

[51] As Justice Côté for the majority said in Boutilier as to s. 753(1) in general:

[27] Before designating a dangerous offender, a sentencing judge must still be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand "intractable" conduct as meaning behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness.

[52] At the second stage, the judge determines whether to impose an indeterminate sentence, a sentence of at least two years and a long-term supervision order, or sentence for the offence (s. 753(4)). The judge has discretion here and must apply the principles of sentencing in ss. 753(4), (4.1) and 718-718.2 of the Code to impose a fit sentence: Boutilier at paras. 53, 61; R. v. Malakpour, 2018 BCCA 254 at para. 37.

[53] Sentencing is addressed in s. 753(4) and (4.1) of the Code as follows:

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

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

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

- [54] The sentencing alternatives in s. 753(4) encompass the entire spectrum of sentences contemplated by the Code and the judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme. The judge must impose a sentence tailored to the specific offender and consistent with the principles of sentencing: Boutilier at paras. 58, 60.
- [55] Section 753(4.1) does not impose "an onus, a rebuttable presumption, or mandatory sanctioning": Boutilier at para. 71. "Every sentence must be imposed after an individualized assessment of all of the relevant factors and circumstances": Boutilier at para. 71. Indeterminate detention is "limited to habitual criminals who pose a tremendous risk to public safety": Boutilier at para. 77.

The Dangerous Offender Proceedings

- [56] The Crown's application under s. 752.1 of the Code for an assessment order was unopposed and the judge made the order on November 2, 2016. The assessment report was prepared by Dr. Tomita.
- [57] As stated, the Crown ultimately sought to have the appellant designated a dangerous offender pursuant to s. 753(1)(b) of the Code. The Crown also advocated an indeterminate sentence on the basis there was no prospect of managing the appellant's risk in the community in light of her severe drug addiction and multiple breaches of court-imposed conditions.
- [58] The appellant submitted she should be designated neither a dangerous offender nor a long-term offender. She sought a determinate sentence of time served plus a day, and two years' probation on strict terms outlined by a probation officer.
- [59] The parties made their submissions before the release of Boutilier which addressed the interpretation and constitutionality of the dangerous offender regime. They later made supplementary submissions on the import of Boutilier.
- [60] The hearing, which began on October 23, 2017, concluded on March 7, 2018, when the judge declared the appellant to be a dangerous offender and sentenced her to an indeterminate sentence.
1. The Evidence of Dr. Tomita
 - a. Ability of Federal Parole to Manage the Appellant's Risk in the Community
- [61] The appellant declined to be interviewed by Dr. Tomita. Therefore, Dr. Tomita's assessment was based on a review of written materials produced about the appellant over the years, and reports. They included those written by Dr. Lohrasbe, a psychiatrist, and Dianna Mawson, an institutional psychologist, both of whom had interviewed the appellant, and a Ms. Bell, apparently a probation officer who had written a presentence report and also interviewed the appellant. Dr. Tomita provided the only expert evidence in the proceeding, and the judge

accepted it. Because the appellant called no evidence, there was no competing expert evidence.

- [62] Other witnesses involved with and working for the Correctional Service of Canada testified. The judge noted the evidence of these witnesses highlighted the importance of stability and full completion of rehabilitative programs within the corrections system. However, Dr. Tomita was the key witness at the proceedings.
- [63] In his report, Dr. Tomita discussed the prospects for federal parole supervision. Dr. Tomita began by reviewing the three risk management strategies relevant in the appellant's case: monitoring, supervision and treatment.
- [64] Dr. Tomita foresaw monitoring as being ineffective and treatment options as having a poor likelihood of containing the appellant's risk. Regarding supervision, Dr. Tomita noted that the appellant "was unable to follow supervision on past federal parole and was revoked twice for failing to abide by conditions" and that she "committed the index sexual offences while on probation and bail." Dr. Tomita then concluded that federal parole supervision was the only mechanism that held some prospect for the feasibility of managing the appellant's risk in the community.
- [65] Dr. Tomita noted the ability of federal parole supervision conditions to contain the appellant's new risk of sexual offending was "untested", and it "might be sufficient" to contain her risk of more serious sexual offending (assuming a residency condition and that her return to drug use was quickly detectable). But Dr. Tomita also added there was uncertainty about whether federal supervision could manage the risk the appellant posed to random victims and respecting lower level sexual offending. He said the risk in this scenario was "difficult to gauge".
- [66] In direct examination, Dr. Tomita was referred to the portion of his report where he foresaw federal parole supervision as the only mechanism to control the appellant's risk in the community. He clarified that this was predicated on the appellant spending a period of time in custody during which she received both sex offender and addiction treatment. Dr. Tomita was clear the appellant needed treatment before release.
- [67] Other aspects of Dr. Tomita's evidence are relevant to risk management:
1. The appellant had not demonstrated any ability to gain control over her substance abuse problems over any prolonged period of time.
 2. Correctional treatment programs, including sex offender treatment, have a small risk reducing effect for those who successfully complete the treatment program. But appraising a person's level of treatability and the likelihood treatment would have a risk-reducing impact depended largely on the facts of a particular case.

3. In her first federal sentence, the appellant had problems relating to peers. She dealt with her problems by going into segregation or moving between different institutions. To successfully complete a program, an inmate needed to remain stable in one place for at least a number of months. Dr. Tomita observed that if the appellant continued her pattern of instability in federal custody, she would have difficulty accessing and completing programming. Dr. Tomita had "significant concerns about disruptions in the treatment even if [she] enters it".
 4. The appellant's offending against unrelated and stranger victims was particularly concerning because it meant there was a much larger victim pool and it would be more difficult to manage and contain her risk.
 5. When the appellant committed the index offences, she orchestrated an opportunity to offend. This suggested a stronger motivation to offend.
- [68] Dr. Tomita observed that the sex offence convictions "represent a new type of offending", her "risk profile has changed", and "[t]he emergence of sexual offending at an older age against unrelated and stranger victims is particularly concerning" from a risk perspective and "leads to a degree of unpredictability in terms of what conditions increase or decrease [her] risk". The appellant was 40 when she committed the index offences. Dr. Tomita concluded it was likely the appellant had a condition called hebephilia, an underlying sexual interest in early adolescent girls, which is marked by sexual attraction to girls about 11-14 years old, with probable paraphilic disorder.
- [69] Dr. Tomita's prediction as to how the appellant would fare on federal supervision was not optimistic. He testified:

I would not expect [her] functioning on parole to change in a substantial way unless certain things were addressed, or [her] motivation was different than during [her] first federal sentence. If most things remain the same, I expect [she] would have the same difficult course, which would be essentially a recapitulation of what happened, meaning breaches for substance use, suspensions, maintaining with additional interventions, maybe in custody, maybe revocations, and then back out.

[Emphasis added.]

b. Use of a Long-Term Supervision Order to Manage the Appellant's Risk

- [70] Dr. Tomita considered the efficacy of a long-term supervision order to manage the appellant's risk and considered her risk in the period following the end of such an order. He testified that if the appellant remained under federal supervision, including a prison term followed by parole supervision, there was some prospect that her risk "may eventually become manageable a decade [or] longer into the future."
- [71] However, Dr. Tomita identified five future unknowable contingencies that bore on this question:

1. Whether the appellant could gain control over her substance abuse problems.
 2. Whether she could build and maintain a prosocial social support network.
 3. Whether age would bring further health and medical issues that would "slow" her down.
 4. Whether sex offender treatment would be of benefit despite pessimistic prospects now.
 5. Whether the age-related reduction in sexual reoffending did in fact apply to her as well.
- [72] Dr. Tomita described the appellant's likelihood of success in implementing these changes as "rather gloomy." When asked to elaborate on this, Dr. Tomita gave the following testimony:
1. The appellant was an entrenched drug user.
 2. In order to dislodge herself from her current lifestyle, the appellant would have to build a prosocial and stable lifestyle. The appellant had not demonstrated any sustained success in doing that since her deportation to Canada.
 3. Any concern Dr. Tomita had about imminent medical issues or deterioration (in particular because of the appellant's earlier bout of cancer) was removed after his review of medical records provided to him during the hearing.
 4. Unless the appellant could get a handle on her substance abuse issues, it was less likely that she would be able to deal with the other problems in her life.
 5. Because the appellant's pattern of offending was atypical, Dr. Tomita was cautious about relying on more general research that suggests the slowing down in older sex offenders.
- [73] In summary, Dr. Tomita testified that several changes were needed for the appellant's risk to be reduced so that it was manageable in the community beyond the timeframe of a long-term supervision order, and those changes were unlikely to occur.

Reasons for Sentence

- [74] The judge began his reasons by reviewing the background of the appellant, her criminal history, and the circumstances of the two index offences. The judge also considered the appellant's unsuccessful attempts to address her substance abuse and that Dr. Tomita had noted these attempts had "failed demonstrably". The judge found the evidence was clear that the appellant continued to use narcotics in prison following the only substance abuse program and module she had actually completed.
- [75] The judge then set out the "competing positions" of the Crown and the appellant as to whether the Crown had established that the appellant should be designated a dangerous offender rather than a long-term offender, and whether the sentence should be determinate (whether or not followed by a period of long-term supervision), or an indeterminate sentence served in a penitentiary.
1. Dangerous Offender and Long-Term Offender Provisions of the Code

- [76] The judge set out the provisions of s. 753(1)(b), (4) and (4.1) of the Code. He observed that sexual assault under s. 271 of the Code is a designated "serious personal injury offence" under s. 752 of the Code and thus engages the provisions of s. 753. He noted it was important that s. 753(5)(a) provides that if the court does not find an offender to be a dangerous offender under s. 753(1), it may in the same proceeding consider whether the offender is a long-term offender under the provisions of s. 753.1 of the Code, which he set out.
- [77] The judge further noted there are two stages to the dangerous offender scheme set out in s. 753 of the Code: designation and sentencing. He said the category of dangerousness involved in the index offences was a failure to control sexual impulses pursuant to s. 753(1)(b) of the Code, and the "Safeway incident" involved the same failure. The judge also said the proven but uncharged offence of luring a child for a sexual purpose under s. 172.1 of the Code involving N.K.J. [sic] and messages from the appellant to her evidenced the same failure to control her sexual impulses.
- [78] The circumstances of the child luring offence were set out in a document provided to the judge that contained undisputed "Additional Facts Regarding the Index Offences Not Before the Jury". This document read, in material part, "[the appellant] and C.J. exchanged a number of Facebook messages. Attached as Appendix 1 to this document are Facebook exchanges between [the appellant] and C.J. that were found on the LG cell phone seized from [the appellant] on March 22, 2015". The messages were attached as described.
- [79] The Crown said this: "And the Crown also relies on the uncharged but proven offence, and -- and I can say proven or admitted because of course there's now the exhibit before the court with [the appellant's] Facebook exchanges with C.J. in which the Crown submits that offence is made out. So that -- the Crown relies on that as in -- and that's -- this is in respect of a third 13-year-old girl, and the uncharged but proven offence that [the appellant] has contravened s. 172.1 of the [Code] in respect of that conduct" (italicised in original submissions). No objection was taken to this material or to the Crown's position respecting it.
- [80] After observing it was accepted that the appellant had committed a "serious personal injury" offence by her convictions under s. 271 of the Code, the judge said the key question under the designation stage was whether the evidence established the appellant had shown a failure to control her sexual impulses in the commission of the index offences, or otherwise, and whether there was a likelihood that she would cause injury, pain, or other evil to a person through failure in the future to control her sexual impulses.
- [81] In other words, the judge said if the likelihood the appellant would reoffend sexually as she had in the past were established by the evidence, the appropriate designation was that she was a dangerous offender under s. 753(1). If the evidence fell short of establishing a likelihood of reoffending, but established a significant risk of such reoffending, the appropriate designation was that the appellant was a long-term offender under s. 753.1 of the Code.

- [82] The judge concluded his review of the designation stage by noting this first stage engaged issues of risk assessment and amenability to treatment.
- [83] The judge noted the second stage of the dangerous offender proceeding under s. 753 dealt with sentencing under s. 753(4) and (4.1). Citing Boutilier at paras. 43 and 61, he observed that future treatment prospects remained relevant at that stage, as did the principles of sentencing enumerated in ss. 718-718.2 of the Code.
- [84] Importantly, the judge said the extent to which "treatability" or intractability is a factor in determining whether an offender meets the criteria for designation as a dangerous offender was set out in Boutilier at para. 31 as follows:

The designation stage is concerned with assessing the future threat posed by an offender. The penalty stage is concerned with imposing the appropriate sentence to manage the established threat.

- [85] The judge noted that when the parties' submissions were made on sentence, the trial judge in Boutilier had found the present legislative framework was overbroad by precluding consideration of the amenability to treatment at the designation stage, and these overbroad provisions were not saved by s. 1 of the Canadian Charter of Rights and Freedoms [Charter] (2015 BCSC 901). As Boutilier was released after the close of submissions in this case, as stated, the parties made further written submissions to address that decision.

