

CANADA / JUDGMENT

# R. v. Sohal

2023 BCCA 256

## COURT

British Columbia Court of Appeal

## DECIDED

23 June 2023

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2023 BCCA 256 R. v. Sohal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sohal,

2023 BCCA 256

Date: 20230623

Docket: CA46623

Between:

Rex

Respondent

And

Sandeep Sohal

## Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under ss. 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Restriction on Publication: A publication ban has been mandatorily imposed under ss. 486.5(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a victim or witness. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated  
December 16, 2019 (sentence) (R. v. Sohal, 2019 BCSC 2271,  
New Westminster Docket X080523).

Counsel for the Appellant:

B.R. Anderson

Counsel for the Respondent:

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

November 22, 2022

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2023

Written Reasons by:

The Honourable Justice Marchand

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

Summary:

The appellant was convicted of sexual assault with a weapon (the "predicate offence"), unlawful confinement and uttering threats (the "non-predicate offences"). The judge designated him as a dangerous offender under ss. 753(1)(a)(i) and 753(1)(b) of the Criminal Code and sentenced him to a determinate jail term of six years to be followed by a ten-year long-term supervision order ("LTSO"). The judge also sentenced him to concurrent six-year custodial sentences on the non-predicate offences and made various ancillary orders. He appeals his designation as a dangerous offender, the ten-year LTSO, and the concurrent six-year custodial sentences imposed on him for unlawful confinement and uttering threats. He does not take issue with the six-year custodial sentence for sexual assault with a weapon, or the ancillary orders made by the judge.

Held: Appeal allowed. The judge erred by adopting and applying too low a standard of proof for assessing the future risk posed by the appellant. Rather than determine whether there was a "high likelihood" of harmful recidivism, the judge considered only whether the appellant was "likely" to reoffend with sexual violence and concluded that he was. She specifically defined "likely" to mean "more probably than not", a standard that was below the standard established by the leading authorities. As the factual findings of the judge did not inexorably lead to the conclusion that the appellant met the criteria to be designated as a dangerous offender, the designation, sentence and ancillary orders in respect of the predicate offence are set aside and a new hearing of the Crown's application to designate and sentence the appellant as a dangerous offender is ordered.

The appellant alleged that the judge made a significant number of additional factual and legal errors. With the exception of correcting an interpretive error committed by the judge in finding that she was statutorily precluded from imposing a determinate sentence of less than two years on the predicate offence, it is neither helpful nor necessary to address the appellant's additional grounds of appeal.

The Crown conceded that the judge erred in imposing concurrent six-year jail sentences on the appellant for unlawful confinement and uttering threats. The maximum sentence for uttering threats was five years' imprisonment. Further, the judge provided no reasons for imposing sentences substantially higher than the sentences proposed by the parties. Given the Crown's concession, the concurrent six-year sentences are set aside and the sentences sought by the Crown at the sentencing hearing, namely two years' imprisonment for unlawful confinement and one-year's imprisonment for uttering threats, are imposed.

The judge did not specify which ancillary orders were made in relation to which specific counts. As a result, the warrant of committal attached the ancillary orders to all three counts. Several ancillary orders were erroneously attached to the non-predicate offences. These orders are set aside.

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## Introduction

- [1] On September 27, 2018, Sandeep Sohal was convicted of sexual assault with a weapon, unlawful confinement and uttering threats. At the time, Mr. Sohal had two previous convictions for sexual assault with a weapon and one previous conviction for attempted theft. The attempted theft involved Mr. Sohal accosting two young women with a weapon and had sexual overtones. Mr. Sohal's previous offences were committed when he was 17 years old, approximately eight years before he committed the offences at issue on this appeal.
- [2] Given Mr. Sohal's criminal history, the Crown applied to have Mr. Sohal designated as a dangerous offender under one or both of ss. 753(1)(a)(i) and 753(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 ["Code"]. The Crown sought to have him sentenced to a determinate jail sentence of six to eight years (less time served) to be followed by a ten-year long-term supervision order ("LTSO"). Mr. Sohal opposed the designation and sought a determinate jail sentence of two years less a day.
- [3] Following a seven-day hearing, on December 16, 2019, the trial judge designated Mr. Sohal as a dangerous offender. She then sentenced him to concurrent six-year custodial sentences on each of the three offences to be followed by a ten-year LTSO. She also made ancillary Sex Offender Information Registration Act ["SOIRA"], DNA and firearms prohibition orders. The judge's reasons for designation and sentence are indexed at 2019 BCSC 2271.
- [4] Mr. Sohal appeals his designation as a dangerous offender, the imposition of the ten-year LTSO, and the six-year custodial sentences for unlawful confinement and uttering threats. He does not take issue with the determinate six-year custodial sentence for sexual assault or the ancillary orders.
- [5] With respect to designation, Mr. Sohal submits the judge erred by: (1) adopting too low a standard of proof for assessing future risk; (2) misapprehending the expert evidence of psychiatrist Dr. Todd Tomita on treatability and intractability; and (3) failing to properly account for his prior convictions having been youth convictions in assessing his moral

