

CANADA / JUDGMENT

R. v. S.W.P.

2020 BCCA 373

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 373 R. v. S.W.P.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. S.W.P.,

2020 BCCA 373

Date: 20201223

Docket: CA46436

Between:

Regina

Respondent

And

S.W.P.

Appellant

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Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

On appeal from: An order of the Provincial Court of British Columbia, dated

September 16, 2019 (sentence) (R. v. Pelletier, Vancouver Docket 23609-1).

Counsel for the Appellant

(via videoconference):

D.N. Fai

Counsel for the Respondent

(via videoconference):

M.A. Street

Place and Date of Hearing:

Vancouver, British Columbia

November 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 23, 2020

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

Summary:

Appeal from four-year determinate sentence and long-term offender designation under Part XXIV of the Criminal Code. Offender was age 16 at time he committed the offences, which were of a sexual nature. He has cognitive difficulties and is of Aboriginal descent. Held: Appeal allowed to the extent of substituting a five-year LTSO for the 10-year maximum imposed by the judge. It was open to the judge to decline to give enhanced credit for time served and to ensure the sentence would allow the appellant to complete programming in the institution that should help his rehabilitation. The predicate offences met the criteria for a long-term offender designation, which is designed to protect the public and rehabilitate the offender. However, the other principles of sentencing and the offender's personal circumstances -- his age, Aboriginal status and other 'attenuated' principles -- had not been considered by the sentencing judge. An LTSO of five years was substituted for the 10-year order.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] On September 14, 2016, the appellant, "SWP," was living in a community living facility where he was being supervised 24 hours per day. For the second time that week, he sneaked out of the house in the early morning hours and entered a nearby residence in which the complainant ("LA") was asleep in her bedroom. She woke to see a man in his underwear standing near her bed, who, in the words of the court below, "took out his penis and began to masturbate to ejaculation." LA managed to flee the bedroom and ran to her daughter's room where her son-in-law and daughter were asleep. Pandemonium broke out and the intruder fled. He was 16 years old.
- [2] It did not take the police long to find evidence implicating the appellant. He was arrested the same day and charged with breaking and entering a dwelling house for the purpose of committing a sexual assault contrary to s. 348(1)(d) of the Criminal Code and sexual assault under s. 271. These are the predicate offences of the sentence now under appeal before this court. SWP remained in custody until he was sentenced, as an adult, on September 16, 2019. Immediately before the sentencing hearing began, the Crown filed notice of its intention to seek an order designating him as a dangerous offender under Part XXIV of the Criminal Code.
- [3] At the time of sentencing, SWP had already pleaded guilty to four offences, namely assaults committed on June 16, 2015 and March 3, 2016; and indecent acts committed on March 4 and 5, 2016. The first assault involved his striking and stomping the head of his 10-year old sister as she slept in her bedroom. Evidently SWP had been suffering auditory hallucinations and experiencing paranoia at the time. The other three charges involved sexual exhibitionism and/or attempts to touch women for sexual purposes; the latter two offences took place while he was living at a recovery house and under supervision. For these offences, he received a global sentence consisting of an Intensive Support and Supervision Order and a six-month Deferred Custody Supervision Order under the Youth Criminal Justice Act, S.C. 2002, c. 1 ("YCJA"), which required constant supervision.
- [4] By the time the dangerous offender ("DO") designation was sought, SWP had also pleaded guilty to two assault charges relating to incidents in July and November 2017 at the Burnaby Youth Correction Centre ("BYCC"). These involved physical altercations with other inmates. SWP was to be sentenced on those charges following the DO ruling.
- [5] As the sentencing judge observed, SWP's response to community supervision as a youth was "problematic", as was his behaviour while in custody at BYCC for the predicate offences. His file was full of reported incidents including "immature posturing physical violence intimidation sexualized behaviour public masturbation and an inability to control his sexual impulses". (See para. 51.) During this time, he received extensive counselling from Dr. Bodnarchuk, one of the authors of an expert report reviewed at the sentencing hearing. Other incidents of inappropriate sexual behaviour led the Director of Corrections to transfer SWP to the North Fraser Regional Correction Centre ("NFRCC") in February 2018. The number of reported incidents of misconduct then decreased dramatically.

Aboriginal Background

- [6] SWP is of Aboriginal heritage and has the support of his large family. His father, Mr. M, was a member of the Ocean Man First Nation. He had been forced to attend residential schools, but seldom discussed this experience with his family. SWP's mother never lived on reserve and was unaware of whether her parents had gone to residential school or not. SWP's parents now have little contact with any band members.
- [7] The appellant was born in Regina and the family lived on the Ocean Man Reserve between 2005 and 2007. According to the Gladue report, he was regarded as an "outsider" and was bullied at school because he was not raised on the reserve. The family left Saskatchewan and moved in 2007 to Vernon, B.C., where the appellant attended school until he was suspended in Grade 9. When he was admitted with symptoms of psychosis to B.C. Children's Hospital in November 2015, the family moved to Vancouver, but they could not find affordable housing. When SWP was released from hospital in February 2016, he had a diagnosis of schizophrenia (about which there is now serious doubt) and severe obsessive-compulsive disorder.
- [8] The author of the Gladue report observed that the following factors were present in SWP's life:
- Disassociation with First Nations community;
 - Intergenerational impacts of residential schools;
 - Absence of culture and traditional teachings;
 - Discrimination and/or community fragmentation by First Nations community;
 - Low income/unemployment in family household; and
 - Inadequate social support by educational system.

The DO/LTO Scheme

- [9] As mentioned above, the Crown sought a dangerous offender designation before the sentencing judge. The judge reviewed the general principles applicable to DO proceedings beginning at para. 9 of his reasons. He quoted in particular from *R. v. Boutilier* 2017 SCC 64 where Côté J. for the majority noted the importance of "prospective evidence" in the DO process. (See paras. 33-40.) As well, Côté J. stated:

As the assessment of prospective risk described above is concerned with whether an offender will continue to be "a real and present danger", being unable to surmount his or her violent conduct, the sentencing judge must consider all retrospective and prospective evidence relating to the continuing nature of this risk, including future treatment prospects. Furthermore, I am of the view that confining the consideration of treatability to the choice of penalty under s. 753(4.1) rests on a theoretical distinction between the designation stage and the penalty stage that is

neither practical nor useful.

In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects.