2. Supplemental Submissions of the Crown and the Appellant

- [86] The judge agreed with the Crown's supplemental submission that as a result of Boutilier, there were two changes to the approach the court must take in dangerous offender proceedings. First, at the designation stage, Boutilier "expands the scope of the evidence that should be considered in assessing the future threat an offender poses."
- [87] Second, the judge agreed with the Crown that at the penalty stage, s. 753(4) and (4.1) of the Code were to be interpreted and applied within the context of the overarching principles of sentencing in ss. 718-718.2 of the Code, and having regard to the dangerous offender regime's general purpose of public protection. He noted that the sentencing judge is obliged to conduct a "thorough inquiry" into the possibility of control in the community. There was no obligation on any of the parties to prove the adequate sentence to any standard. Finally, an indeterminate sentence should only be imposed if it is the only sentence that will reduce the risk to the community to an acceptable level.
- [88] The appellant submitted she was not part of that small group of persistent offenders who were dangerous. Only on finding beyond a reasonable doubt that the offender actually constitutes a future threat to the safety of others in light of all the relevant evidence could the designation follow. Here, it could not be said the appellant's conduct was "intractable". The judge observed that this submission was "not tied in any way" to the factual matrix of the present case. Similarly, as to sentence, the appellant said if declared a dangerous offender, she should receive no more than time served because she was not an habitual

criminal who posed great risk to public safety.

3. Psychological Expert Evidence

[89] The judge reviewed salient parts of Dr. Tomita's report in his reasons at paras. 108-113, which are discussed earlier and replicated later in these reasons.

4. Conclusion on Designation

[90] After briefly reviewing again the requirements under ss. 753(1)(b) and 753.1, the judge noted that after the first step of determining that the offence in question is a "serious personal injury offence", the remaining elements required for designation were both retrospective and prospective. And if the elements of s. 753(1)(b) were satisfied, the court "shall find the offender to be a dangerous offender".

[91] The judge said that based on the material Dr. Tomita had reviewed, he had concluded it was likely the appellant had a condition called hebephilia.

[92] As to treatability at the designation stage, the judge said that "to the extent" he may inquire into treatability at the designation stage, he found the totality of the evidence required a finding that while the appellant might at times "pay lip service to a willingness to engage in treatment to address the causes of [her] sexual offending against children and control [her] sexual urges, the genuineness of that willingness is highly suspect". The judge was recognizing, as he explained at para. 110, that Dr. Tomita drew a link between the appellant's drug use and her sexual offending.

[93] The judge considered that the appellant had "filtered through" 31 different treatment centres or programs regarding her substance abuse which demonstrated an unwillingness to meaningfully address her challenges.

[94] The judge then made this finding:

[120] Perhaps the most disturbing is the evidence from Dr. Tomita that there is a lack of any prospect for effective rehabilitative treatment to address the pedophilic causes of the offending by [the appellant], as identified by Dr. Tomita. [The appellant] has demonstrated significant institutional instability throughout her time in custody thus far. [She] has also shown a lack of ability to create and follow realistic plans to increase [her] stability.

[95] The judge reviewed some of the evidence from a number of witnesses involved with the Correctional Service of Canada that highlighted the importance of stability and full completion of rehabilitation programs within that system. He observed that Dr. Tomita noted the appellant's high risk of a continuing pattern of segregation and institutional transfers due to likely involvement in the prison drug subculture, then discussed federal parole supervision as a mechanism to contain the appellant's risk in the community. Dr. Tomita noted that provincial probation supervision had been demonstrably ineffective given the appellant committed the index offences when she was on probation for the attempted robbery.

[96] Thus, based on the evidence he had reviewed and the authorities, the judge found the evidence proved beyond a reasonable doubt the requirements of s. 753(1)(b). The judge therefore designated the appellant a dangerous offender.

5. Conclusion on Sentence

[97] The judge said the offences in this case were serious sexual offences the appellant committed to satisfy her sexual impulses. They were committed by violating laws designed to protect society, and children in particular, from sexual predators. The judge said the appellant was "breaching parole and bail conditions" and at the same time, in breach of laws against the use or possession of narcotics, which she was providing to children. I note that in fact the appellant was breaching probation and then bail conditions, as corrected by the Crown at the hearing of this appeal. The appellant had twice breached her conditions while paroled for the manslaughter offence -- she had used drugs and consorted with a sex-trade worker.

[98] The judge noted that under s. 718.01 of the Code, where an offender is convicted of an offence involving the abuse of a person under the age of 18 years, the court shall give primary consideration to the objectives of denunciation and deterrence.

[99] The judge said the aggravating circumstances were "legion" as set out earlier in his reasons, emphasizing denunciation and deterrence, particularly where drug use was flagrant and became the vehicle for abuse of children. The judge noted the "Safeway" case (of sexual interference committed between the two index offences), and the uncharged but proven luring of a child contrary to s. 172.1 of the Code demonstrated that the appellant's sexual urges controlled her, rather than vice versa.

[100] The judge further noted the aggravating factor on sentence was the significant criminal record that included manslaughter. He found it difficult to find a mitigating circumstance. The apology made by the appellant could not provide a mitigating benefit because it came after trial. While the letter of apology revealed some acceptance of responsibility, given the appellant's failure to take steps to control her addiction and sexual impulses, the expression of responsibility overall had little consequence.

[101] Not satisfied that a lesser measure would adequately protect the public against the commission of a future serious personal injury offence, the judge imposed an indeterminate sentence.

Application to Admit Fresh Evidence on Appeal

[102] The appellant applies to adduce fresh evidence on appeal. The fresh evidence consists of the affidavit of Virginia Martin, office manager of the law firm of the appellant's counsel. The affidavit attaches the "Inmate Copy" of her "Program Performance Report" at Pacific Institution in Abbotsford, British Columbia respecting completion of a sex offender program and a certificate of completion. The appellant submits she has now completed the

required treatment in custody for sexual offenders, and is therefore ready for federal parole supervision in the community. Having remained in one place (Pacific Institution in Abbotsford) long enough to complete the required program, the appellant says the only other programs offered are federal maintenance programs that she can complete in the community.

- [103] The appellant refers to no authority in support of the admission of such evidence on a dangerous offender application.
- [104] This Court recognized in *R. v. Widdifield*, 2018 BCCA 62, citing *R. v. Leslie*, 2016 BCCA 213, and *R. v. Sipos*, 2014 SCC 47, that sentence appeals should generally not be decided on the basis of post-sentence events.
- [105] In *Sipos*, a dangerous offender appeal, a question concerned the role on appeal of fresh evidence about the offender's current treatment and prospects. Justice Cromwell said:
- [28] On sentence appeals in indictable offences, the court may consider "such evidence, if any, as it thinks fit to require or to receive": s. 687(1). There is no parallel provision in relation to appeals of dangerous offender designations. However, on those appeals, the court of appeal may admit fresh evidence when it is in the interests of justice to do so: s. 759(7) and s. 683(1).
- [29] The Court established in *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, that while the sources and types of new evidence are more flexible in relation to sentence appeals, the well-known "Palmer" test governs admissibility of fresh evidence. That test, as is well known, sets out four criteria concerned with due diligence, relevance, credibility and impact on the result: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result when considered along with the trial evidence. As Charron J. explained in *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 15:

In accordance with the last three of the Palmer criteria, an appellate court can therefore admit evidence only if it is relevant and credible and if it could reasonably be expected to have affected the result had it been adduced at trial together with the other evidence.

[Emphasis added in *Sipos*.]

- [106] The "Inmate Copy" of the appellant's "Program Performance Report" respecting completion of a sex offender program is divided into sections that include:

- Attendance and Participation;
- Impact of Program;

- Specific Risk Management Strategies;
- Various Risk Factors;
- Recommendations for Future Treatment;
- Supervisions Strategies, and;
- Next Steps.

[107] The "Summary of Risk/Need Analysis" in the report contains the overall conclusion and summary of the appellant's participation in the program. It considers all the information in the report. That summary includes the following: "Based on the analysis of each of [the appellant's] personal targets, it has been determined that her current overall ability and commitment to use the skills required to manage her various risk factors improved slightly and is currently rated as needing some improvement. She does best when she is in a structured environment, She has made gains while in custody; however, she has been in a controlled environment where she has not experienced the same stressors and temptations she would encounter in the community and in a partner relationship; She is taking steps to doing what is needed for her to manage her risk areas, and is encouraged to continue having healthy goals to work towards" (emphasis added).

[108] In my view, if accepted, the report in question could not reasonably be expected to have affected the result when considered with all the relevant evidence on treatability and intractability. As this Court said in *Leslie* at para. 14, the appellant's conduct while incarcerated after sentence is a relevant consideration for the parole board and correctional authorities, but is not relevant to the sentence imposed in this case.

[109] I do not find the report relevant to the designation and sentence imposed in this case.

Standard of Review

[110] This Court in *R. v. Garnot*, 2019 BCCA 404, recently described the applicable standard of review as follows:

[47] Under s. 759(1) of the Criminal Code, a person who is found to be a dangerous offender may appeal on any ground of law or fact or mixed law and fact. This court has stated that the appellate review of a dangerous offender designation is "somewhat more robust" than "regular" appellate review of a sentence, although some deference is still owed to the sentencing judge's findings of fact and credibility. As observed in *R. v. Malakpour* 2018 BCCA 254, the standard for errors of law is correctness and for errors of fact, reasonableness. (At para. 47, citing *R. v. Sipos* 2014 SCC 47 at para. 26; *R. v. Boutilier* 2017 SCC 64 at para. 81; and *R. v. Walsh* 2017 BCCA 195 at para. 23.)

See also: *R. v. Hexamer*, 2019 BCCA 285 at para. 157, leave to appeal ref'd (2020), [2019] S.C.C.A. No. 343.

[111] The "some deference" owed to the sentencing judge includes findings as to risk and manageability in the community: Boutilier at para. 81; R. v. R.M., 2007 ONCA 872 at para. 53, leave to appeal ref'd, [2008] S.C.C.A. No. 91.

Issues on Appeal

[112] The appellant raises five grounds of appeal, asserting the judge erred by:

1. acting arbitrarily and beyond his jurisdiction when he entered convictions on the Code s. 271 counts instead of the s. 151 counts to facilitate the Crown's application to pursue dangerous offender proceedings under s. 753(1)(b) of the Code;
2. misapplying the principles in Boutilier by:
 - (a) expanding the scope of evidence to be considered at the designation stage;
 - (b) not properly considering the separate inquiries mandated at the designation and penalty phases due to conflating intractability with manageability;
 - (c) failing to consider whether the appellant's risk could be managed other than by an indeterminate sentence; and
 - (d) imposing an unreasonable and disproportionate sentence.

The appellant's primary submission is the judge erred in designating the appellant a dangerous offender.

[113] The Crown submits the judge's determination that the appellant was a dangerous offender was reasonable and well-supported by the expert evidence before him. The Crown says similarly the judge's decision to impose an indeterminate sentence was reasonable as there was ample evidence to support the conclusion that no lesser measure would protect the public and the sentence was otherwise fit.

Issue 1: Did the judge act arbitrarily or beyond his jurisdiction when he entered convictions on the s. 271 counts instead of the s. 151 counts?

[114] The appellant contends the judge erred by reversing his earlier decision and entering convictions on the Code s. 271 counts instead of the s. 151 counts.

[115] Following the verdict on April 1, 2016, the appellant raised the application of the rule in Kienapple which precludes multiple convictions for the same matter or delict. In R. v. Nutall, 2018 BCCA 479, the operation of the rule in Kienapple was described as:

[495] In Provo [R. v. Provo, [1989] 2 S.C.R. 3], the Court set out the appropriate process for considering overlapping offences and concluded that the best approach would be for the trial judge to enter a conditional stay of proceedings on the lesser offence if the jury convicted the accused of both, thus preserving the guilty verdict on the lesser offence in case of an appeal. Thus, the Crown would not be obliged to appeal the stay (as it was here). If the conviction on the main count was either not appealed or affirmed on appeal, the

conditional nature of the stay would become permanent.