culpability for those offences and in assessing his future risk. As a result of these errors, he says the judge's decision to designate him as a dangerous offender was the product of error in principle and unreasonable.

- [6] With respect to the ten-year LTSO, Mr. Sohal submits the judge erred by: (1) finding she was statutorily precluded from imposing a determinate sentence of less than two years; (2) misapprehending the evidence of Dr. Tomita concerning the need for supervision following a determinate sentence; (3) failing to consider the length of the determinate sentence when determining the necessity and length of the LTSO; (4) failing to consider principles of sentencing apart from the protection of the public; and (5) failing to consider Mr. Sohal's compliance with strict bail conditions as a mitigating factor. As a result of these errors, he says the judge imposed a clearly unreasonable and demonstrably unfit sentence.
- [7] With respect to the six-year custodial sentences for uttering threats and unlawful confinement, Mr. Sohal submits the judge imposed demonstrably unfit sentences and gave insufficient reasons for departing from the sentences sought by the Crown.
- [8] Mr. Sohal seeks orders:
- setting aside his dangerous offender designation;
  - in the alternative, setting aside the LTSO or substantially reducing its length; and
  - substituting sentences of two years' incarceration for unlawful confinement and one-year's incarceration for uttering threats, to be served concurrently to the determinate six-year sentence for sexual assault.
- [9] While the Crown acknowledges that the judge made several legal errors, it maintains they were not material to Mr. Sohal's designation as a dangerous offender or to the imposition of the ten-year LTSO. The Crown agrees that Mr. Sohal's appeal of the determinate sentences imposed for unlawful confinement and uttering threats should be allowed, the sentences for those offences should be set aside, and sentences of two years' incarceration for unlawful confinement and one year's incarceration for uttering threats (both of which the Crown sought at the sentencing hearing) should be imposed.
- [10] As will be seen, in my view, the judge erred by adopting and applying too low a standard of proof for assessing the future risk posed by Mr. Sohal. The leading authorities are clear that to designate Mr. Sohal as a dangerous offender, the Crown had to prove, among other things, that Mr. Sohal's pattern of conduct was "very likely" to continue or, stated slightly differently, that there was a "high likelihood" of harmful recidivism: *R. v. Lyons*, 1987 CanLII 25, [1987] 2 S.C.R. 309 at 338; *R. v. Boutilier*, 2017 SCC 64 at paras. 26-27.

- [11] Respectfully, the judge did not set her mind to whether the evidence satisfied the correct standard regarding Mr. Sohal's future risk. Rather, she considered only whether Mr. Sohal was "likely" to reoffend with sexual violence and concluded that he was. She specifically defined "likely" to mean "more probably than not", a standard that was decidedly below the standard established by the Supreme Court of Canada.
- [12] Further, in my view, the factual findings of the judge do not inexorably lead to the conclusion that Mr. Sohal meets the criteria to be designated as a dangerous offender. As a result, I would set aside his designation and the sentence imposed by the judge on the predicate offence and I would order a new hearing.
- [13] In view of the Crown's concession regarding the sentences imposed for unlawful confinement and uttering threats, I would also allow Mr. Sohal's appeals against those sentences and substitute the sentences sought by the Crown at the sentencing hearing. Further, the warrant of committal erroneously attached SOIRA orders to both of these counts and a firearms prohibition order to the uttering threats count. I would therefore set them aside as well.
- [14] Given my conclusion on the standard of proof issue, with one exception, I do not consider it helpful or necessary to address Mr. Sohal's other grounds of appeal. The one exception relates to an interpretive error committed by the judge in finding that she was statutorily precluded from imposing the sentence sought by Mr. Sohal at the sentencing hearing, namely a determinate sentence of less than two years.