[At paras. 43, 46; emphasis added.]

[10] The sentencing judge also noted the importance of the principle of restraint, as codified by paras. 718.2(d) and (e) of the Code. Where, as here, the offender falls under the YCJA, the objective of rehabilitation must also be taken into account in the sentencing: see *R. v. Neve* 1999 ABCA 206 at para. 259. The judge in the case at bar stated:

As noted at para. 24 of this ruling, s. 3(1)(b)(9) of the YCJA places an emphasis on rehabilitation and reintegration. Following the reasoning of the Court of Appeal in *Neve*, I find that it is necessary to exercise caution when placing weight on the accused's prior behaviour, including weight that would attach to his prior youth criminal record in dangerous offender proceedings.

The accused was 16 years old at the time he committed the predicate offences. [At paras. 29-30; emphasis added.]

[11] As mentioned, the statutory scheme dealing with DOs and Long Term Supervision Orders, or "LTSOs", is found at Part XXIV of the Code. As discussed in *R. v. Steele* 2014 SCC 61 at paras. 30-31, the provisions of Part XXIV have been amended over recent years, due partly to constitutional concerns. (See especially *R. v. Lyons* [1987] 2 S.C.R. 309 and *R. v. Johnson* 2003 SCC 46.) In broad strokes, the process begins with an application by the Crown, which must convince the court that there are reasonable grounds to believe that an offender who has been convicted of a "serious personal injury offence" (defined in s. 752) or an offence described in s. 753.1(2)(a) might be found to be a DO or a long-term offender. If the court finds reasonable grounds, it must before sentence is imposed remand the offender for 60 days during which a person designated by the court prepares an assessment for use as evidence in the application.

[12] Where the offender meets the criteria in paragraph (a) or (b) of s. 753(1), the court must find him or her to be a DO, and must do one of three things under s. 753(4) -- impose a sentence of penitentiary detention for an indeterminate period; impose a sentence for the offence(s) for which the offender has been convicted and order that he or she be subject to long-term supervision for a period not exceeding ten years; or impose a sentence for the offence without any further order.

- [13] If the offender is found not to be a DO, the court may either treat the application as one for an LTSO, in which case s. 753.1 applies; or it may simply sentence the offender for the offence(s) for which he or she has been convicted.
- [14] I have reproduced s. 753.1 at para. 39 below. It sets out the three criteria for finding that an offender is a long-term offender. Where the criteria are met, the court must impose a sentence (which must be a minimum of two years' imprisonment) for the predicate offence and order that the offender be subject to a period of supervision for up to ten years: s. 753.1(3). In *R. v L.M.* 2008 SCC 31, the Court expressed the view that in determining the length of sentence for the predicate offence, the sentencing judge should not take into consideration the subsequent period of community supervision to which the offender will be subject if found to be a long-term offender. (See para. 38.) Speaking for the Court, LeBel J. highlighted the distinction between the sentencing procedures for dangerous offenders and those for long-term offenders. In his analysis:

Although they both contribute to assuring public safety, the dangerous offender and long-term offender designations have different objectives. Unlike a dangerous offender (s. 753 Cr. C.), who will continue to be deprived of liberty, since such offenders are kept in prison to separate them from society (s. 718.1), a long-term offender serves a sentence of imprisonment of two years or more and is then subject to an order of supervision in the community for a period not exceeding 10 years for the purpose of assisting in his or her rehabilitation (s. 753.1(3) Cr. C.). This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [translation] "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (*Dadour*, at p. 228). [At para. 42; emphasis by underlining added.]

- [15] The Court in *L.M.* also rejected the proposition that the usual principles of sentencing at ss. 718-718.2 of the Code should be applied in the usual way to the "combined effect" of a custodial sentence and an LTSO to be served thereafter. Although agreeing that a period of long-term supervision "cannot be any longer than is necessary to obviate the risk that the offender will reoffend and thus to protect the public", the Court emphasized the different objectives of determinate sentences of imprisonment and LTSOs. Whereas a 'normal' prison sentence is determined on a consideration of several factors, including the gravity of the offence, the degree or responsibility of the offender, the parity principle and the possibility of imposing a less restrictive sanction, the length of an LTSO is based "on an offender's criminal past and on the likelihood that he or she will reoffend". (At para. 47.) In addition, LeBel J. stated:

... it is important to remain faithful to the distinction between sentencing and the imposition of a supervision period. A judge who confuses these two processes risks straying from the normative principles and the objectives of sentencing. A judge who does so would also neglect the specific objective of the procedure for finding an offender to be a long-term offender, which requires the application of different principles. Parliament intended that the judge determine the appropriate sentence first. After doing so, the judge is to ask, in light of Parliament's objective of protecting

the public, whether a period of supervision is warranted. The period of community supervision cannot therefore be equated with a new period of deprivation of liberty consecutive to the one resulting from the sentence. [At para. 49; emphasis added.]

Expert Reports and Testimony

[16] Returning to the sentencing judge's reasons in the case at bar, I note that he correctly stated the two purposes of LTSOs -- to protect the public and to rehabilitate and reintegrate offenders back into the community. He continued:

The supervision period in an LTSO is not intended to be penal, but rather to accomplish the goal of preventing future crimes: *R. v. R.(J.W.)*, 2010 BCCA 66 (CanLII) at para. 43.

By operation of ss. 134 and 134.1 of the Corrections and Conditional Release Act ("CCRA"), an offender is subject to conditions that are imposed by the National Parole Board ("NPB"), as well as being subject to instructions imposed by a Community Parole Officer ("CPO"). The NPB may set or cancel conditions. In other words, once an offender's sentence has expired, he or she is essentially on parole. As such, "an order of this nature is a drastic interference with the liberty of the subject": *R v. Norman*, 2015 ONSC 2735 (CanLII), applied *R. v. Davidson*, 2015 BCPC 0335.

While the NPB will not impose a supervision condition requiring that an offender take a specific type of medications the NPB can require an offender to follow psychiatric counselling, which may include a prescription of a specific type of medication: *Davidson*, *ibid* at para. 57. [At paras. 38-40; emphasis added.]