- [116] On April 7, 2016, the Crown applied for an order that convictions be recorded on the two counts under s. 151 of the Code and conditional stays be entered on the two counts under s. 271 of the Code. The judge granted the application.
- [117] When the original Kienapple ruling was made on April 7, 2016, the Crown had given oral notice of its intention to proceed with an application for an assessment order under s. 752.1 of the Code.
- [118] On April 10, 2017, the Crown applied to reverse the earlier Kienapple ruling so that convictions would be entered on the two counts under s. 271 and the conditional stays would be entered on the two counts under s. 151 of the Code. The Crown explained it had erred in earlier seeking convictions under s. 151 as s. 271 was explicitly referred to as a "serious personal injury offence" in paragraph (b) of the definition under s. 752 of the Code.
- [119] Counsel for the appellant argued that s. 151 of the Code was the more serious of the two counts and pursuant to Kienapple, the s. 271 counts ought to remain stayed.
- [120] On April 19, 2017, the court granted the Crown's application and lifted the conditional stays on the s. 271 counts, entering convictions on those counts and entering conditional stays on the two s. 151 counts.
- [121] The appellant essentially argues that the judge erred in two ways in reversing his earlier Kienapple ruling by entering convictions on the s. 271 offences:
1. The judge acted arbitrarily and lacked jurisdiction to amend his Kienapple ruling; and
 2. Section 151 is the more serious offence and based on Kienapple and subsequent jurisprudence, the judge should have left the convictions on the s. 151 charges.

I turn to address these arguments.

- a. The judge acted arbitrarily and lacked jurisdiction to amend his Kienapple ruling

[122] The appellant contends the judge acted arbitrarily and without jurisdiction in reversing his earlier Kienapple ruling in order to facilitate the anticipated dangerous offender proceedings. This argument is inconsistent with the appellant's agreement, as noted by the judge, that the court was not *functus officio* as a result of the earlier Kienapple ruling since the sentencing process had not started: see *R. v. Head* (1986), 30 C.C.C. (3d) 481 at 491 (S.C.C.); *R. v. Woodley* (1993), 21 B.C.A.C. 275 at para. 23. The appellant develops no argument and cites no authority as to why the judge lacked jurisdiction to amend his Kienapple ruling. Nor can the ruling be fairly characterized as arbitrary.

[123] I would not sustain this argument.

- b. Section 151 is the more serious offence so the judge should have left the convictions on the s. 151 counts

- [124] The appellant submits the application of Kienapple results in the s. 151 offence being the more serious offence every time an accused is charged under both ss. 151 and 271 of the Code and, accordingly, it was an error to stay the s. 151 counts and enter convictions on the s. 271 counts.
- [125] The appellant relies on *R. v. D.L.W.*, 2014 BCSC 43, in support of her submission that the circumstances of the accused are not considered when determining which offence is less serious, and s. 151 is the more serious offence. The appellant says what is the lesser offence is not determined by a measure of "the negative result to the accused" but by a measure of the "more blameworthy conduct" as reflected in the sentence prescribed by Parliament for the specific offence. The appellant contends the offence of sexual interference of a child is generally more serious than sexual assault, so the counts under s. 271 ought to have remained stayed.
- [126] In *D.L.W.*, the complainants' stepfather was charged with 14 counts that included sexual interference pursuant to s. 151 and sexual assault pursuant to s. 271 of the Code. Justice Romilly found the s. 271 offences less serious than the s. 151 offences. He amended his earlier ruling so as to record convictions on the s. 151 offences and entered conditional stays on the s. 271 offences.
- [127] The Crown submits the judge, in reasons indexed as 2017 BCSC 2586, correctly distinguished *D.L.W.* on the basis the accused in that case had no prior criminal record and was not the subject of dangerous offender proceedings. *D.L.W.* did not address the circumstances present here. Also, when *D.L.W.* was decided, s. 151 carried a minimum sentence of one year in jail, while s. 271 was not the subject of a minimum sentence. The one-year minimum penalty under s. 151 has since been found unconstitutional on the basis it constitutes cruel and unusual punishment in violation of s. 12 of the Charter: *R. v. Scofield*, 2019 BCCA 3 at para. 83; *R. v. B.J.T.*, 2019 ONCA 694 at para. 75. The Crown had given notice of its intention to pursue dangerous offender proceedings. A finding the appellant was a dangerous offender was more readily available with the s. 271 offences than the s. 151 offences.
- [128] The principle in *Kienapple* has been referred to as the rule against multiple convictions or the "Kienapple principle": *R. v. Prince*, [1986] 2 S.C.R. 480 at para. 13. *Kienapple* did not specifically address on which of the two counts the conviction should be entered.
- [129] In *R. v. T.L.C.* (1994), 40 B.C.A.C. 60 at para. 42, Justice Rowles in dissent, but not on this point, said "seriousness" refers to the penalty, citing *R. v. Provo*, [1989] 2 S.C.R. 3, and *R. v. Loyer et al.*, [1978] 2 S.C.R. 631. Counsel were in agreement in *T.L.C.* that "where the rule against multiple convictions for the same delict applies, a conviction on the more serious charge should be entered and a conditional stay of proceedings should be entered on the less serious charge". In turn, in *Provo* the Court observed that "Following the requirement of the rule [in *Kienapple*], the trial judge properly entered a conviction for the more serious offence of incest": at para. 17.

- [130] In this case, the Code provisions in effect when the offences were committed carried the same penalty for both the s. 271 and the s. 151 offences, so the offences were of equal seriousness or gravity. While the law precludes multiple convictions for the same delict, the Crown here could exercise its discretion as to which count it sought to have the conditional stay entered upon. The appellant alleges no bad faith, improper motive or any other conduct indicating an abuse of process by the Crown. The offences were of equal gravity based on carrying the same penalty: T.L.C. at para. 42.
- [131] As a result, it cannot be said the judge's ruling was incorrect. It is unnecessary to address whether the result would be different if the offences carried different penalties.
- [132] The appellant also contended in her factum that she has the right under s. 11(i) of the Charter to "the benefit of the lesser punishment" where "the punishment for the offence has been varied between the time of commission and the time of sentencing". She does not explain how s. 11(i) could be relevant in the circumstances. In oral submissions, the appellant said she was "not really making a s. 11(i) Charter argument", but that the Crown should exercise its discretion in her favour so as to have recorded a conviction for the offence for which a dangerous offender designation was potentially less available in the circumstances. There is no merit to this suggestion for which the appellant cites no authority.
- [133] I would not sustain any of the appellant's arguments relating to the entry of the conditional stays based on the Kienapple rule.

Issue 2: Did the judge misapply the principles in Boutilier?

- a. Did the judge err by considering the appellant's non-sexual offences at the designation stage by relying on the Crown's post-Boutilier submissions?

[134] This issue was developed through questioning by the Court during the hearing and not addressed in any detail in the appellant's factum. The appellant says the judge erred by agreeing with the Crown's written supplemental ("post-Boutilier") submissions that as a result of Boutilier, the court was required to make two changes in its approach to the sentencing. At issue is the first "change", that at the designation stage, Boutilier "expanded the scope of the evidence that should be considered in assessing the future threat at the designation stage."

[135] These submissions must be read as a whole and in context. For ease of reference, I set out in full the Crown's post-Boutilier submissions to the court below on the effect of Boutilier at the designation stage:

OVERVIEW

1. These submissions are intended to supplement the submissions the Crown has already made so as to address the impact of *R. v. Boutilier*, 2017 SCC 64.

THE TWO CHANGES AS A RESULT OF BOUTILIER

2. The Crown submits there are two changes to the approach the Court must take to this sentencing as a result of Boutilier: one at the designation stage and the other at the penalty stage.
 - (i) The Designation Stage: There has been a Change to the Scope of Evidence which Can be Considered With Respect to Future Threat
3. At the designation stage, the Crown must establish three things beyond a reasonable doubt. As previously submitted, those are:
 - i. The predicate is a serious personal injury offence as defined by s. 752 of the Criminal Code;
 - ii. [Ms.] Patel's conduct in any sexual matter, including that involved in the predicate offence, has shown a failure to control [her] sexual impulses; and
 - iii. There is a likelihood [Ms.] Patel's failure to control [her] sexual impulses in the future will cause injury, pain or other evil to other people.
4. In the Crown's submission, Boutilier has expanded the scope of the evidence that should be considered in assessing the future threat at the designation stage.
5. The Crown's original position, relying on paras. 78-83 of R. v. Pike, [2010] B.C.J. No. 1803 (CA) was that the Court could not rely on evidence other than [Ms.] Patel's conduct in sexual matters that showed [Ms.] Patel's failure to control [her] sexual impulses (in [Ms.] Patel's case the conduct [she] engaged in between January 21 and March 22, 2015) in assessing the future threat.
6. As a result of Boutilier the Crown submits that this has changed. The Court can consider all of the (relevant) evidence before it in determining whether there is a likely [sic] that [Ms.] Patel's failure to control [her] sexual impulses in the future will cause injury, pain or other evil to other persons.
7. This is made particular [sic] clear in paragraph 44 wherein the Court stated:

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

8. At the bottom of paragraph 44, the Court quoted with approval from J. A. Neuberger, *Assessing Dangerousness: Guide to the Dangerous Offender Application Process* (loose-leaf), at p. 2-37.

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

9. At paragraph 45 the Court discussed the use to be put to prospective treatability at each stage, explaining that at the designation stage the prospective evidence of treatability informs the decision on the extent of the threat posed by the offender, whereas at the penalty stage, this evidence helps determine the appropriate sentence to manage the threat.

[*Italic emphasis in Boutilier; Crown's emphasis underlined.*]

[136] The Crown then went on to address Boutilier's treatment of the constitutionality of s. 753(4.1). Finally, in concluding its post-Boutilier submissions, the Crown said:

12. In the Crown's submission, while Boutilier has had an impact on the approach the Court should take to this matter, the appropriate disposition in this case has not changed. The change at the designation stage means the Court can consider all of the information underpinning Dr. Tomita's assessment of [Ms.] Patel's risk to reoffend sexually, and the additional information the Court can now consider only strengthens Dr. Tomita's opinion as to the risk posed.

[Crown's emphasis.]

[137] In addressing the Crown's post-Boutilier submissions, the judge said this:

[96] The Crown submits that there are two changes to the approach the Court must take as a result of Boutilier. First, at the designation stage, the Crown's position is that Boutilier expands the scope of the evidence that should be considered in assessing the future threat an offender poses. Originally, the Crown relied only upon evidence of [the appellant's] conduct in sexual matters that showed a failure to control [her] sexual impulses. Now, the Crown submits that the Court can and should consider the broader scope of relevant evidence before it in determining whether it is likely that a failure by [the appellant] to control [her] sexual impulses in the future will cause injury, pain, or other evil to other persons. Further, prospective evidence of treatability at the designation stage informs the decision on the extent of the threat posed by the offender. In the present case, this means that the Court is not restricted to examine [sic] the evidence between January 21, 2015 to March 22, 2015, when assessing the future threat, but is able to examine all relevant evidence (Boutilier para. 44).

- [97] Second, at the penalty stage, the Crown submits that ss. 753(4) and (4.1) of the Criminal Code are to be interpreted and applied within the context of the overarching principles of sentencing in ss. 718 to 718.2 of the Criminal Code. These are to be applied having regard to the dangerous offender regime's general purpose of public protection. The sentencing judge is obliged to conduct a "thorough inquiry" into the possibility of control in the community; there is no obligation on any of the parties to prove on any standard the adequate sentence. An indeterminate sentence should only be imposed if it is the only sentence that will reduce the risk to the community to an acceptable level.
- [98] I agree with the Crown's submissions with regard to the law as it was detailed in Boutilier. It is the Crown's position overall that nothing less than an indeterminate sentence will reduce [the appellant's] risk of the commission of murder or a serious personal injury offence to an acceptable level.
- [138] In saying, "Further, prospective evidence of treatability at the designation stage informs the decision on the extent of the threat posed by the offender" (at para. 96), I consider the judge used the word "further" to mean "specifically" as he continued reciting the Crown's post-Boutilier submissions from its paras. 6-9.
- [139] The appellant says we cannot know whether the judge, in agreeing with these post-Boutilier submissions, erred by considering the appellant's other offences, including the manslaughter, at the designation stage.
- [140] Two questions arise from these post-Boutilier submissions. First, is there any indication in his reasons that the judge considered non-sexual offences, including the appellant's manslaughter conviction, in designating the appellant to be a dangerous offender? If not, that disposes of this ground of appeal. But in addition, secondly, was the Crown in fact wrong in its post-Boutilier submissions to the judge?
- [141] First, I see no indication whatsoever in his reasons that the judge used, improperly or otherwise, any of the appellant's convictions apart from the index offences, the "Safeway" sexual interference conviction, and the s. 172.1 child luring (uncharged but proven/admitted) offence in his decision to designate the appellant a dangerous offender. On the contrary, the judge clearly indicated he did not do so. For example, at para. 46 of his reasons, the judge specifically accepted the agreement of the parties that neither the manslaughter, nor any of the earlier offences for which the appellant had been convicted, had any aspect of sexuality to them and would not be considered at the designation stage. He said:
- [46] I will not rely upon the manslaughter conviction to demonstrate a failure by [the appellant] to control [her] sexual impulses for the designation stage of the dangerous offender proceedings. Likewise none of the earlier offences of which [the appellant] had been convicted have any aspect of sexuality to them, and shall not be considered at the designation stage of the process.