## Overview of the Dangerous Offender Regime

- [15] The dangerous offender regime is preventative: *R. v. Johnson*, 2003 SCC 46 at para. 19; *Lyons* at 339. It aims to protect the public from the risk of violent or sexual reoffending by the offender: *Lyons* at 328-329; *R. v. Boutilier* at para. 3. It involves a "two stage" process, the "designation stage" and the "penalty stage": *Boutilier* at paras. 13-15. "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": *Boutilier* at para. 31.
- [16] Section 753(1) of the Code lists the statutory requirements that must be met before a court can designate an offender as dangerous. In this case, the relevant provisions are ss. 753(1)(a) (i) and 753(1)(b) which provide:

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

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

- (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
  - (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.
- [17] In *Boutilier*, the Court held that designations under s. 753(1)(a) are directed at protecting the public from future violence and designations under s. 753(1)(b) are directed at protecting the public from future sexual misconduct: para. 16. However, in *R. v. White*, 2022 BCCA 91 at paras. 113-119, this Court observed that the above noted remarks were made by way of general introduction to the legislative provisions and rejected a submission based on *Boutilier* that a sexual assault, an inherently violent offence, could not found an application under s. 753(1)(a)(i).
- [18] In *Boutilier*, the Court addressed the prospective risk assessment that is required to make a designation under s. 753(1). The Court held that to make a designation, the 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." By "intractable", the Court meant "behaviour that the offender is unable to surmount": *Boutilier* at paras. 26-27.
- [19] Assessing an offender's future treatment prospects is an essential part of determining whether they remain an unacceptably serious risk due to their inability to surmount their behaviour: *Boutilier* at para. 43. "[O]ffenders 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": *Boutilier* at para. 45, citing J. A. Neuberger, *Assessing Dangerousness: Guide to the Dangerous Offender Application Process* (loose-leaf) at p. 7-1. Evidence of treatability that "(i) is more than mere speculative hope, and (ii) indicates that the specific offender can be treated within an ascertainable time frame" is required to meet the goal of protecting the public: *R. v. Little*, 2007 ONCA 548 at para. 42.
- [20] The onus is on the Crown to prove all of the statutory criteria beyond a reasonable doubt. If the Crown does so, then the court "shall" designate the offender to be a dangerous offender. There is no discretion to do otherwise: *Boutilier* at para. 41.

- [21] At the penalty stage, the objective of protection of the public assumes enhanced importance: Boutilier at para. 56. But, that is not to say that other sentencing objectives have no role to play. Dangerous offender proceedings are sentencing proceedings. Accordingly, the determination of a fit sentence for a dangerous offender is guided by the purpose and principles of sentencing set out at ss. 718-718.2 of the Code: Boutilier at para. 53.
- [22] Section 753(4) of the Code provides the court with discretion to impose a fit sentence on a dangerous offender:
- (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.
- [23] The court's discretion is constrained by s. 753(4.1), which provides:
- (4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
- [24] Section 753(4.1) "does not impose an onus, a rebuttable presumption [of an indeterminate sentence], or mandatory sanctioning. Nor does it prevent a sentencing judge from considering sentencing objectives and principles": Boutilier at para. 71. To properly exercise their discretion under s. 753(4), sentencing judges must impose the least intrusive sentence required to achieve the primary objective of protecting the public: Boutilier at paras. 60, 65. In cases involving the imposition of an LTSO, 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": R. v. S.W.P., 2020 BCCA 373 at para. 57, citing R. v. M. (L.), 2008 SCC 31 at para. 44.
- [25] If the court does not find the offender to be a dangerous offender, then, under s. 753(5) of the Code, the court may treat the application as an application to find the offender to be a long-term offender under s. 753.1 or simply impose sentence for the offence for which the offender has been convicted.

- [26] In this case, it is common ground that sexual assault with a weapon is a "serious personal injury offence" as defined by s. 752(a). It is, therefore, the type of offence for which a dangerous offender designation can be made under either s. 753(1)(a) or (b). I will refer to it as the "predicate offence" in these reasons. For brevity, at times, I will refer to the uttering threats and unlawful confinement offences as the "other offences" or the "non-predicate offences".