[17] After describing SWP's criminal record, the judge reviewed his response to corrections, both at the youth and adult levels, and to community supervision, at paras. 50-60. The Court described the expert evidence aimed at risk assessment and treatment in the appellant's case, beginning with Dr. Bodnarchuk, a clinical psychologist who treated and counselled him from 2016 to 2018. At the time he was undergoing this treatment, the appellant took prescribed medications including Abilify, Clonazepam, Prozac, Sertraline, and Trazadone. Dr. Bodnarchuk opined that he was "at a moderate risk to re-offend if efforts were not made to manage this risk" and that he would benefit from "greater structure in his daily life, close supervision, psychoeducation on appropriate sexuality and social skills training and development of sexual relationships, sexual offence-specific treatment and greater residential stability." (At para. 69.)

[18] Dr. Paul Janke, a forensic psychiatrist, had met with the appellant three times and reviewed various reports of other clinicians who had been involved in his assessment and treatment. Dr. Janke prepared a psychiatric report in which he noted that SWP had a "prior diagnosis of obsessive compulsive disorder that was in remission as a result of [his] taking prescribed medication." He opined that the appellant met the criteria for paraphilia. The judge recounted:

He expressed concern that while the accused's sexual offending behaviours had not involved penetration, if the accused's behaviour is not checked, it could result in an escalating pattern of more aggressive sexualized behaviour: *ibid* at p. 8 and 9.

He described the accused as an individual with:

"... considerable limitations in terms of interpersonal social skills and in some ways presents as being quite immature, In other aspects he has awareness of societal expectations and is able to interact and engage with the adults involved in his current supervision and care. The accused enjoys tremendous support from his biological parents " *ibid*.

He testified that he would place the accused in the high-risk category to reoffend, and that his inappropriate sexual behaviour was more likely than not to increase over the next 10 or even 15 years before he might experience a radical reduction in sexual drive and interest: Transcript, *supra* p.26, ll. 39-47.

From a treatment perspective, it was his opinion that the Provincial Correction system had only limited programming that was not specific enough to address the needs of the accused.

It was his understanding that the Federal Correction system would be more appropriate, as the accused would have access to intensive programming specifically designed to address his deviant sexual arousal: *ibid* at p. 9.

It is noteworthy that Dr. Janke contemplated the future reintegration of the accused into the community, but with strict supervision:

"It is my very strong opinion that [the accused] will require very close supervision in the community, far beyond that which can be offered through placement with his parents, or even in a specialized group home. It is my opinion it is more likely than not that [the accused], at some point will require treatment with anti-androgen medications to provide him with adequate control over his sexual drive": *ibid* at p. 10. [At paras. 77-82.]

[19] Dr. Su, a psychologist, had conducted a psychological assessment of SWP in connection with the inquiry into whether he should be sentenced as an adult on the predicate offences. With respect to his risk to reoffend, she expressed the view that the risk would be high "if no efforts are made to manage his risk". In addition, the judge noted:

In relation to treatment and management of the accused, Dr. Su, in part, was of the opinion that the accused would require long-term therapy, including a requirement that he receive consistent supervision and external controls on his behaviours, which could be provided through a custodial setting: *ibid* at p. 16.

Dr. Su recommended that in light of the accused's low intellectual abilities, he would require specialized treatment programs specific to his cognitive limitations. In addition, given his Indigenous status, he may be more receptive to therapeutic interventions using culturally specific treatment approaches available within a custodial setting: *ibid*.

Dr. Su also recommended that when the accused is returned to the community, he should have intensive supervision over a long period of time, as well as comprehensive and culturally specific treatment: *ibid.*

[At paras. 94-96; emphasis added.]

Dr. Tomita's Evidence

[20] At para. 97, the sentencing judge then turned to the report of Dr. Tomita, the forensic psychiatrist tasked to perform the risk assessment of the appellant for use by the Court under s. 752.1(2). Dr. Tomita produced an extensive report dated June 26, 2018. He had interviewed SWP at length and read all the materials filed as exhibits at the hearing. At the outset, he stressed that one should not lose track of the appellant's young age or of the fact he had not received sex offender treatment in either the provincial or federal Corrections systems. (At para. 100.)

[21] I have, of course, reviewed Dr. Tomita's report, and others, in their entirety and do not intend to try to rehearse them in these reasons. I note here only the most salient conclusions in the report. With respect to future risks of re-offending, the sentencing judge reproduced the following comments of Dr. Tomita:

[SWP] is at high risk of future sexual violence involving exposing his genitals and nonconsenting sexual touching,

[SWP] is at moderate risk of more serious sexual violence such as that enacted in the index sexual offence where there was selection of specific targets, planning and intrusion into the victim's home.

Based on the clinical profile of [SWP]'s sexual offending and sexually inappropriate behaviours, there is a real risk of an escalation in severity to more intrusive types of sexual offending; however, based on present data, I am unable to provide a risk estimate with a reasonable degree of medical certainty.

Based on [SWP]'s clinical profile, there is a low risk for his sexual violence to escalate in severity to serious or life-threatening levels.

[SWP] is at a high risk of future non-sexual violence at lower levels of severity comparable to the kinds of violence that occurred in the outstanding assaults he committed against a peer and a youth correctional officer while in youth custody. The likelihood of escalation to more severe levels of non-sexual physical violence is in the moderate to low range.

[Quoted at para. 101 of the sentencing judge's reasons; emphasis added.]

[22] Using certain "tools" designed to consider the risk of general violence (i.e., not specifically sexual violence), Dr. Tomita found that the appellant had the following markers of psychopathy -- callousness/lack of empathy, poor behavioural controls, and juvenile delinquency. He was found to fall at the border between low and moderate levels of psychopathic personality traits. The sentencing judge quoted the following opinions of Dr. Tomita concerning sexual violence:

Using the RSVP approach, I identify the most likely future scenario of sexual violence for [the accused] to be a repetition of exposing his genitals and sexual touching and rubbing of an adult stranger or superficial acquaintance female victim. The motive would be to gratify his sexual urges. The psychological harm from a random attack from a stranger is likely to be high but in this scenario, [the accused] is unlikely to escalate to serious or life-threatening levels of violence. There might be no specific warning signs other than indicators of general interest in exposing and touching as well as manifestations of inappropriate sexual interactions with females generally. The risk of this behaviour is chronic, and exhibitionists tend to have the highest rates of sexual recidivism among sex offenders. In light of his history, the risk of this type of sexual recidivism occurring in the future is high. [Quoted at para. 105; emphasis added.]

The judge continued:

He testified that the accused's risk of future sexual violence is a product of paraphilia, coupled with mild intellectual disability and sexual immaturity.