[Emphasis added.]

[142] Furthermore, the judge devoted paras. 114-130 of his reasons to why the appellant met the criteria for designation as a dangerous offender. In that section, he did not once refer to any other offence except the sexual offending. In particular, he did not refer to the manslaughter. This is particularly noteworthy because the judge expressly considered treatability in this section. In the course of his discussion on the appellant's treatability prospects at the designation stage, the judge made no reference to the manslaughter.

[143] At paras. 128-129, the judge dealt with the prior offences relevant to his determination. They are the sex offences. There is no reference to the manslaughter.

[144] In the section of his reasons addressing the penalty stage at para. 147, it is significant that the judge referred to the manslaughter offence and explicitly confined himself to considering it, as counsel had agreed, at the penalty stage and to isolate it from consideration at the designation stage. After stating he was not satisfied there was a reasonable expectation that a lesser measure under s. 753(4)(b) or (c) of the Code than an indeterminate sentence would adequately protect the public against the commission of a future serious personal injury offence, the judge said this regarding his finding at the penalty stage:

[147] This is bolstered by the findings of intractability, and instability while incarcerated and while on parole. Additionally, at the sentencing stage, the manslaughter conviction is a relevant consideration. It demonstrates further impulsivity and an inability to control emotions. Taken with Dr. Tomita's comments on the offender's inability to extricate [herself] from the drug community within prison and without -- and the likelihood that such will put [her] in contact with young and vulnerable girls upon any eventual release -- the rehabilitation programs are insufficient to protect the community from future similar offence were a determinate sentence given at this time.

[Emphasis added.]

Notably however, the judge did not similarly attribute any specific relevance to the manslaughter conviction at the designation stage. Had he used it at that stage, he would have said so.

[145] In its earlier closing submissions, the Crown described again why the manslaughter offence could not be considered in assessing the components of s. 753(1)(b): the manslaughter was not conduct in a sexual matter that showed a failure of the appellant to control her sexual impulses. The Crown did not state in its post-Boutilier submissions that it was resiling from this position. In my opinion, the judge would have noted any qualification on what he said at para. 46 had he indeed considered the manslaughter at any point of the designation stage, including in assessing the appellant's failure in the future to control her sexual impulses.

- [146] The majority in Boutilier affirmed that treatability was relevant at the designation stage to assessing the likelihood of future harm: Boutilier at para. 42, citing *R. v. Neve*, 1999 ABCA 206; see also *R. v. Crane*, 2010 ABCA 130 at para. 27.
- [147] The Crown's post-Boutilier submission that Boutilier expanded the scope of relevant evidence at the designation stage was not a suggestion that the judge was obliged to find any relevance to treatability in the manslaughter or any other non-sexual offence. Nor did the judge's acceptance of the Crown's post-Boutilier submission on "expansion" amount to a finding that these non-sexual offences were relevant to treatability or to dangerousness generally.
- [148] This is sufficient to dispose of this ground of appeal.
- [149] Second and in addition, I consider the Crown's post-Boutilier submissions when read as a whole were not incorrect. The Crown said in its post-Boutilier submissions that its original position, relying on *R. v. Pike*, 2010 BCCA 401 at paras. 78-83, was that the court could not rely on evidence, including non-sexual offences, other than the appellant's conduct in sexual matters that showed the appellant's failure to control her sexual impulses (in the appellant's case the conduct she engaged in between January 21 and March 22, 2015) in assessing future threat. But as a result of Boutilier, the Crown said this had changed. The Crown submitted Boutilier had expanded the scope of the evidence that must be considered in assessing the future threat at the designation stage. The court could now consider all the relevant evidence before it in determining whether there was a likelihood that the appellant's failure to control her sexual impulses in the future would cause injury, pain or other evil to other persons. The Crown explained its submissions and placed them in context by quoting para. 44 of Boutilier, including Boutilier's description of the various clinical evaluations, persistent personality disorders, and substance-use disorders that could become relevant in assessing whether the offender meets the required criteria to be designated as dangerous.
- [150] The majority in Boutilier at para. 44 said, "All of the evidence adduced during a dangerous offender hearing must be considered at both stages of the sentencing judge's analysis, though for the purpose of making different findings related to different legal criteria. During the application hearing, the Crown or the accused must present any prospective evidence concerning risk, intractability, or treatment programs". A consideration of treatability at the designation stage would narrow the group of offenders meeting the criteria of dangerous offender so as to avoid an infringement of s. 7 of the Charter by legislation that was overbroad. As the majority said at para. 45: "offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable".
- [151] In *R. v. Smarch*, 2019 YKCA 5, Justice Fitch summarized Boutilier:

[16] To summarize, the Court in Boutilier held that the 2008 amendments to the dangerous offender provisions of the Code did not broaden the pool of offenders who could properly be designated dangerous. Like the 1977 regime at issue in *R. v. Lyons*, [1987] 2 S.C.R. 309, the 2008 amendments were found to target "a small group of persistent criminals with a propensity for committing violent crimes against the person": at paras. 3, 75. In addition, Boutilier confirms that an offender cannot be designated a dangerous offender unless the sentencing judge concludes that the offender is a future threat having conducted a prospective assessment of risk: at para. 23. Accordingly, sentencing judges must consider an offender's treatment prospects at the designation stage. Before designating a person a dangerous offender, a sentencing judge must be satisfied on the evidence that the offender "poses a high likelihood of harmful recidivism and that his or her conduct is intractable": at para. 27.

See also *R. v. Parfitt*, 2019 SKCA 55 at para. 65; and *R. v. Piche*, 2019 SKCA 54.

[152] Boutilier said:

[43] As the assessment of prospective risk described above is concerned with whether an offender will continue to be "a real and present danger", being unable to surmount his or her violent conduct, the sentencing judge must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects.

[153] Examples of the wide variety of evidence that may be relevant in determining treatability is set out in Boutilier at para. 44, quoted in the Crown's written post-Boutilier submissions:

[44] All of the evidence adduced during a dangerous offender hearing must be considered at both stages of the sentencing judge's analysis, though for the purpose of making different findings related to different legal criteria.

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

(Neuberger, at p. 2-37)

[Emphasis added in Boutilier; footnotes omitted in Boutilier.]

[154] While Boutilier dealt with an application under s. 753(1)(a) of the Code, the need to consider an offender's treatment prospects at the designation stage applies equally to dangerous offender applications premised on s. 753(1)(b): Smarch at para. 18.

- [155] Taking into account treatment prospects is a departure from exclusively considering the offender's past sexual offending at the designation stage. It demands a broader assessment of the evidence at the designation stage, but does not broaden the group of offenders who will be designated as dangerous. It broadens the assessment by incorporating all evidence relevant to treatability, which may include in some cases past non-sexual offences, to the extent that those offences are relevant to the treatability of an offender's failure to control sexual impulses. Boutilier reinforces that the court is tasked with determining a complete picture of the offender's prospects for treatability in an assessment of future risk to commit sexual offences. This is not to permit non-sexual offending to be considered generally or in an unrestricted manner in assessing such future risk.
- [156] The appellant herself submits, at para. 65 of her factum, that the efficacy of substance-use rehabilitation programs in which she participated was relevant to the existence of her risk to commit further sexual offences and whether that risk could be successfully treated. If only evidence of past conduct in sexual matters were to be considered at designation, then the appellant's participation in rehabilitation programs for substance-use disorders could not be considered. Offenders who might be able to establish that extrinsic evidence of treatability shows they do not "present a high likelihood of harmful recidivism or that their violent pattern is intractable" (Boutilier at para. 45), would be prevented from doing so. Neither party argued for such a narrow interpretation of the law. Furthermore, Dr. Tomita thoroughly addressed the appellant's treatability prospects in his report (for example, at para. 102). In the Crown's conclusion of its post-Boutilier submissions at para. 12, it did not mention the manslaughter, but confined Boutilier's change at the designation stage to mean the court could consider all the information underpinning Dr. Tomita's assessment of the appellant's risk to reoffend sexually.
- [157] It follows from this that I respectfully disagree with my colleague when he says that reading Boutilier to permit consideration of all evidence relevant to treatability at the designation stage (as the text of Boutilier itself commands) would "almost certainly have the effect of expanding the pool of offenders who might be declared dangerous". Simply put, before Boutilier, under the guidance of some cases including Pike, a sentencing judge would look exclusively to the offender's past sexual offending. If that conduct persuaded the judge that the offender had shown a failure to control sexual impulses and a likelihood of causing injury, pain or other evil through failure to control sexual impulses in the future, the designation analysis was complete and the offender was designated. Now, post Boutilier, a sentencing judge must also consider whether treatment prospects -- based on all evidence relevant to treatability -- show that the offender is not likely to cause injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses. But in evaluating treatment prospects for this purpose, the judge is not to be artificially constrained and may consider all relevant evidence.

- [158] In my opinion, it is apparent from the Crown's post-Boutilier submissions as a whole that it was simply submitting that treatability was now relevant at the first stage, and that previously, on certain authorities (including *R. v. Boutilier*, 2016 BCCA 235 [CA Boutilier], which it will be recalled, had governed the Crown when it made its earlier closing submissions), it was not permissible to consider treatability at the designation stage. The majority in *Boutilier* at para. 42 recognized the jurisprudence was divided as to whether treatability was a relevant consideration at the designation stage. The majority could not agree with this Court that the criteria for designation "have never included the future treatability of the offender" (CA *Boutilier* at para. 53). In overturning this Court's decision, the majority in *Boutilier* held s. 753(1) survived constitutional scrutiny. This critical finding means an offender who might otherwise be designated as dangerous could avoid such a designation by the mitigating effect of treatability prospects. As *Boutilier* said:
- [45] The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process. At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat. Thus, offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable: see *Neuberger*, at p. 7-1, by M. Henschel. However, even where the treatment prospects are not compelling enough to affect the judge's conclusion on dangerousness, they will still be relevant in choosing the sentence required to adequately protect the public.
- [159] *Pike* (on which the Crown originally relied), limited consideration at the designation stage to the index offence and other proven offences forming part of the pattern required for designation (*Pike* involved proceedings relying on s. 753(1)(a) of the Code). *Pike* precluded from consideration unproven offences and offences not related to the index offence or to the pattern of behaviour it revealed. *Pike* did not address treatability and its relevance at the designation stage. In my opinion, to the extent *Pike* and consistent jurisprudence precludes consideration at designation of evidence relevant to treatability, including as referred to in *Boutilier* at para. 44, deeply ingrained personality traits or disorders, or substance-use disorders, *Boutilier* has overtaken those authorities.
- [160] Thus from the Crown's point of view, *Boutilier* expanded the scope of evidence that should be considered in assessing the future threat at the designation stage to the extent such evidence is relevant to treatability. Understood in this light, the Crown's post-*Boutilier* submissions were correct. In my view, the Crown was clear in oral argument at the hearing of the appeal in answering questions from the Court that other non-sexual offences and conduct could ("potentially") be relevant to treatability. This is reflected in the transcript of the oral hearing at 48-58.

- [161] In sum, in light of the judge's explicit statement that he was not considering the manslaughter or any other non-sexual offence at the designation stage, and in the absence of any evidence that he did so, I would not speculate to the contrary. Nor were the Crown's submissions incorrect when read as a whole and in the context of Boutilier at para. 44, which the Crown quoted to explain its submissions.
- [162] It follows that I would not accede to this ground of appeal.
- b. Did the judge properly consider the separate inquiries required at the designation and penalty stages or did he conflate intractability with manageability?
- [163] The judge found the appellant was not motivated for treatment for her drug addiction and in turn, it was highly unlikely her future risk of failing to control her sexual impulses could be successfully treated. Thus, the appellant demonstrated an ongoing significant threat to commit further sexual offences against young women, which was not manageable in the community. The appellant contends that because of these findings at the designation stage, the judge erroneously concluded he was in effect compelled to impose an indeterminate sentence.
- [164] The appellant submits this was an error because the majority in Boutilier clarified that the two phases are distinct; one is not the replication of the other. The penalty phase is focussed on the available measures aimed at managing an offender whose conduct is intractable and whose risk is high. Therefore, the appellant says the judge was required to separately consider the manageability of the appellant's risk.
- [165] I disagree that the judge erred. The appellant's submission takes the judge's reasoning out of context. The judge had set out s. 753(4) and (4.1), explicitly considering the sentencing options set out in s. 753(4).
- [166] At the penalty stage, the judge relied on findings made at the designation stage, but Boutilier says all the evidence adduced during a dangerous offender hearing must be considered at both stages of the judge's analysis, although for the purpose of making different findings related to different legal criteria at each stage. For example, many findings, such as those related to the presence of impulsivity, lack of empathy, and need for immediate gratification at the expense of other people, will be relevant to both the designation and penalty stages: Boutilier at para. 44.
- [167] As Boutilier emphasized, treatability is relevant at both the designation and the penalty stages. The Crown correctly says a judge may find that although there is a high likelihood of harmful recidivism and a high degree of intractability, the offender's risk can be managed without an indeterminate sentence. This might be so where there are other effective measures by which to manage the risk.