## Background

### Circumstances of the Predicate and Other Offences

- [27] The offences at issue were committed from May 23 to May 24, 2016 when the complainant was 18 years old and Mr. Sohal was 25. At the time, the complainant had an intravenous ("IV") shunt in her arm to receive antibiotics for tonsillitis.
- [28] On the evening of May 23, 2016, Mr. Sohal was hosting a party in the basement suite of the home he shared with his parents. The complainant attended with two friends. She did not know Mr. Sohal or anyone else (other than her friends) at the party.
- [29] At some point, all of the partygoers except for Mr. Sohal, one of his friends, the complainant and one of her friends left the basement suite. Mr. Sohal or his friend produced cocaine and the two of them insisted that the complainant and her friend have some. After the complainant and her friend consumed the cocaine, Mr. Sohal's friend and the complainant's friend left the basement suite and Mr. Sohal locked the door.
- [30] When the complainant was alone with Mr. Sohal, he suggested that she should repay him for the cocaine and told her he wanted to "hook up". She said she did not want to and tried to leave. Mr. Sohal produced a gun and pointed it at her. The complainant believed the gun to be real. It was later recovered by the police and turned out to be an imitation. Mr. Sohal told her no one would hear her and directed her to the back room of the suite. She felt she could not escape.
- [31] Once in the back room, Mr. Sohal told the complainant to take off her clothes. She complied. He then made her snort cocaine off his penis. He pushed her to the floor and she hit her head against the wall. He laid on top of her and put her legs over his shoulders. She again told him she did not want to but he penetrated her vaginally with his penis, and did not stop until he got a phone call.
- [32] Following the assault, Mr. Sohal again pointed the gun at the complainant. He told her that he did not care if she said anything and no one would know. Soon after, the complainant's friend and Mr. Sohal's friend returned. The complainant said she needed to go outside for some air. Once outside, she ran and hid in a nearby forest. She eventually walked to a McDonald's restaurant and called another friend who quickly came to pick her up.

- [33] The friend took the complainant to the hospital where she disclosed what had happened. A medical exam found that the complainant had bruising on her right inner wrist, an abrasion on her right forearm, a petechia to her left nipple and a scratch to her right lower leg. Her head and the site of her IV shunt hurt. Vaginal swabs recovered human semen with a DNA profile matching Mr. Sohal.
- [34] The judge concluded that Mr. Sohal's offences were not impulsive. She found he had created an opportunity for them to occur.

#### Previous Youth Offences and Disposition

- [35] Mr. Sohal's three prior convictions were committed within a five-month period when he was 17 years old.
- [36] First, on November 27, 2007, Mr. Sohal flirted with a 16-year-old girl on MSN Chat using a false name. He invited her to meet him at a schoolyard near his home to smoke marihuana. Mr. Sohal arrived wearing a bandana covering the lower half of his face. He threatened the victim with bear spray and demanded she get on her knees and open her mouth. After the victim got on her knees, Mr. Sohal tried to force his penis into her mouth, but she kept moving her head and saying "no". He asked to suck on her breast but she refused. The victim then saw a janitor approaching, yelled "fire" and ran away. Mr. Sohal was under the influence of ecstasy.
- [37] Second, on April 27, 2008, Mr. Sohal threatened two 19-year-old women with a knife, demanding money or oral sex. He was wearing a bandana covering the lower half of his face. He touched one victim's stomach and grabbed her breast. The other victim called the police on her cell phone. Mr. Sohal then chased both women with the knife, but they were able to escape and hide. Mr. Sohal ran away.
- [38] Third, later on the night of April 27, 2008, Mr. Sohal asked a 17-year-old girl he knew from school to meet him at the schoolyard over MSN Chat. He identified himself as "Mike", an acquaintance of hers. When she arrived, Mr. Sohal was again wearing a bandana covering the lower half of his face. He produced a knife and threatened to hurt her if she did not obey him. Mr. Sohal rubbed himself against her, placed his hand on her crotch and held a knife close to her stomach. He asked the victim if she had any condoms and she indicated she did. He demanded one and directed the victim to place it on his penis. He then forcibly penetrated her vaginally with his penis for about five minutes. When he was finished, he ran away. Mr. Sohal was again under the influence of ecstasy.
- [39] Computer forensics indicated that the suspect in the first and third incidents had contacted the victims from a computer at Mr. Sohal's home and the victim in the third incident identified him in a yearbook photo lineup. He was arrested on May 2, 2008. He was cooperative with the police. He gave a sworn statement admitting his actions. A search warrant was executed which resulted in the seizure of numerous bandanas. The police also located a used condom in the schoolyard. DNA of the final victim and Mr. Sohal was located

on the condom. Mr. Sohal pleaded guilty to two counts of sexual assault with a weapon and one count of attempted theft.