He stated, in part, in his report:

" future sexual violence will continue to be in the service of sexual gratification... Of most concern is the possibility that [the accused] may progress along a path of multiple paraphilias called a 'courtship disorder'. This pattern is marked by a progression in severity from voyeurism to exhibitionism to frotteurism to a sexual preference for coercive and nonconsenting sex": Assessment Report at pp. 22-23.

Dr. Tomita concluded, in part, that the RSVP test results establish that it is " difficult to conclude that he is higher than a moderate risk, but his escalation scenario is the most concerning scenario": *ibid* at para. 135. [At paras. 106-108.]

[23] Under the heading "The Accused's Treatment Needs", the judge noted Dr. Tomita's opinion that the appellant was treatable but would require the high- intensity sexual offender treatment available in the federal Corrections system. Further, the judge noted:

Dr. Tomita testified that, in his opinion, the treatment needs for the accused would take years rather than months. The planning of a treatment program specific to the accused should also involve an investigation of his potential for a future schizophrenia diagnosis: *ibid* p. 30, ll. 5-30

To meet the treatment needs of the accused, Dr. Tomita recommended that a "cautious approach", in which the accused is placed under legal supervision for as long as possible, would give the accused the best chance of future success, and would be the best approach for containment of the risk he presents: *ibid* p. 35, ll. 23-37. [At paras. 126-127; emphasis added.]

[24] Near the end of his report, Dr. Tomita wrote at para. 121 that:

Given [SWP]'s high risk of repetition of exposing and nonconsensual sexual touching, the uncertainties around his risk of further escalation in severity, and the uncertain prospects for risk reduction from further sex offender treatment, the safest community management strategy is long term legal supervision. Given the facts of [SWP]'s case, he needs a lengthy period under legal supervision in order to allow a slow and gradual reintegration into the community and a mechanism for rapid intervention if there were indicators that he was heading towards sexual reoffending. Although he is a first time adult offender, such long term legal supervision is only realistically available if he were under federal parole supervision as he will need a period likely in the range of years in order to achieve stability in light of his clinical needs and dismal failure under youth legal supervision. [At para. 121.]

[25] The psychiatrist outlined five factors that "only the fullness of time" would clarify and, depending on the direction, that would affect whether SWP becomes more or less manageable under legal supervision. These factors were the potential for progression or shifting in his sexual deviant interests; uncertainty about the future course of his sexual development; whether his maturity would help mitigate some of the problematic manifestations of his intellectual disability; his capacity to "adaptively function in the community as an adult" and the degree of practical and emotional supports he will require and whether they will be available to him; and finally, whether he has schizophrenia. Dr. Tomita then concluded his report as follows:

Given the uncertainties of the case specific factors, it is exceedingly difficult to forecast his risk beyond the near term. Based on his present clinical and risk profile, it would be reasonable to assume risk estimates might extend about 5 years into the future. Beyond that point, the outcome of the case specific factors noted and his actual course will provide the necessary data in order to project his risk picture further ahead into the future. I appreciate that the Court cannot delay sentencing decisions for years but given the realities of [SWP]'s young age it is only possible to provide an opinion with caveats.

While recognizing that there are other sentencing consideration; from a treatment and rehabilitation perspective, I would conclude that the cautious approach and one that affords [SWP] with the best chance of future success and containment of his risk is one that places him under legal supervision for as long as possible. [At paras. 125-126; emphasis added.]

At trial, Dr. Tomita was taken to the reference in his report to legal supervision for "as long as possible." Counsel suggested that "the longest possible is a 10-year long-term supervision order", to which Dr. Tomita answered "That's my understanding, yes."

[26] The sentencing judge himself asked Dr. Tomita what level of confidence he had that the appellant would be able to reduce his risk to reoffend without medication, including sex-drive reducing medications. Dr. Tomita gave the following answer and this exchange followed:

A I think it's much less likely that he will be able to do that without at least sex-drive-reducing medications forming part of his treatment plan. What form that takes, whether it's long-term and chronic need to take it, or intermittent usage coupled with non-medication interventions, that I don't know.

Q Any such treatment plan must be realistic in addressing both risk factors and timeline treatability, in other words, it's got to have some sort of finite end to it. And that's why I asked earlier about LTSO.

A I wouldn't agree that it needs to have a finite end. I think what it needs is a staged or phased approach. People with these kind of conditions do generally need to manage them for most of their life, but the treatment, if we're speaking about medications or correctional sex offender treatment program, that is relatively time-limited and will take months or perhaps years, if one takes into consideration pre-treatment, treatment, and then maintenance treatment after.

The point of a long-term supervision order is that there is an external incentive to get these things set up and one hopes that over a number of years in ideal circumstances that the person's risk management will successfully carry on, even when the external incentive falls away. But there's no certainty about that. One's risk can outlive any determinate order. [Emphasis added.]

Other Evidence

[27] After reviewing the evidence of four Corrections officials and the Gladue report, the judge noted the victim impact statements of LA, the victim of the sexual assault described earlier, and KA, her daughter. LA in particular described continuing serious effects of the incident and had sought counselling and therapy. KA described no longer feeling safe in her house and continuing to experience nightmares.

[28] Under the heading "Submissions of the Accused's Parents", the judge noted some very general aspects of a letter SWP's parents had written to the Court. The judge stated that the parents were deeply devoted to their son and stand ready to help him when he is permitted to join society outside of a custodial setting. (At para. 159.) This is surely laudable, but the expert evidence leaves some doubt as to whether the parents of SWP truly appreciate the true condition of their son. I note that Dr. Tomita was referred at the hearing to an entry in a youth incident report made by a probation officer in the provincial Corrections system. He had received a telephone call from the appellant's father, Mr. M, who according to the note was "still very angry that [SWP] continues to remain in custody. Says that he knows with a hundred percent certainty that SWP is innocent and that the only reason he remains locked up is because he is Native. [Mr. M] then went on blaming everyone for his son's current circumstances."

[29] There was also an indication that SWP's parents had disapproved of his taking psychotropic medications and had encouraged him to stop taking them in mid-2017. (In fact, SWP's psychotropic symptoms diminished significantly after he discontinued these medications.) Dr. Janke stated in his report that the parents had on occasion expressed "extreme opposition to the diagnosis and treatment" being offered to their son. Dr. Janke did not regard them as "appropriately aware of their son's behaviour" and stated that they appeared to be lacking in understanding of the seriousness and dangerous nature of their son's sexual behaviour." (This concern was expressed by almost all the other experts, including the author of the Gladue report at pp. 3-4.) The parents have expressed the view that SWP has attention deficit disorder -- a diagnosis made when he was a child, but now not supported by Dr. Janke or Dr. Tomita.