- [168] In this case, the judge determined the appellant's conduct was both intractable and not manageable in the community. He considered whether a lesser measure would adequately protect the public and found it would not, as demonstrated by his reasoning at paras. 146-47. In reaching this conclusion, the judge had explicitly set out the principles of sentencing in ss. 718-718.2 of the Code, which include proportionality.
- [169] The judge reviewed the evidence relevant to the risk posed by the appellant at paras. 117, 119-20. The judge discussed the appellant's intractability at para. 127, noting poor rehabilitative potential "negatively impacts the effect of the treatment and supervision programs available." He concluded the appellant's behaviour was not manageable in the community. The judge never restricted himself to a conclusion that he was required to impose an indeterminate sentence because of his finding of intractability at the designation stage. The judge specifically considered the risk management strategy component of Dr. Tomita's report, as the Crown points out, noting the appellant's inability to control her substance abuse meant it was less likely she could be effectively supervised in the community and linked the supervision concern to the high risk the appellant posed to street-oriented early adolescent girls.
- [170] Thus, the judge's reasons reflect that at the penalty stage, he considered the manageability of the appellant's risk. He did not make the error alleged, but properly considered treatability as part of whether the appellant's risk could be managed.
- c. Did the judge consider whether the appellant's risk could be managed other than by an indeterminate sentence?
- [171] The appellant contends that despite finding there was no reasonable expectation that a lesser measure would adequately protect the public, the judge failed to exhaustively review, thoroughly inquire into, or even consider the risk management measures available under a determinate sentence, (whether or not it was followed by a long-term supervision order), in deciding an indeterminate sentence had to be imposed. The appellant argues that as part of the necessary exhaustive review and as a matter of constitutional imperative, the judge was required to either adopt the decision-making framework presented in *Boutilier* at para. 70 or at least to separately consider each of the lesser measures set out in s. 753(4) of the Code. *Boutilier* said this at para. 70:
- [70] The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained by Justice Tuck-Jackson of the Ontario Court of Justice: *R. v. Crowe*, No. 10-10013990, March 22, 2017. First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the

public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

- [172] The appellant submits that had the judge considered broader sentencing principles, including proportionality, he would have concluded there was a reasonable expectation that a lesser measure than an indeterminate sentence would adequately protect the public.
- [173] In my view, it is clear from his reasons when considered as a whole and the submissions on sentence that the judge did not fail to consider each of the lesser measures set out in s. 753(4), including a long-term supervision order.
- [174] In *R. v. Lawrence*, 2019 BCCA 291 at paras. 79-83, this Court held that Boutilier does not require a strict, formalistic style of reasoning or an explicit step-by-step analysis. The Court said, "a less than formulaic approach is also consistent with the general instruction to judges to avoid 'watch me think' reasons and to grapple, instead, with the real issue before the court." Thus, had the judge applied the strict analytical structure described by the appellant, he would certainly have satisfied the requirement to canvass lesser penalties. However, such an approach was not necessary. As a result, the judge did not err by not using a formulaic approach.
- [175] The judge explicitly set out the statutorily available sentencing options under s. 753(4) of the Code and the sentencing principles in ss. 718-718.2 of the Code. The judge referred to the appellant's ongoing risk and to his finding the appellant was an ongoing significant threat to commit further sexual offences against female children. Having referred to the availability of lesser measures than an indeterminate sentence, the judge found a lesser measure would not adequately protect the public as the appellant's risk to reoffend was too great to be managed in the community. I consider the judge's conclusion to be entirely supported by the evidence.
- [176] Dr. Tomita was clear the appellant's risk could not be managed in a provincial jail setting and while a federal sentence and parole offered the best hope of containing the risk, this depended on the appellant's success regarding the five contingencies discussed by Dr. Tomita who was of the opinion that the appellant's outlook was "gloomy".
- [177] The language of s. 753(4.1) requires a court to impose an indeterminate sentence "unless satisfied by the evidence that there is a reasonable expectation" that a lesser measure will adequately protect the public. A "reasonable expectation" is a belief that something will happen, as opposed to the mere possibility it may happen: *R. v. D.J.S.*, 2015 BCCA 111 at para. 30; *R. v. Osborne*, 2014 MBCA 73 at paras. 70-73.

- [178] Dr. Tomita's opinion that federal supervision offered the best hope falls short of a reasonable expectation. The appellant's history reflects only a hope that the appellant will overcome her severe drug addiction, which is inextricably linked to any reasonable likelihood of overcoming her sexual impulses and a likelihood of causing injury, pain, or other evil to other persons through failure in the future to control her sexual impulses. Dr. Tomita's opinion and the uncontroverted facts on which it was based provided a solid foundation for the judge's conclusion.
- [179] In this case, it is clear from the record as a whole that the judge properly considered whether a lesser sentence would adequately protect the public. The Crown had reviewed in detail the three sentencing options and addressed why lesser measures than an indeterminate sentence were not appropriate or feasible. The judge reviewed the evidence and the relevant legal principles in concluding a lesser measure under s. 753(4)(b) or (c) would not adequately protect the public. It is quite apparent from a holistic reading of his reasons, including paras. 97-98, 145-46 as discussed above, that the judge addressed and considered the relevant sentencing principles in reaching his conclusion.
- [180] I would not accede to this ground of appeal.
- d. Was the sentence unreasonable and disproportionate?
- [181] The appellant contends the judge ignored the observation in Boutilier that dangerous offenders constitute a small group of persistent offenders posing "a high likelihood of harmful recidivism" whose conduct is "intractable": Boutilier at para. 46.
- [182] Further, the appellant submits the judge erred in finding the appellant's sexual assault of the same 13-year-old complainant within a six-week period, and the sexual interference in the interim with a different 13-year-old complainant was a basis for finding the appellant's behaviour was intractable and that she is a person whose sexual urges are not manageable in the community.
- [183] Specifically, the appellant says the judge "indulged in a leap of logic" in concluding the appellant's drug addiction "demonstrates intractable behaviour which is not manageable in the community" and therefore the appellant will not be able to control her sexual urges in the community in the future on the basis of the two index offences.
- [184] The following passage concerning the judge's decision to impose an indeterminate sentence bears repeating:
- [146] Based on the evidence which has been heard in these sentencing proceedings, the submissions of counsel and the authorities cited therein, and having found there is an ongoing significant threat to commit further sexual offences against young women, [Ms.] Patel, s. 753(4.1) requires that I sentence you to detention in a penitentiary for an indeterminate period. I am not satisfied that there is a reasonable expectation that a lesser measure under s. 753(4)(b) or (c) of the Criminal Code will adequately protect the public against the commission of a future serious personal injury offence.

- [147] This is bolstered by the findings of intractability, and instability while incarcerated and while on parole. Additionally, at the sentencing stage, the manslaughter conviction is a relevant consideration. It demonstrates further impulsivity and an inability to control emotions. Taken with Dr. Tomita's comments on the offender's inability to extricate [herself] from the drug community within prison and without -- and the likelihood that such will put [her] in contact with young and vulnerable girls upon any eventual release -- the rehabilitation programs are insufficient to protect the community from future similar offence were a determinate sentence given at this time.
- [185] I take the reference above to "intractability, and instability while on parole" to refer to the appellant's breaches of parole conditions by consorting with sex-trade workers and consuming drugs.
- [186] There is no question the legislation sets stringent criteria that targets "a small group of persistent criminals with a propensity for committing violent crimes against the person": Boutilier at para. 3; R. v. Lyons, [1987] 2 S.C.R. 309 at 339, 347; Hexamer at para. 131. The judge twice acknowledged, once at para. 99 and again at para. 101 of his reasons, that the appellant's submission was her circumstances did not reflect those of the small group of target offenders envisioned by Parliament. In my view, the judge clearly rejected -- not ignored -- this submission.
- [187] The judge explained his conclusion that the criteria in s. 753(1)(b) were met in this case, including why the appellant's behaviour over the course of the index offences demonstrated that her behaviour was intractable and that her sexual urges were not manageable in the community.
- [188] In my opinion, the judge did not indulge in the "leap of logic" alleged. Rather, he carefully explained the connection between the appellant's drug use and sexual deviance. Dr. Tomita provided ample evidence about the significant effect of what he described as the appellant's current "markedly severe" drug addiction on her likelihood of reoffending. Further, as the Crown submits, Dr. Tomita examined the appellant's health and life circumstances which he said were set out in a report by Dr. Lohrasbe in 2005 and which circumstances the judge considered.
- [189] The difficulty with the appellant's submission is that it ignores the flagrant and public defiance of court ordered terms of probation, bail or both. The appellant's multiple breaches of these conditions formed the context for the appellant's sexual offending. The appellant engaged in extremely high-risk behaviour to satisfy her sexual impulses. The appellant's submissions also fail to consider Dr. Tomita's evidence that there was ample file information to indicate that the appellant had a condition called hebephilia, which, as stated, is an underlying sexual interest in early adolescent girls, which is marked by sexual attraction to girls about 11-14 years old, with probable paraphilic disorder.

- [190] The narrow or select group of offenders envisioned by Parliament is what is intended to emerge after the application of the legislation results in a designation as a dangerous offender. I consider that result occurred here.
- [191] In essence, the appellant's submission is a complaint that the judge was wrong to conclude there was no reasonable expectation that a lesser measure than an indeterminate sentence would adequately protect the public.
- [192] On the correct application of the legislation, I consider the sentence was reasonable, particularly in light of the principle that in a dangerous offender proceeding, a proportionate sentence is one that not only balances the nature of the offence and the circumstances of the offender, but gives considerable weight to the protection of the public: *R. v. Armstrong*, 2014 BCCA 174 at para. 72.
- [193] The combination of her particular sexual deviance, moderate to high risk of future sexual violence, demonstrably poor potential treatability for substance abuse, and readily foreseeable engagement in more forceful and intrusive sexual activities with intoxicated and vulnerable victims are of particular concern in this case. In the following passage, the judge captured this in his review of the significant aspects of Dr. Tomita's evidence:
- [109] [The appellant] was reported to evidence features of antisocial personality disorder including disregard for and violation of the rights of others, failure to conform to social norms, deceitfulness, and consistent irresponsibility. With respect to sexual deviance, Dr. Tomita reported that, on the data available, "[The appellant] probably has an underlying sexual interest in early adolescent girls, a condition called hebephilia, which is marked by sexual attraction to girls about 11 to 14 years old." In his testimony-in-chief, Dr. Tomita clarified that he had factored in the shortness of the time period he considered into his identification of and strength of that position. In cross-examination, Dr. Tomita confirmed he was comfortable saying that [the appellant] had a "probable" paraphilic disorder based on the approximately six-week period during which the sexual offending took place.
- [110] Dr. Tomita further opined that [the appellant] "appears to be at moderate to high risk of future sexual violence", and [her] potential treatability for substance abuse problems was "demonstrably poor". Linking those two issues, Dr. Tomita noted that "[t]he most salient risk is for future sexual offending targeting adolescent girls. If [the appellant] remains entrenched in a drug using lifestyle and subculture, the risks of contact with street-oriented early adolescent girls remains high." The report further notes that "[The appellant] has not been able to control [her] substance use despite repeated attempts at treatment. [Her] substance use will make it less likely [s]he can be effectively supervised in the community."

[111] Dr. Tomita used the Static 99-R actuarial risk assessment, and structured professional judgment to assess the risk of violence [the appellant] poses. [The appellant] scored in the "Above Average Risk Level on the Static 99-R for being charged or convicted of another sexual offence." In the section on formulating the sexual violence risk, Dr. Tomita stated at para. 90 of his report:

A significant concern in [the appellant's] case is an escalating trajectory of sexual violence as [evidenced] by 3 offences over the course of about 6 weeks and the last sexual offence against N.K.J. occurring after [s]he was charged with sexual interference and sexual assault. Short of custodial confinement, all indicators point to a likelihood [the appellant] would have continued [her] pattern of sexual offending. Probation supervision was demonstrably ineffective in continuing [her] risk.

[112] Looking at potential sexual violence scenarios, Dr. Tomita noted that "[o]ne escalating scenario which is readily foreseeable is [the appellant] engaging in more forceful and intrusive sexual activities with intoxicated and vulnerable victims."

[113] Despite there being no direct interview of [the appellant], therefore, Dr. Tomita confidently indicated a moderate to high risk of [the appellant's] causing injury to other persons in the future through failure to control [her] sexual impulses. [The appellant] has demonstrated a lack of control of [her] sexual impulses both while using drugs - the use of which [s]he is unable to control - and while sober, which presents great concern.