- [40] The Youth Court judge considered a pre-sentence report as well as two forensic psychological assessment reports, one prepared by Dr. Tisha Gangopadhyay for the Crown and the other prepared by Dr. Robert Ley for the defence. Dr. Gangopadhyay's report was based, in part, on a forensic psychosocial assessment completed by registered clinical psychologist, Roy Josephson.
- [41] The reports contained consistent information regarding Mr. Sohal's background. Mr. Sohal grew up in a stable and supportive family environment where he did not experience neglect or abuse. Mr. Sohal generally displayed poor behaviour and had poor results in school, to the point that he was expelled before graduating from high school. At the time of his offences, he was largely socially isolated and engaged in sedentary activities at home. He had little structure and was consuming marihuana on a daily basis.
- [42] In Dr. Gangopadhyay's opinion, Mr. Sohal's intellectual abilities were in the low/average range, he had significant deviant sexual interests, he tended to justify his actions by blaming them on his substance use, he engaged in victim-blaming by indicating one of the victims had a reputation for promiscuity and he did not fully appreciate the seriousness of his behaviour. Dr. Gangopadhyay concluded that his risk for re-offending was high and recommended that he receive sexual offence specific treatment.
- [43] Dr. Ley disagreed with many of Dr. Gangopadhyay's opinions. He was concerned that she did not spend sufficient time or establish sufficient rapport with Mr. Sohal to arrive at her conclusions. Most importantly, Dr. Ley did not find that Mr. Sohal's crimes were driven by deviant sexual arousal or fantasies. Instead, based on Mr. Sohal's self-reports, Dr. Ley concluded that Mr. Sohal's offences were motivated by an intention to rob his victims. He assessed Mr. Sohal's risk of violent recidivism to be low/moderate. He noted that Mr. Sohal had "relatively few features in his psychosocial adjustment that typify sexual offenders." For example, Mr. Sohal had not been a victim of child abuse, was not psychopathic, did not have a major mental illness, had no history of committing non-sexual violent offences and had no history of "supervision failures". In Dr. Ley's opinion, Mr. Sohal's interests would be best served through a community-based sentence.
- [44] The Youth Court judge characterized Mr. Sohal's conduct as "very serious" and "predatory". He highlighted that Mr. Sohal had planned the sexual assaults, arranged to meet the victims under false pretenses, masked his face, carried and threatened to use weapons, violated the personal integrity of the victims and caused them serious emotional harm. He found that Mr. Sohal's moral culpability was high.
- [45] The Youth Court judge identified Mr. Sohal's apparently genuine remorse, guilty pleas, lack of criminal record, compliance with bail conditions, education plan and strong family support as mitigating. He identified Mr. Sohal's planning, wearing of masks, carrying of weapons and threatening to use weapons as aggravating. He sentenced Mr. Sohal to a nine-

month custody and supervision order followed by a two-year intensive support and supervision order, which he considered to reflect the Youth Criminal Justice Act, S.C. 2002, c. 1, principles of fair and proportionate accountability and meaningful consequences. In the Youth Court judge's view, the sentence he imposed was also proportionate to the seriousness of Mr. Sohal's offences and his degree of responsibility.