Sentencing Judge's Conclusions

- [30] I turn to the sentencing judge's application of s. 753(1)(a) of the Code to the case before him. Noting that Dr. Tomita was the court-appointed assessor, the judge acknowledged that he was required to give deference to his opinions and conclusions. (Citing *R. v. Badger* 2012 SKCA 119.) The judge found that the risk assessment tools used by Dr. Tomita established reliably that the most likely future risk of sexual violence by SWP would include exhibitionism, voyeurism, and frotteurism. (At para. 200.) In the Court's analysis, the Crown had not proven beyond a reasonable doubt that the appellant's conduct would likely cause death or injury to others or inflict severe psychological damage to other persons through a failure to restrain his behaviour; nor had the Crown proven beyond a reasonable doubt that SWP's conduct amounted to a "pattern of persistent aggressive behaviour", showing a substantial degree of indifference on his part regarding reasonably foreseeable consequences to others due to his behaviour. (At paras. 201-2.)
- [31] Turning next to s. 753(1)(b), the Court found the Crown had proven beyond a reasonable doubt that the accused "showed a failure to control his sexual impulses" when committing the predicate offences. However, all of Drs. Bodnarchuk, Janke, Su and Tomita had contemplated SWP's eventual reintegration into society while under close supervision. After noting *R. v. Yogaratnam* 2009 ONCJ 121 and *LSJPA-146* 2014 QCCA 303, the judge said he was not satisfied it was more likely than not that SWP would cause injury, pain or other evil to others through his failure in the future to control his sexual impulses. (At para. 216.) It followed that the criteria for a DO designation had not been met. The Crown's application for a DO order under s. 753 was dismissed.
- [32] Moving to the "penalty stage" analysis, the Crown submitted below that SWP should receive a determinate sentence of four years concurrent, to be followed by a 10-year LTSO pursuant to ss. 753(5)(a) and 753.1 of the Code. The Crown opposed giving enhanced credit for the time SWP had served in prison, assuming that that would "result in the potential for his release back into the community untreated, which would put the public at risk."

- [33] Between the BYCC and the North Fraser Centre, SWP had at the time of the hearing spent almost three years in custody and had not received any formal sex offender treatment. The judge agreed with the Crown's submission that the protection of the public would best be achieved if he were placed in the federal Corrections system.
- [34] In arriving at the length of the determinate sentence, the judge noted the aggravating factors of the offences and their consequences at para. 228. At para. 229 he noted the mitigating factors -- SWP's young age at the time the predicate offences occurred; his intellectual deficits; his immaturity; his "mental health challenges"; expressions of remorse reported by various clinicians; strong family support; his ability to control his behaviour since being transferred to NFRCC; and his Aboriginal status.
- [35] Considering also the overarching need to protect society and the appellant's needs to receive sex offender treatment that would promote his rehabilitation and eventual reintegration into society, the Court arrived at a sentence of four years' imprisonment on each of the two offences, to be served concurrently. The judge declined to grant enhanced credit for time served. Two years were credited, leaving two years remaining on the prison sentence. The Court recommended that the sentence be served at a federal prison that would provide sex offender treatment specific to the appellant's needs, including treatment with an Aboriginal focus. (At para. 236.)
- [36] Finally, in his brief "LTSO Analysis", the judge stated his conclusions concerning long-term supervision:

As previously noted, the purpose of an LTSO is twofold: (1) to protect the public, and (2) to rehabilitate and reintegrate offenders back into the community.

I accept the diagnoses of Dr. Janke and Dr. Tomita that the accused suffers from paraphilia (not specified) and requires treatment to control this condition.

I accept the opinions of Dr. Bodnarchuk, Dr. Su, Dr. Janke and Dr. Tomita that the accused will require close community supervision over an extended timeframe. This timeframe could be years.

If the accused does not receive close community supervision and treatment specific to his needs, there is a substantial risk that the accused will reoffend.

I accept the opinion of Dr. Tomita that the accused is treatable. His opinion in particular satisfies me that if the accused responds to treatment specific to his needs, there is a reasonable possibility of the eventual control of his risk in the community.

XXI. RULING ON LTSO

I am satisfied that the protection of the public and the accused's ultimate rehabilitation and reintegration into society require the imposition of a 10-year LTSO pursuant to ss. 753(5) and 753.1(1) of the Code. [At paras. 237-42.]

On Appeal

[37] SWP appeals both the four-year determinate sentence and the long-term offender designation. In the alternative, he asks that the LTSO be shortened to five years. He asserts the following errors in judgment on the part of the trial judge:

- 1) That the learned Trial Judge erred when he designated the appellant a Long Term Offender and placed him on a ten year Long Term Supervision Order;
- 2) That the learned Trial Judge erred when he failed to give the Appellant full credit for time served awaiting disposition of this matter;
- 3) The sentence is excessive and unfit and fails to adequately take into consideration the mitigating circumstances of the Appellant;
- 4) Alternatively, that the learned Trial Judge erred when he imposed the maximum 10 year Long Term Supervision Order when a much shorter term would have been appropriate;

LTSO Designation

[38] It will be recalled that Part XXIV of the Code is set in motion by the Crown where there are reasonable grounds to believe that criteria set forth in s. 752.01 are met. If they are, the Crown is required to advise the court "as soon as feasible after the finding of guilt and in any event before sentence is imposed", whether it intends to make an application under s. 752.1(1). On its face, the latter section contemplates that either a DO or LTSO designation may be sought, although it appears that in most instances, the Crown seeks first a DO and then if the court declines to grant that designation, an LTSO designation is then considered. (In this sense, the LTSO alternative has been compared to a conviction on a lesser/included offence where the accused is not convicted of the greater offence at trial: see *R. v. Turley* (1999) 136 C.C.C. (3d) 426 (B.C.C.A.).) This "usual" procedure was followed in the case at bar.