[194] I conclude the judge was justified in declaring the appellant a dangerous offender and imposing an indeterminate sentence in a penitentiary. In my view, it was open to the judge below to conclude, based on the evidence, that no measure other than an indeterminate sentence would adequately protect the public. The result was reasonable and anchored in the judge's acceptance of Dr. Tomita's evidence. Therefore, it is not for this Court to substitute its own opinion. I would not give effect to any of the grounds of appeal.

Disposition

[195] In the result, I would dismiss the appeal.

"The Honourable Madam Justice MacKenzie"

Reasons for Judgment of the Honourable Mr. Justice Fitch:

Introduction

[196] I have had the privilege of reading in draft form the reasons for judgment of Justice MacKenzie. I adopt her thorough summary of the appellant's history of sexual and non-sexual offending, as well as the appellant's history of non-compliance with community supervision orders.

- [197] I agree with my colleague's analysis of Grounds 1, 2(b), (c) and (d) as those grounds of appeal have been framed in paragraph 112 of her reasons. I also agree with her proposed disposition of the appellant's fresh evidence application.
- [198] For the reasons that follow, I am unable to agree with all aspects of her analysis of Ground 2(a), or with her proposed disposition of this appeal.
- [199] In broad terms, the issues raised by Ground 2(a) concern the extent to which the Supreme Court of Canada's judgment in *Boutilier* affects the manner in which s. 753(1)(b) of the Code should be interpreted and applied. More specifically, this ground of appeal asks whether the prospective risk assessment conducted at the designation stage is tied to the established pattern of sexual offending, or whether that risk assessment must now take account of the whole of an offender's criminal history and responsiveness to past treatment interventions, including offences that do not involve sexual misconduct.
- [200] I understand the Crown to submit that *Boutilier* requires the prospective assessment of risk conducted under s. 753(1)(b) to be informed by behaviour that includes, but is not restricted to, an offender's "conduct in any sexual matter". The Crown acknowledges that its position, which was adopted by the sentencing judge in this case, has significant implications for the interpretation and application of s. 753(1)(a)(i) and (ii) of the Code. The Crown concedes, as it must, that adoption of its position also means that the prospective assessment of risk at the designation stage of a dangerous offender application brought pursuant to s. 753(1)(a)(i) and (ii) is not circumscribed by the established pattern of behaviour referenced in those provisions. In short, the Crown submits that *Boutilier* mandates that the prospective assessment of risk under s. 753(1)(a)(i), (ii) and (b) take account of the entirety of an offender's criminal history, whether it forms part of the relevant pattern of behaviour or not.
- [201] The position advanced by the Crown constitutes a significant departure from the way in which the dangerous offender provisions of the Code have been interpreted in the past. I am not persuaded that anything said in *Boutilier* requires adoption of the Crown's position on this point. The narrow issue that arises on this appeal was not before the Supreme Court of Canada in *Boutilier*. More to the point, the interpretive approach urged upon us by the Crown is not faithful to the legislative text of the dangerous offender provisions that are directly and indirectly engaged by this appeal.
- [202] I take no issue with the proposition that at the designation stage of an application made pursuant to s. 753(1)(a)(i), (ii) and (b), the prospects that an offender will be successfully treated (i.e., made manageable in the community) for a disorder or addiction causally connected to the offending pattern of behaviour will be highly relevant. As *Boutilier* makes clear (at para. 23), a sentencing judge must consider an offender's treatment prospects at the designation stage. An offender cannot be designated a dangerous offender unless the sentencing judge concludes that the offender's conduct is intractable and that he or she poses a threat of engaging in similar behaviour in the future.

- [203] Further, and without deciding the point in this case, I accept that on an application made pursuant to s. 753(1)(b), it may be possible, post-Boutilier, to argue that the prospective assessment of risk and, relatedly, an offender's future treatment prospects, should take into account that offender's responsiveness to treatment provided in relation to past offences, including offences that do not involve a failure to restrain sexual impulses. The issue will perhaps most commonly arise where a disorder or addiction has been shown to motivate commission by an offender of both sexual and non-sexual offences in the past. In these circumstances, the offender's amenability to treatment for a disorder that is causally connected to a broader pattern of behaviour could conceivably be relevant at the designation stage.
- [204] But this does not, as the Crown seems to suggest, make the content of any previous non-sexual offences relevant at the designation stage of an application brought pursuant to s. 753(1)(b). What is relevant is the offender's likely responsiveness to treatment for a disorder or addiction that is shown to have played a role in motivating commission of the pattern of sexual offending relied on by the Crown.
- [205] In my view, the post-Boutilier approach advocated by the Crown in this case, and adopted by the sentencing judge, reflects error in law in the interpretation and application of s. 753(1)(b). As it cannot be said the error was inconsequential in the sense that there is no reasonable possibility that the judge would have resolved the application differently but for the error, I would allow the appeal and order a new dangerous offender hearing pursuant to s. 759(3)(a)(ii).

The Issues

- [206] As I see it, the issues that fall to be determined under Ground 2(a) may be restated as follows:
1. Did the sentencing judge consider the appellant's criminal record for non-sexual violent offences, including her previous conviction for manslaughter -- a conviction the Crown conceded did not involve conduct by her in a sexual matter -- in assessing whether it was likely the appellant would cause injury, pain or evil to other persons by failing to control her sexual impulses in the future?
 2. If so, did the sentencing judge err in principle by considering the appellant's criminal record for non-sexual violent offences in assessing whether it was likely that she would cause harm by failing to control her sexual impulses in the future?
 3. If so, what remedy should be granted?
- [207] Before turning to address these questions, some additional background is required to put these reasons in context.

Background

- [208] As my colleague has explained, dangerous offender applications involve a two-stage process: a designation stage, followed by a sentencing stage. In general terms, dangerous offender applications premised on s. 753(1)(a)(i)-(ii) and s. 753(1)(b) take one of two forms. At the designation stage, the Crown may seek to establish under these provisions that the offender is dangerous as a result of: (a) uncontrollable violent behaviour; or (b) uncontrollable sexual impulsivity that manifests itself in criminal conduct. In either event, the offender's past behaviour (of which the predicate offence forms a part) must prove beyond a reasonable doubt that it is likely the offender will cause harm in the future by engaging in criminal conduct consistent with the entrenched and intractable pattern of behaviour he or she has demonstrated in the past.
- [209] In the case at bar, the Crown's application to have the appellant declared a dangerous offender was initially premised on s. 753(1)(a)(i) and (b). In closing submissions, the Crown abandoned its reliance on s. 753(1)(a)(i) and proceeded solely on the basis of s. 753(1)(b).
- [210] For convenience, s. 753(1)(b) -- the only provision directly engaged by this appeal -- reads as follows:

Application for finding that an offender is a dangerous offender

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

- (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.
- [211] Section 753(1)(b), by its terms, engages both retrospective and prospective elements. Retrospectively, the offender must be shown to have failed in the past to control his or her sexual impulses. Based on that conduct, the Crown must prove that there is a likelihood the offender will cause harm through failure in the future to control his or her sexual impulses: Sipos at para. 20. Put differently, "the prospective dangerousness of the offender is measured by reference to '[the offender's past] conduct in any sexual matter including that involved in the commission of the offence for which [s]he has been convicted': R. v. Currie, [1997] 2 S.C.R. 260 at para. 22 (emphasis in original).
- [212] The word "pattern" is not used in s. 753(1)(b) as it is in s. 753(1)(a)(i) and (ii). Nevertheless, what is common to all of these provisions is the onus on the Crown to prove past harmful conduct of a particular kind, rooted in behaviour so intractable that it can safely be concluded that the same type of conduct is likely to manifest itself in the future. As Justice

Côté observed in Boutilier, s. 753(1)(b), like its companion provisions in s. 753(1)(a)(i) and (ii), requires "in addition to evidence of a pattern of past conduct, an independent assessment of future risk": para. 38.

[213] The evidence upon which the Crown sought the appellant's designation as a dangerous sexual offender under s. 753(1)(b) consisted of the two sexual assault offences involving N.K.J. (the index offences), the sexual interference offence that occurred between the two index offences (the Safeway incident), and the uncharged but admitted conduct of luring C.J. (N.K.J.'s friend) for the purpose of facilitating the commission of an offence involving sexual exploitation or sexual assault, contrary to s. 172.1 of the Code.

[214] As my colleague notes, the Crown conceded in its closing submissions that because the circumstances of the manslaughter did not involve conduct by the appellant in a sexual matter, the offence could not be taken into account for any reason at the designation stage. In particular, the Crown conceded that the prior conviction for manslaughter could not be taken into account in determining under s. 753(1)(b) whether the appellant failed in the past to control her sexual impulses or in determining whether she was likely to cause harm to others in the future by failing to control her sexual impulses. The Crown said this:

Now, the second component is, by [her] conduct in sexual matters, [Ms.] Patel has shown a failure to control [her] sexual impulses, so the Crown, as I said, the Crown relies on -- essentially on the period January 21st, 2015 through to March 22nd, 2015 in respect of establishing that. I think as we go through the different components of 753(1)(b), perhaps one of the traps that at least I was initially inclined to fall into is [Ms.] Patel has got quite a varied -- a diverse criminal record. [She's] got a more dated criminal record for a number of quite striking offences, including of course the manslaughter offence.

Having reviewed how this provision is constructed, it's the Crown's [position] that the manslaughter conviction cannot be considered in assessing the components of s. 753(b). The reason I say that is there's no evidence in -- in the material that's before the court about [Ms.] Patel's manslaughter conviction that [her] crime was driven or motivated by a sexual impulse.

Dr. Tomita said as much in his evidence, and there is no reference by the judge in -- in reasons for sentence to there being a sexual motivation. There was a discussion about the trail and -- and -- and other motivations, but the notion that the killing was caused or was motivated by a -- a sexual impulse simply does not arise on the evidence.

So because of that, in my submission, the manslaughter therefore cannot be used to show that [Ms.] Patel has shown a failure to control [her] sexual impulses, and because [her] conduct in that matter is not conduct in a sexual matter that shows a failure to control [her] sexual impulses, it then cannot be used to demonstrate a likelihood of causing injury, pain or other evil to other persons through failure in the future to control [her] sexual impulses. There's sort of a knock-on effect from that initial proposition in terms of how that offence can or cannot be used, so it'll be my submission that it's open to Your Lordship to use all the other information about [Ms.] Patel if you get to subsection (4) and considering what the appropriate sentence is, but when you're

looking at whether or not to designate [Ms.] Patel as a dangerous offender, in my submission, the consideration must be confined to the conduct [Ms.] Patel engaged in between what I am saying is January 21st, 2015 through to March 22nd, 2015.

[Emphasis added.]

[215] In advancing the position in its closing submissions that the manslaughter could not form part of the inquiry mandated by s. 753(1)(b) at the designation stage, the Crown relied on Pike. In Pike, the Crown sought a dangerous offender designation pursuant to s. 753(1)(a)(i) and (ii). Under both provisions, the Crown is required to establish that the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing a pattern of repetitive or persistent aggressive behaviour by the offender, of which the predicate offence forms a part. At issue in Pike was the required relationship, if any, between the requisite pattern of past conduct and the assessment of future risk.

[216] To appreciate what Pike decided, it may be helpful to understand the respective positions of the parties that were advanced on appeal. Those positions were succinctly summarized by Justice Levine, writing for the Court:

[77] The Crown's position is that the relationship [between the requisite pattern of past conduct and the assessment of future risk] is limited. Crown counsel argues that once a pattern meeting the bare conditions of either s. 752(a)(i) or (ii) [sic] is established, the Crown may move beyond the confines of the pattern and the risk associated with its repetition to satisfy the remainder of the application - whether the offender constitutes a threat to the life, safety or physical or mental well-being of other persons.

[78] The appellant, on the other hand, says that the pattern defines the risk. He says that in assessing an offender's risk to reoffend, it is his risk to reoffend by acting in accordance with his established pattern of behaviour, or by failing to restrain that pattern of behaviour, that must be assessed - not his risk to reoffend in some manner other than that.

[Emphasis in original.]

[217] The Court held that the wording of the legislative text supported the appellant's position on the manner in which the provision should be interpreted. Justice Levine concluded:

[80] The "threat" under s. (a) is to be determined "on the basis of evidence" of a pattern of behaviour under ss. (i) or (ii). That pattern, in turn, must be linked to the predicate offence.

[81] Breaking any of these connections - between the predicate offence, the pattern analysis or the threat assessment - distorts the careful balance of the provisions, and risks serious injustice. This is revealed more clearly when one considers the provisions broadly.