[39] Section 753.1 of the Code deals with LTOs specifically. It provides in material part:

Application for finding that an offender is a long-term offender

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

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

Substantial risk

- (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
- (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement -- sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking -- person under 18 years) or subsection 279.02(2) (material benefit -- trafficking of person under 18 years), 279.03(2) (withholding or destroying documents -- trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring -- person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and
- (b) the offender
- (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
- (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

Sentence for long-term offender

- (3) If the court finds an offender to be a long-term offender, it shall
- (a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and
- (b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

If offender not found to be long-term offender

- (6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

This provision has been in effect since 2002; subsections 4 and 5 were repealed in 2008.

[40] It will be seen that s. 753.1 is much simpler in terms of future risk than the DO provisions: there need only be a "substantial risk that the offender will reoffend". It is on this condition that the appellant bases his first ground of appeal. As I understand it, counsel for SWP submits that the assessment of a "substantial risk to reoffend" must surely require the commission of a serious offence -- even a violent one -- that resulted in serious harm. Otherwise, Mr. Fai argues, one could imagine a serial shoplifter prosecuted by indictment being made subject to an LTSO -- a result he says could not have been intended by Parliament.

[41] A somewhat similar argument was made in *R. v. Piapot* 2017 SKCA 69. In that instance, the trial judge had expressed the view that the 'reoffending' required by s. 753.1(1)(b) did not require a risk of reoffending violently. The Saskatchewan Court of Appeal disagreed. It pointed out that:

The LTO provisions of Part XXIV are integrated with the dangerous offender provisions of that part, which explicitly deal with behaviour that can only be described as violent. It would therefore be surprising if the special sentencing regime of Part XXIV were intended to be used for a class of offenders that did not have a risk to offend violently. Moreover, the entry point to the Part XXIV scheme for an accused to be designated either a dangerous offender or an LTO requires, pursuant to s. 752.01 [sic; s. 752.1(1)], that the accused has been convicted of a serious personal injury offence as defined by s. 752. Such offences, apart from sexual offences, involve the use or attempted use of violence against another person, conduct endangering or likely to endanger the life or safety of another person, or inflicting or are likely to inflict severe psychological damage upon another person. When a conviction for a crime that, broadly speaking, is violent initiates the LTO designation process it would be incongruous if the future substantial risk the designation is intended to address were not a risk of violence. In short, looking at the scheme of the LTO provisions in Part XXIV as a whole points to an interpretation of s. 753.1(1)(b) that requires the risk to reoffend be a violent one. [At para. 69; emphasis added.]

(I note that s. 752.1(1) requires either a conviction for a serious personal offence as defined, or an offence described in s. 753.1(2)(a).) The Court in *Piapot* referred to *R. v. K.R.S.* 2004 SKCA 127, *R. v. Ryan* 2017 ONCA 334, and *Guindon v. R.* 2008 QCCA 1445, from which it inferred that the scant jurisprudence on the question suggested that the phrase "substantial risk to reoffend" required the risk to be a risk of violence. (At para. 77.)

[42] It will be recalled that subsection (2) of s. 753.1 sets out the circumstances in which a court "shall be satisfied" there is a substantial risk the offender will reoffend. The offences listed in para. (a) include some that are not normally regarded as "violent" per se -- e.g., making, distributing, possessing or accessing child pornography referred to at s. 163.1 of the Code. Alternatively, a substantial risk of reoffending will exist under para. (a) if the offender "has engaged in serious conduct of a sexual nature in the commission of another offence" of which he or she has been convicted. Under para. (b), a substantial risk of reoffending will be shown if the offender has shown a "pattern of repetitive behaviour" of which the offence he or she has been convicted forms a part, that shows a "likelihood of the offender's causing

death or injury to others or inflicting severe psychological damage" on others; or if by "conduct in any sexual matter", including that involved in the offence for which he or she has been convicted, the offender has shown a "likelihood of causing injury, pain or other evil to other persons" in the future. (My emphasis.)

- [43] However, s. 753.1(2) is not the only route to an LTO designation. In *R. v. McLeod* 1999 BCCA 347, this court per Madam Justice Prowse rejected the argument that s. 753.1(2) is an exhaustive statement of the circumstances in which an offender will be found to pose a substantial risk to reoffend. Rather, the Court concluded, s. 753.1(2) simply creates a presumption of the existence of a substantial risk to reoffend, leaving the issue of such risk in other circumstances to be determined without the aid of the presumption. (At paras. 26-7.) Similar reasoning has been adopted in *R. v. Jeurissen* 2014 BCSC 1718 at para. 55; and in *R. v. Henwood* 2017 BCSC 2302 at para. 69; and at the appellate level in *R. v. Weasel* 2003 SKCA 131. There the Court ruled that s. 753.1(2) "is not to be seen as defining the term 'substantial risk'" in s. 753.1, but as "creating a conclusive presumption of 'substantial risk' in those circumstances to which paragraphs (a) and (b) of the subsection are addressed, leaving the issue of such risk in other circumstances to be determined without the aid of the presumption." (At para. 56.)
- [44] As I understand Mr. Fai's submission, it is that where, as here, the statutory presumption in s. 753.1(2) has been held not to arise such that the court is construing subsection (1) without any presumption, para. (b) must be informed by the seriousness of the offence that the offender is likely to commit ('reoffend') in future. I agree that it would not be appropriate for a persistent offender whose offences are not of a serious or violent nature, to be swept into the broad wording of s. 753.1(1). However, the requirement in para. (a) that it would be appropriate to impose a sentence of two years or more imprisonment for the predicate offence is likely to minimize if not eliminate, that possibility. This, and the reference in para. (c) to "eventual control of the risk in the community" -- a phrase used in s. 753(1) in connection with sexual offences in contrast to the references in para. (a) to 'restraining' or 'inhibiting' behaviour on the part of the offender -- suggest that s. 753.1(1) is unlikely to include offenders who commit only minor offences, albeit persistently.
- [45] In *R. v. Hall* (2004) 70 O.R. (3d) 257, the Ontario Court of Appeal ruled that it was erroneous for a trial judge to require as a condition of a DO designation that the sexual offences of which the accused had been convicted be of a "very serious" nature. The Court of Appeal cited *R. v. Currie* [1997] 2 S.C.R. 260 at 272. There the Supreme Court held that once it was shown that the offender had committed one of the offences listed in s. 753(1)(b) as "serious personal injury offences" or "SPIOs", the threshold was passed. The second element of future risk then fell to be considered without more. In *Hall*, the Court of Appeal applied similar reasoning to LTSOs under s. 753.1:

The extracts from the trial judge's reasons quoted above also make it clear that he interpreted the long-term offender provisions as applicable only where the circumstances surrounding the offence giving rise to the application were so serious as to approach the worst offender/worst

offence category. This limitation is not found in s. 753.1. The seriousness of the offences giving rise to the application is addressed in s. 753.1(1)(a). If the offence or offences for which the offender was convicted merit a sentence of two years or more, they are sufficiently serious to trigger the further inquiry into the risk posed by the offender and the possibility of controlling that risk within the community.

The trial judge erred in law in limiting the application of the dangerous offender and long-term offender provisions to situations in which the circumstances surrounding the sexual assault giving rise to the application were sufficiently serious to warrant a dangerous offender designation. [At paras. 50-1; emphasis added.]

[46] As for a requirement of a risk of "violent" reoffending, I agree with the Crown that the Supreme Court of Canada's comments in *R. v. Steele* 2014 SCC 61 are apposite. In *Steele*, Justice Wagner (as he then was) carried out a lengthy analysis of the meaning of "violence", considered both in the context of the definition of SPIO, and in its plain meaning. In the former context, he observed:

This statutory framework enables courts to properly sentence dangerous offenders who have committed SPIOs "without having to wait for them to strike out in a particularly egregious way" (Currie, at para. 26). For our purposes, the jurisprudence confirms that the words "use or attempted use of violence" must be read in their grammatical and ordinary sense, having regard to their statutory context. Neither the purpose of the SPIO requirement nor that of Part XXIV warrants reading in a qualitative minimum level of violence. [At para. 41; emphasis added.]

Considered in the broader context, he noted that a threat of harm "can itself be an act of violence even if the threats are not conveyed to their intended recipients or are not intended to be so conveyed, so long as they are intended to be taken seriously." (At para. 47.) In summary, Wagner J. said:

This brief survey of judicial interpretations of the term "violence" suggests that the focus is on the harm caused, attempted or threatened rather than on the force that was applied. I do not suggest that the definition of violence must be a harm-based one in every case. Context will be paramount. As I mention below (see para. 65), there may be situations in which the presumption of consistent expression is clearly rebutted by other principles of interpretation and, as a result, the intended meaning of violence may vary between statutes and even, in some circumstances, within them: *R. Sullivan, Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 222. However, unless the context or the purpose of the statute suggests a different approach, the prevailing definition of "violence" is a harm-based one that encompasses acts by which a person causes, attempts to cause or threatens to cause harm. [At para. 51; emphasis added.]

In the end, the Court approved a "harm-based approach" in which threatening violence "is not inconsistent with the endangerment and psychological damage aspects of the definition" of SPIO. (At para. 60.)

[47] Given my conclusion that, consistent with Currie and Hall, the 'seriousness' requirement is met by para. (1)(a) of s. 753.1, it is in my view not necessary to go further and require that the offences involved violence. The predicate offences committed by SWP in this case were obviously of a serious and sexual nature and represented an escalation from his past offences. They had serious and long-lasting effects on his victims. In my view, it was open to the sentencing judge to find that the criteria in s. 753.1 were met, notwithstanding his findings at paras. 201, 202, 216 and 218 that weighed against a DO designation.

Determinate Sentence

[48] The remaining three grounds of appeal asserted on SWP's behalf concern the length of the LTSO in combination with the determinate sentence imposed by the Court on the predicate offences themselves. I will deal first with the length of the determinate sentence and the trial judge's failure to give "enhanced" credit for time served by the appellant awaiting disposition of the application under Part XXIV of the Code.

[49] It will be recalled that at the time of sentencing, SWP had been in custody for 968 days. Given the circumstances of the case and the harm done to the victims, the judge declined to pronounce a sentence of "essentially time served". (At para. 231.) He sentenced the appellant to four years on each charge, concurrent, and credited him with two years (730 days) rather than the 1,452 days sought if enhanced credit (at the maximum rate of 1:1.5) were given. As we have seen, the Court recommended that the sentence be served in a federal institution that would provide appropriate sex offender treatment.

[50] The law is clear that it was open to the sentencing judge to decline to give enhanced credit and thereby reduce the term of sentence. In *R. v. Summers* 2014 SCC 26 itself, the Supreme Court observed that a judge retains the discretion "to deny credit at the enhanced rate". (At para. 17.) In *R. v. Hopley* 2015 BCCA 499, this court upheld a sentencing judge's refusal to give a long-term offender enhanced credit. As in this case, the trial judge had been motivated to ensure that the sentence was long enough to allow the offender to complete programming "in the institution that should help his rehabilitation." (See also *R. v. Cote* 2015 SKCA 52 and *Henwood*, supra, at paras. 118-123.) In the case at bar, the sentencing judge stressed not only that appropriate treatment was likely to be available at a federal institution, but also the possibility of treatment tailored to SWP's Aboriginal background.

[51] I see no error on the part of the sentencing judge on this point.

Length of LTSO

[52] I turn finally to the most difficult issue in this case, namely whether the sentencing judge erred in imposing the maximum ten years available on the designation of a long term offender. The judge's reasons on this point were very brief and are reproduced above at para. 36. He noted that the purposes of an LTSO are to protect the public and to rehabilitate and reintegrate the offender back into the community. He accepted the opinions of Drs.

Bodnarchuk, Su, Janke, and Tomita that SWP would require "close community supervision over an extended time frame", failing which there was a substantial risk he would reoffend.

[53] It must be acknowledged that the imposition of a ten-year LTSO on an offender who was a "young person" (as defined in the Youth Criminal Justice Act) at the time of the predicate offences, is not a frequent occurrence. The order is even more unusual given that SWP is of Aboriginal background. Dr. Tomita, the court-appointed assessor, struggled to predict the future course of SWP's psychiatric development and the likelihood he will respond to treatment as he becomes more mature. At para. 90 of his report, Dr. Tomita observed that typically, paraphilic interests and urges "wax and wane but are lifelong." At para. 93, he said it was impossible to know whether SWP has schizophrenia or not and suggested that if he does not experience any indications of psychosis within the next two years, the diagnosis would be much less likely and he would have a "much better prognosis for remaining free of psychotic relapse." There were some positive signs -- Dr. Tomita said it was likely SWP would be willing to acknowledge "a need for some degree of sex offender treatment" and indeed it was "likely that [he] is willing to enter and be able to complete individual or group sex offender treatment". (At para. 107.)