[82] The predicate offence is not a meaningless, statutory trigger. It is a "last straw", described by Marshall J.A. in *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197 at para. 69 (Nfld. C.A.) as a "one last act of serious personal violence to anchor the offender's pattern of pre-existing

unrestrained or uninhibited behaviour". It takes its significance, in part, from the fact that it demonstrates that the relevant pattern of behaviour continues. As Marshall J.A. explains, it serves an important purpose: "[i]t guards against visiting one of the most serious criminal sanctions upon someone who has essentially abandoned a past pattern of intensely serious violence on the basis of a relapse of relatively less grave proportions" (at para. 72). This explains why the pattern and predicate offence must be related. It would be inconsistent and unfair if the ultimate threat determination were to be made on the basis of a perceived threat unrelated to either the predicate offence or the pattern of behaviour it reveals as still persisting.

- [83] Similarly, the pattern analysis is inextricably linked to the ultimate threat assessment. It is the basis for predicting the future behaviour which threatens others. As explained in Neve, the two are linked in the sense that "the court cannot make a determination that an offender constitutes a threat in the manner specified in s. 753(a) except on the basis of evidence that meets at least one of the specified behaviour thresholds" (at para. 103). The Court went on to state (at para. 110):

We read s. 753(a) as requiring that the court be satisfied on two points: (a) that the predicate offence is part of a pattern of behaviour which has involved violent, aggressive or brutal conduct; and (b) that it is likely that this pattern of conduct will continue and will lead to conduct endangering the life, safety or physical well-being of others

- [84] Comments to the same effect were made by Lambert J.A. in *R. v. Dow*, 1999 BCCA 177, 134 C.C.C. (3d) 323 at paras. 21 and 22 [leave to appeal ref'd [1999] S.C.C.A. No. 302]:

The elements of subpara. (i) of para. 753(a) are: (1) that there be a pattern of repetitive behaviour revealed in the offences and that the pattern be present in the offence which gave rise to the dangerous offender proceeding; and (2) that the pattern of repetitive behaviour contained two essential elements: first, a failure to restrain the relevant repetitive behaviour and, second, a likelihood of causing death or injury through a failure to restrain that behaviour in the future.

So there must be a pattern revealed by repetitive behaviour; the pattern must contain an element that the dangerous behaviour was not restrained in the past; and there must be a likelihood that the same behaviour in the future will not be restrained and will cause death or injury.

[*Italicized emphasis added; underlined emphasis in original.*]

- [218] Pike stands for the proposition that the prospective assessment of risk must be linked to the retrospective analysis -- the past pattern of behaviour or conduct in a sexual matter -- mandated by the particular provision the Crown relies on in seeking a dangerous offender designation.

- [219] There is a long line of authority from this Court holding that there must be a link between the predicate offence, the past conduct, and the assessment of future risk: in addition to *R. v. Dow*, 1999 BCCA 177 and *Pike*, see *R. v. Walsh*, 2017 BCCA 195 per Bennett J.A. at para. 18, per Dickson J.A. (dissenting in the result) at para. 87(e); *R. v. Dorfer*, 2013 BCCA 223 at para. 43; and *Hexamer* at paras. 135, 184. I note that *Hexamer* was decided after the Supreme Court of Canada's decision in *Boutilier*.
- [220] Appellate courts across Canada have also endorsed the view that the assessment of future risk must be tied to the past type of criminal behaviour anchoring the application that an offender be designated "dangerous": see *Neve* at paras. 103, 119; *R. v. Hogg*, 2011 ONCA 840 at paras. 38-41; *R. v. Montgrand*, 2017 SKCA 49 at paras. 9, 11, 16; *R. v. Shea*, 2017 NSCA 43 per Bryson J.A. (dissenting in the result) at paras. 66-67, leave to appeal ref'd (2018), [2017] S.C.C.A. No. 351; and *R. v. Knife*, 2015 SKCA 82, leave to appeal ref'd (2016), [2015] S.C.C.A. No. 382. The Saskatchewan Court of Appeal summarized the required link as follows in *Knife*:
- [221] Thus, the pattern/repetition analysis provides the evidentiary basis for assessing the future threat. It is this future threat the dangerous offender provisions are aimed at curbing. Broadly speaking, if a court is unable to conclude the offender will pose a danger to the public in the future based on the offender's prior violent offences, the requirements of s. 753(1)(a) have not been met and the offender must not be designated as a dangerous offender. However, if it is apparent the predicate offence is not an isolated occurrence but is rather a repetition of violent behaviour which shows a failure to restrain violent behaviour and is likely to continue in the future causing injury or death to others (for s. 753(1)(a)(i)), then the offender does pose a danger to the public in the required sense and should be accordingly designated as a dangerous offender.
- [221] As is apparent from the earlier references to *Currie* and *Sipos*, the required link between the past conduct of an offender, of which the predicate offence forms a part, and the assessment of future risk has similarly found expression in the Supreme Court of Canada's jurisprudence. In *Lyons*, the majority held that three criteria must be established to show that an offender will likely cause future harm of the kind identified in what is now s. 753(1)(a): (1) the predicate offence is part of a broader pattern; (2) "the pattern of conduct is very likely to continue" and to result in the harm identified in the relevant subparagraph; and (3) "the pattern of conduct is substantially or pathologically intractable": at 338. Despite important amendments to the statutory scheme in 1997 and 2008, the language of s. 753(1) has not changed in any relevant way and the requirements of the prospective risk assessment remain the same: *Boutilier* at paras. 26-27.

- [222] The majority of the Court in Lyons held that the dangerous offender legislation does not punish an offender for what he or she might do, as the punishment flows from the actual commission of a serious personal injury offence: at 328. A dangerous offender is subjected to a different sentencing procedure -- which prioritizes the protection of society over other sentencing principles -- because the evidence establishes beyond a reasonable doubt a present likelihood of "specified future conduct": at 328, 364 (emphasis added).
- [223] The link between the predicate offence, the pattern of past conduct, and the risk that the same pattern will likely continue is an integral part of the ultimate threat assessment. This link ensures that only offenders with a proven likelihood of posing a specific risk to the public in the future are labelled as dangerous: Currie at paras. 22, 26, 30; and R. v. Steele, 2014 SCC 61 at para. 37.
- [224] Many of these authorities, including Pike and Lyons, concern the designation of an offender as dangerous pursuant to s. 753(1)(a), for what will usually involve a pattern of violent, non-sexual offending. Yet the principle that the threat assessment must be tied to the pattern of behaviour that anchors the dangerous offender application has also been applied in the context of dangerous offender applications based on sexual misconduct under s. 753(1)(b): see R. v. Ziegler, 2012 BCCA 353 at para. 6, leave to appeal ref'd (2015), [2014] S.C.C.A. No. 491; Dorfer at paras. 28, 61; Hexamer at paras. 135, 183-185; Sipos; and Currie.
- [225] As these authorities confirm, the predicate offence must form part of a pattern of behaviour that gives rise to the likelihood that the same type of behaviour will continue in the future. For dangerous sexual offender applications under s. 753(1)(b), there must be a link between the predicate sexual offence and the offender's past criminal behaviour in sexual matters. Additionally, the Crown must prove beyond a reasonable doubt the likelihood that the offender's past failure to control his or her sexual impulses will manifest itself in the future. In other words, it is the risk of harmful recidivism through further sexual offending that is at issue. The language of the provision does not contemplate a more generalized risk assessment that considers whether the offender may harm some person in the future by reoffending in a non-sexual way.
- [226] In summary, I consider it well-established prior to Boutilier that on an application to have an offender declared a dangerous sexual offender pursuant to s. 753(1)(b), a sentencing judge was obliged to conduct the required prospective assessment of risk based exclusively on the offender's past pattern of sexual offending.
- [227] I turn now to consider the Crown's submission that Boutilier effectively overrules Pike and authorities to like effect.

- [228] As my colleague notes, closing submissions in the case at bar were made before the Supreme Court of Canada released its judgment in Boutilier. The parties were invited to make further written submissions addressing the impact of Boutilier on the analysis the sentencing judge was obliged to undertake, including at the designation stage.
- [229] Boutilier decided that an offender cannot be designated a dangerous offender unless the sentencing judge concludes that the offender is a future threat, having conducted a prospective assessment of risk. Sentencing judges must, therefore, consider an offender's treatment prospects at the designation stage. Before designating a person a dangerous offender, a sentencing judge must be satisfied that the offender "poses a high likelihood of harmful recidivism and that his or her conduct is intractable": paras. 23, 27.
- [230] In its post-Boutilier supplementary written submission, the Crown, in my respectful view, did more than simply argue that treatment prospects were relevant at the designation stage, as my colleague seems to suggest at paras. 157-158 of her reasons. The Crown argued that Boutilier fundamentally altered the designation stage of the analysis by unmooring the assessment of future risk from the specific conduct anchoring the dangerous offender application. The Crown's post-Boutilier written submission reads, in relevant part, as follows:
4. In the Crown's submission, Boutilier has expanded the scope of the evidence that should be considered in assessing the future threat at the designation stage.
 5. The Crown's original position, relying on paras. 78-83 of *R. v. Pike* was that the Court could not rely on evidence other than [the appellant's] conduct in sexual matters that showed [the appellant's] failure to control [her] sexual impulses in assessing the future threat.
 6. As a result of Boutilier the Crown submits that this has changed. The Court can consider all of the (relevant) evidence before it in determining whether there is a [likelihood] that [the appellant's] failure to control [her] sexual impulses in the future will cause injury, pain or evil to other persons.

[Emphasis added.]

- [231] The Crown relied, in particular, on paras. 44-45 of Boutilier in support of its submission that the appellant's criminal record for non-sexual offences, including the manslaughter, was relevant in this case to the prospective risk assessment mandated by s. 753(1)(b).
- [232] The Crown confirmed in oral argument that this was the intended thrust of its post-Boutilier written submission, and sought to defend its reading of Boutilier on appeal. While the Crown maintained its position that the judge did not, in fact, rely on the appellant's manslaughter conviction at the designation stage, it conceded that the judge was invited to consider all of the appellant's offending behaviour, including the manslaughter, at the designation stage. The Crown argued on appeal that Boutilier stands for the proposition that "anything relevant to treatability has to be considered [at] the designation phase." The Crown was less than clear about how the appellant's conviction for

manslaughter informed her treatment prospects for sexual deviance and substance abuse -- neither of which were motivational factors in the commission of the manslaughter.

- [233] Against this background, I am unable to agree with my colleague that the Crown, in its post-Boutilier written submission, did not resile from the position advanced in its closing argument. Further, I do not agree with my colleague's conclusion at para. 144 of her reasons that "counsel had agreed" that the appellant's conviction for manslaughter (and other non-sexual criminal offences) was only relevant at the penalty stage of the application. The Crown's supplementary written submission demonstrates otherwise.
- [234] As my colleague points out, the judge said in his reasons for sentence that he would not rely on the manslaughter conviction to demonstrate a past failure by the appellant to control her sexual impulses:
- [46] Crown counsel submitted that this Court cannot rely upon the manslaughter conviction to demonstrate a failure by [Ms.] Patel to control [her] sexual impulses at the designation stage of the dangerous offender proceedings. That was notwithstanding the violent death followed an alleged discovery of sexual reassignment by [Ms.] Patel during the performing of oral sex by the accused on the victim. Dr. Tomita described the motivation for the manslaughter as "betrayal" rather than a failure to control sexual impulses. I will not rely upon the manslaughter conviction to demonstrate a failure by [Ms.] Patel to control [her] sexual impulses for the designation stage of the dangerous offender proceedings. Likewise none of the earlier offences of which [Ms.] Patel has been convicted have any aspect of sexuality to them, and shall not be considered at the designation stage of the process.
- [235] In my view, the above-noted paragraph goes no further than to acknowledge that previous offences committed by the appellant that do not have a sexual assault-related component to them cannot constitute conduct in a sexual matter demonstrating a failure in the past to control her sexual impulses. I do not understand the judge to be saying in this paragraph that previous, non-sexual offences cannot be considered in assessing whether there is a likelihood of the appellant causing harm through failure in the future to control her sexual impulses. In other words, I read para. 46 of the judge's reasons as addressing the retrospective component of s. 753(1)(b). I do not read that paragraph as addressing the prospective assessment of risk.
- [236] As I have explained, the essence of the Crown's post-Boutilier written submission was that the prospective assessment of risk had to take account of non-sexual offences, including the manslaughter. That the judge seems to have adopted the Crown's position on this point is evidenced by his later remarks which, for convenience, I reproduce below:

Supplemental submissions of the Crown following R. v. Boutilier

- [96] The Crown submits that there are two changes to the approach the Court must take as a result of Boutilier. First, at the designation stage, the Crown's position is that Boutilier expands the scope of the evidence that should be considered in assessing the future threat

an offender poses. Originally, the Crown relied only upon evidence of [Ms.] Patel's conduct in sexual matters that showed a failure to control [her] sexual impulses. Now, the Crown submits that the Court can and should consider the broader scope of relevant evidence before it in determining whether it is likely that a failure by [Ms.] Patel to control [her] sexual impulses in the future will cause injury, pain, or other evil to other persons. Further, prospective evidence of treatability at the designation stage informs the decision on the extent of the threat posed by the offender. In the present case, this means that the Court is not restricted to examine the evidence between January 21, 2015 to March 22, 2015, when assessing the future threat, but is able to examine all relevant evidence (Boutilier para. 44).