[54] I repeat Dr. Tomita's comments on SWP's "high risk of repetition of exposing and non-consensual sexual touching, the uncertainties around his risk of further escalation in severity, and the uncertain prospects for risk reduction from further sex offender treatment":

the safest community management strategy is long term legal supervision. Given the facts of [SWP]'s case, he needs a lengthy period under legal supervision in order to allow a slow and gradual integration into the community and a mechanism for rapid intervention if there were indicators that he was heading towards sexual reoffending. Although he is a first time adult offender, such long term legal supervision is only realistically available if he were under federal parole supervision as he will need a period likely in the range of years in order to achieve stability in light of his clinical needs and dismal failure on youth legal supervision. [A para. 121; emphasis added.]

At para. 125, he reasoned:

Given the uncertainties of the case specific factors, it is exceedingly difficult to forecast his risk beyond the near term. Based on his present clinical and risk profile, it would be reasonable to assume risk estimates might extend about 5 years into the future. Beyond that point, the outcome of the case specific factors noted and his actual course will provide the necessary data in order to project his risk picture further ahead into the future. I appreciate that the Court cannot delay sentencing decisions for years but given the realities of [SWP]'s young age it is only possible to provide an opinion with caveats. [At para. 125; emphasis added.]

- [55] In the last paragraph of his report, Dr. Tomita concluded that, taking a cautious approach, the appellant would have the "best chance of future success and containment of his risk" if he were given a sentence that "places him under legal supervision for as long as possible." (At para. 126; emphasis added.) When he was questioned by the Crown at trial about this conclusion, he stated that SWP's "adaptive functioning" might be "slower to develop" given his intellectual deficit, especially since he has spent so much time in custody.
- [56] There is, of course, a natural tension between courts of law, which must pronounce LTSOs that have a clear end-point, and professionals in the position of Dr. Tomita, who are simply unable to predict with any certainty when a patient is likely to recover or respond to treatment or even improve at all. It is not surprising that Dr. Tomita opined that this offender would have the best chance of future success in treatment if he were under legal supervision "for as long as possible". In the same statement, however, he recognized "that there are other sentencing considerations" that preclude a "perpetual" supervision order.
- [57] Among these considerations are the principle that (as acknowledged by the Crown) the period of supervision "cannot be any longer than is necessary to obviate the risk that the offender will reoffend and thus to protect the public"; the young age of the offender in this case; and the principle of proportionality. Indeed, in *Lyons* it was said that preventive detention "simply represents a judgement that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased". (At 329, quoted in *Johnson* at para. 23.) The principles applicable to the sentencing of Aboriginal offenders, as explained in cases such as *R. v. Gladue* [1999] 1 S.C.R. 688 and *R. v. Ipeelee* 2012 SCC 13, have also been found to apply in the DO/LTSO scheme, although again their application is "more limited." (See *R. v. Smarch* 2015 YKCA 13 at para. 47, citing *R. v. Ominayak* 2012 ABCA 337 at para. 41; and *R. v. Standingwater* 2013 SKCA 78 at para. 49.)
- [58] More recently, in *Boutilier*, a majority of the Supreme Court suggested at para. 54 that the usual principles and objectives of sentencing "apply to every sentencing decision, whether made under the regular sentencing regime, the dangerous offender regime or the long-term offender regime." As an example, the Court pointed to *Ipeelee*, in which the two offenders had been sentenced under the LTO regime. The Court had nevertheless reviewed the fitness of their sentences "according to sentencing principles, and more specifically the principle in s. 718.2(e) requiring judges to pay attention to the circumstances of Aboriginal offenders in sentencing proceedings". (At para. 54.) Whether *Boutilier* represents a change of direction from LM is unclear; LM was not referred to by the majority. *Lyons* was quoted from extensively, including its reference to the 'attenuation' of the sentencing goals of rehabilitation and retribution.

[59] In another recent case, *R. v. C.R.G.* 2019 BCCA 463, this court set aside a DO made by the court below and substituted an LTSO of ten years. The offender was an adult who had sexually assaulted his step-daughter over a period of three to four years and was in possession of child pornography. He had no prior criminal record and had been assessed by Dr. Tomita, who stated in his report:

Balancing [C.R.G.'s] liberty interests with the possibility that his risk might outlast a determinate sentence, the Court may consider it reasonable to consider the utility of placing him on a federal parole term for as long as possible, which would invoke considerations of the long-term offender provisions.

In finding that a ten-year LTSO would be appropriate, Madam Justice Fenlon for the Court stated:

Although the length of the long-term supervision order is significant, it reflects the recommendation of Dr. Tomita that the appellant should be placed on a federal parole term "for as long as possible". Further, it must be remembered that the fixed sentence and supervision orders focus on two different goals: the former on punishment for the predicate offence, the latter on prevention of future criminal conduct: *R. v. Blair*, 2002 BCCA 205 at para. 37; see also *R. v. S.*, 2006 BCSC 2004 at paras. 134 and 137. In the context of a period of incarceration at the low end of the range for this type of offence, and the anticipated need for long-term treatment and supervision, in my view a ten-year supervision order accommodates the dual objectives of protection of the public and the rehabilitation of the appellant.

[60] The facts of the case at bar are considerably different from those in *C.R.G.* Again, SWP was 16 years old when the offences were committed. He is now 21. He has lifelong cognitive deficits and has suffered many of the disadvantages that are experienced by Aboriginal offenders in Canada. He has not received treatment in any prison institution. I do not view the ten-year maximum as a "default" position, and the Crown agreed that it should not be so viewed.

[61] In all the circumstances, I find that the objectives of an LTSO -- i.e., the protection of the public and the rehabilitation of the offender -- considered together with the "attenuated" principles mentioned above -- did not justify a ten-year supervision order in this case; and that, with respect, the sentencing judge erred in failing to consider these principles. The result was that he imposed an order that was excessive. I would affirm the designation of SWP as a long-term offender but substitute an LTSO of five years for that of ten years. The five years will of course commence once he has served his term of imprisonment on the predicate offences.

Disposition

[62] In the result, I would allow the appeal to the extent of substituting a five-year LTSO for the ten years imposed by the sentencing judge. We are indebted to both counsel for their able arguments.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Harris"

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