[98] I agree with the Crown's submissions with regard to the law as it was detailed in Boutilier. It is the Crown's position overall that nothing less than an indeterminate sentence will reduce [Ms.] Patel's risk of the commission of murder or a serious personal injury offence to an acceptable level.

[Emphasis added.]

Analysis

Question #1: Did the judge consider the manslaughter conviction in conducting the prospective assessment of risk?

[237] Against this background, I cannot agree with my colleague's assertion at para. 141 that there is "no indication whatsoever in his reasons" that the sentencing judge used any of the appellant's convictions for non-sexual offences, including her conviction for manslaughter, in his decision to designate the appellant as a dangerous offender pursuant to s. 753(1)(b).

[238] In my respectful view, it is clear from the judge's explicit adoption of the Crown's post-Boutilier written submission that the manslaughter conviction formed part of the judge's prospective assessment of the risk the appellant poses to the community. My colleague's contrary conclusion on this point does not take into account the context in which the Crown's supplementary written submission was made, or the significance of the judge's adoption of that submission. It also renders meaningless paras. 96 and 98 of the reasons for sentence.

[239] At the very least, I am of the view it cannot be said with any confidence that the judge did not rely on the manslaughter conviction in determining that the appellant was likely to cause harm through failure in the future to control her sexual impulses. He was asked by the Crown in its supplementary written submission to use the manslaughter conviction (as well as the appellant's record for other non-sexual offences) in conducting the prospective assessment of risk. He accepted the Crown's position that the court "can and should" consider the entirety of the appellant's criminal misconduct in determining whether it was likely she would cause harm through failure in the future to control her sexual impulses. In other words, the judge accepted an interpretation of Boutilier that would permit the use of unrelated criminal behaviour to conclude that the offender poses a higher risk of harmful

recidivism of the type contemplated by s. 753(1)(b).

Question #2: Did the judge err in principle by considering the appellant's convictions for offences not involving her conduct in any sexual matter in determining whether it was likely she would cause harm in the future by failing to control her sexual impulses?

- [240] I turn next to address the second question -- whether the sentencing judge erred in principle by considering the appellant's conviction for manslaughter (and other violent non-sexual offences) in assessing whether it was likely she would cause harm by failing to control her sexual impulses in the future. In my view, he did.
- [241] As the authorities cited herein explain, the future threat assessment is, by the language of s. 753(1)(b), tied to the past pattern of behaviour that gives rise to the dangerous offender application. The subsection asks whether an offender, by his or her conduct in any sexual matter, including the index offence(s), has shown a failure to control his or her sexual impulses in the past and a likelihood of causing harm through failure in the future to control his or her sexual impulses. The inquiry is not about risk generally, but about the risk that the offender will continue to engage in the pattern of harmful sexual misconduct he or she has engaged in in the past. That is the point this Court made in *Pike* and in its subsequent jurisprudence -- an interpretive approach which, as I have noted, is consistent with the Supreme Court of Canada's jurisprudence and the decisions of other provincial appellate courts.
- [242] I cannot agree with the position of the Crown that *Boutilier* must be taken to have overruled the *Pike* line of authority on this fundamental issue. I say this for four reasons.
- [243] First, the issue did not squarely arise in *Boutilier* and, in my view, it is reading too much into *Boutilier* to suggest that the Court was saying anything more than an offender's treatment prospects must be taken into account at the designation stage, and that a finding of intractability is a pre-condition to the making of a dangerous offender designation.
- [244] Specifically, I do not see that *Boutilier* (at paras. 44-45) provides any support for the Crown's position that conduct falling outside the relevant behavioural pattern engaged by the application must now be taken into account at the designation stage. In these two paragraphs, Justice Côté, for the majority, was simply making the point that evidence relevant to the prospective risk assessment will often be common to issues arising at both the designation and sentencing stages. Importantly, she emphasized that this common body of evidence, although relevant at both stages, must be considered "for the purpose of making different findings related to different legal criteria": para. 44. I do not understand *Boutilier* to dictate a departure from the requirement at the designation stage that the prospective risk assessment be tied to the established pattern of past behaviour.
- [245] Second, the Court in *Boutilier* did not mention its own jurisprudence on this point, or *Pike* and its progeny, let alone expressly state that it was overruling this well-established line of authority.

- [246] Third, adoption of the Crown's position would, in my view, broaden the pool of offenders who might be declared dangerous. Boutilier reinforced the point made in Lyons that the dangerous offender provisions pass constitutional muster because they carefully define the very small group of offenders for whom preventative incarceration is justified. It would be inconsistent with the constitutional and policy underpinnings of Boutilier to read the decision as endorsing an analytic approach that would almost certainly have the effect of expanding the pool of offenders who might be declared dangerous and potentially subjected to an indeterminate period of imprisonment.
- [247] My colleague disagrees that the Crown's interpretation of Boutilier will have this broadening effect. As she states at para. 158, Boutilier "means an offender who might otherwise be designated as dangerous could avoid such a designation by the mitigating effect of treatability prospects." I agree. At the same time, adoption of the Crown's position would require sentencing judges to consider at the designation stage past criminal behaviour that does not fit within the applicable pattern in conducting the prospective risk assessment.
- [248] In the case at bar, the Crown's interest in introducing such evidence at the designation stage was not to prove that the root causes of the appellant's sexual offending were amenable to treatment, but to show that she poses an even higher risk of harmful recidivism when her entire history of offending is taken into account. Given the change Boutilier was said to usher in at the designation stage, the Crown argued in its supplementary written submission that "the additional information the Court can now consider only strengthens Dr. Tomita's opinion as to the risk posed." In this Court, the Crown similarly argued that the judge could have considered the manslaughter offence if, for example, it caused the judge to be "more concerned" about the appellant's impulsivity.
- [249] Of particular concern is the foreseeable and deleterious impact of such an approach on Indigenous persons -- a group already grossly over-represented in the population of dangerous offenders serving indeterminate sentences in federal correctional institutions. I read Boutilier as narrowing the group of offenders meeting the criteria for dangerousness at the designation stage by filtering out those capable of surmounting their specific behaviour through treatment: see, for example, *R. v. Skookum*, 2018 YKCA 2, where this Court overturned an Indigenous man's dangerous offender designation under s. 753(1)(b) after Boutilier. Adoption of the Crown's position would, almost certainly, have the opposite effect.
- [250] Fourth, and perhaps most importantly, the Supreme Court in Boutilier cannot reasonably be said to have brought an interpretation to the provision that is inconsistent with its terms. The language used in s. 753(1)(b) plainly requires that the prospective assessment of risk -- the likelihood that an offender will fail in the future to control his or her sexual impulses -- be grounded in that offender's past misconduct "in any sexual matter".

- [251] As the Crown acknowledged in oral argument, adoption of its position would necessarily have implications for the prospective risk assessments required by s. 753(1)(a)(i) and (ii). If the Crown is right in its interpretation of Boutilier, the prospective risk assessment would not be tied to the patterns of behaviour set out in s. 753(1)(a)(i) and (ii), but would take account of the entirety of an offender's past behaviour, including conduct not falling within the requisite pattern. I know of no previous authority supporting such an approach, and I see nothing in Boutilier that requires us to adopt it now.
- [252] I conclude, therefore, that the judge erred in principle by adopting the Crown's submission that on an application for a dangerous offender designation premised on s. 753(1)(b), Boutilier fundamentally alters the analysis at the designation stage by expanding the prospective assessment of risk to include consideration of the entirety of an offender's criminal behaviour, including behaviour that goes beyond the offender's past conduct in any sexual matter.
- [253] I turn next to address my colleague's suggestion that Boutilier broadens the risk assessment at the designation stage by incorporating all evidence relevant to treatability, which, in a case of this kind, may include past non-sexual offences to the extent that those offences are relevant to the treatability of the offender's failure to control sexual impulses.
- [254] As noted earlier, I accept that it may be possible to argue in a future case that an offender's responsiveness to a particular type of treatment following criminal conduct in a non-sexual matter should inform the prospective assessment of risk at the designation stage on an application made pursuant to s. 753(1)(b). This may arise, for example, if the same disorder or addiction is shown to have motivated the commission by an offender of both sexual and non-sexual offences in the past. In these circumstances, the non-sexual offences are not relevant in and of themselves at the designation stage. Those offences merely provide the historical background for considering whether treatment intervention is likely to ameliorate the risk that an offender will engage in harmful behaviour in the future as a consequence of failing to restrain his or her sexual impulses.
- [255] Beyond acknowledging the availability of the argument in an appropriate case, I consider it to be both unnecessary and unwise for this Court to engage in a predictive analysis of the circumstances or precise ways in which evidence addressing the treatability of a disorder that is shown to have motivated the commission of both sexual and non-sexual offences could conceivably be taken into account at the designation stage of an application brought pursuant to s. 753(1)(b). I say this for the following reasons.
- [256] First, the consequences of adopting an argument like this are significant and the implications of doing so are difficult to forecast in the abstract. I note, as well, that issues that are likely to arise in this area were not addressed by either counsel in any sort of concerted way.

- [257] Second, the issue does not squarely arise in this case. There are no obvious similarities between the factors that motivated the manslaughter and those that motivated the sexual misconduct at issue. The sexual assault-related offences were predatory and the product of the appellant's deviant attraction to pre-pubescent girls. All of them occurred while she was in the throes of her long-standing addiction to methamphetamines. By contrast, the manslaughter committed in 2003 was conceded by the Crown to be a reactive outburst of non-sexual violence. There is no evidence that the appellant's drug addiction or deviant attraction to young girls had anything to do with this offence, which appears to have involved an adult victim. The sentencing judge held that the appellant consumed drugs after committing the manslaughter. The related psychiatric report by Dr. Lohrasbe confirms the appellant used cocaine for the first time in her life after the manslaughter and, although she consumed beer earlier in the day, she did not recall feeling intoxicated at the relevant time. I understand it to be common ground on this appeal that intoxication was not a motivating factor in the manslaughter. Whereas the manslaughter was conceded to be an act of impulsive violence, the sexual assault-related offences that formed the evidentiary foundation for the dangerous offender designation were carefully orchestrated by the appellant.
- [258] In short, the issue does not arise in this case as there is no evidence that sexual deviance or substance abuse, which played direct and primary roles in the commission of the sexual offences at issue on this application, were causally connected to the commission of the manslaughter.
- [259] In these circumstances, I would leave for another day a more detailed discussion of the circumstances and ways in which evidence addressing the treatability of a disorder that is shown to have motivated the commission of both sexual and non-sexual offences should be taken into account at the designation stage of an application brought pursuant to s. 753(1)(b).
- [260] Suffice it to say that I do not agree with my colleague's suggestion at para. 156 of her reasons that "[i]f only evidence of past conduct in sexual matters were to be considered at designation, then the appellant's participation in rehabilitation programs for substance-use disorders could not be considered." This is not the effect of my reasoning. An offender's treatment prospects in relation to the very disorder shown to have caused or contributed to the relevant pattern of offending -- in this case sexual offending -- will be highly relevant at the designation stage. If the same disorder caused or contributed to offences falling outside that pattern, it is arguable that evidence respecting the entrenchment of the disorder and its resilience in the face of previously attempted treatment interventions may be relevant in determining whether it is likely the offender will engage in future harmful behaviour consistent with the established pattern. For the reasons previously expressed, this does not, however, make non-sexual offences themselves relevant to the prospective assessment of risk which, by the language of s. 753(1)(b), remains tied to the established pattern of sexual misconduct.

Question #3: What remedy should be granted?

[261] In my view, the sentencing judge's apparent reliance on the appellant's previous conviction for manslaughter and other non-sexual offences in conducting a prospective assessment of the risk that she would likely continue to fail to control her sexual impulses in the future fatally taints his conclusion that she met the criteria for a dangerous offender designation set out in s. 753(1)(b). Given the materiality of the error, I am unable to conclude that there is no reasonable possibility that the sentencing judge would have resolved the application differently but for the error: *R. v. Johnson*, 2003 SCC 46 at paras. 47-51.

[262] In the result, I would allow the appeal, set aside the dangerous offender designation and indeterminate sentence, and order a new hearing pursuant to s. 759(3)(a)(ii) of the Code.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Butler"

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