- [46] Mr. Sohal completed his Youth Court sentence, including the Sex Offender Treatment Program ("SOTP") provided by Youth Forensic Psychiatric Services on an outpatient basis, without incident.
- [47] According to the SOTP Discharge Summary, Mr. Sohal planned to continue living at his family home and attend community college. On discharge, he was able to articulate his risk and relapse plan and showed considerable insight into his behaviour and mental state when he committed the youth offences.
- [48] On the other hand, the Discharge Summary noted that Mr. Sohal's sexual offences were part of a broader pattern of antisocial behaviour and that he objectified women. Further, it was unclear whether Mr. Sohal was sexually aroused by violent or coerced sex. The facilitator noted that he denied that to be the case. Instead, Mr. Sohal told the facilitator he targeted his victims because he perceived them to be easy, promiscuous, and willing to trade drugs for sexual favours. (In his report, Dr. Tomita noted that these disclosures demonstrated that Dr. Ley's conclusion that Mr. Sohal's offences were motivated by an intention to rob his victims was incorrect.)
- [49] Finally, the Discharge Summary indicated that it was difficult to assess Mr. Sohal's risk for sexual recidivism. "Static factors" (i.e., factors that are by definition unchangeable), such as the number and nature of victims, Mr. Sohal's use of weapons and threats, his "diverse sexual-assault behaviours" and his "antisocial interpersonal orientation" at the time of the sexual assaults were causes for concern. On the other hand, Mr. Sohal's self-reported "dynamic factors", such as abstinence from substances, elimination of antisocial peer associations and improved relationship with his parents, were positive. The author of the Discharge Summary did not know whether Mr. Sohal had been completely forthright, particularly regarding the extent of deviant sexual fantasies. Ultimately, he concluded that Mr. Sohal presented a moderate risk for sexual recidivism.

#### Evidence at the Designation and Sentencing Hearing

- [50] The Crown adduced substantial documentary evidence at the designation and sentencing hearing, including:
- Mr. Sohal's youth and adult Corrections files;
  - materials related to the predicate and youth offences;
  - the reports of Dr. Ley, Mr. Josephson and Dr. Gangopadhyay;

- certificates of completion of treatment programs;
- an agreed statement of facts indicating that Mr. Sohal had complied with the bail order made following his arrest on the predicate and other offences; and
- a victim impact statement indicating that the complainant experienced feelings of paranoia, pain, lack of self-respect, lack of dignity, social isolation, depression, anxiety, panic attacks, lack of sexual desire, insomnia, night terrors and posttraumatic stress.

[51] The Crown called four witnesses. Three provided testimony regarding federal corrections programming, parole eligibility and parole supervision. The fourth Crown witness was Dr. Tomita. He provided expert opinion evidence in forensic psychiatry. Dr. Tomita was the only expert to testify regarding Mr. Sohal's future risk and prospects for treatment. His report and testimony were central to the judge's conclusions. I will summarize his evidence below.

[52] Mr. Sohal also adduced substantial documentary evidence, including:

- population statistics;
- information published by British Columbia Corrections largely regarding its strategies, resources and programs;
- certificates showing that Mr. Sohal had completed a number of programs while in custody awaiting his sentence, mostly regarding substance abuse and life skills;
- letters of support from family members and a worship leader that characterized Mr. Sohal as a caring and helpful person who was remorseful; and
- a letter offering Mr. Sohal employment as a warehouse clerk.

[53] Mr. Sohal called one witness, Carrie McCulley, the director of programs and interventions at B.C. Corrections. Ms. McCulley gave evidence regarding programs and initiatives provided by B.C. Corrections, including the "moderate intensity" Sexual Offender Treatment and Maintenance Program delivered by the B.C. Forensic Psychiatric Services Commission.

### **Evidence of Dr. Tomita**

[54] Dr. Tomita conducted a court-ordered assessment of Mr. Sohal under s. 752.1(1) of the Code. Mr. Sohal did not consent to an interview with Dr. Tomita. As a result, Dr. Tomita based his report on materials provided by the Crown, including Mr. Sohal's youth record, his B.C. Corrections files, the reports of Dr. Gangopadhyay, Mr. Josephson and Dr. Ley, the SOTP Discharge Summary and court documents and transcripts relating to the predicate offence. Dr. Tomita did not conduct any collateral interviews.

[55] Dr. Tomita acknowledged in his testimony that his inability to interview Mr. Sohal was a "significant limitation" in conducting his assessment. The absence of information about Mr. Sohal's functioning between the conclusion of his youth sentence in 2012 and the date of the predicate offence impaired Dr. Tomita's ability to understand whether the apparent positive

trajectory Mr. Sohal had been on had continued up to the commission of the predicate offence. Furthermore, without a clinical interview, Dr. Tomita was unable to (1) diagnose any psychiatric disorders or (2) utilize the most common method for completing dangerous and long-term offender assessments, the Psychopathy Checklist-Revised (or "PCL-R"), to determine whether Mr. Sohal had a psychopathic personality.

[56] In cross-examination, Dr. Tomita agreed that "it becomes much more complicated" to predict future sexual offending when there are gaps in the data. However, Dr. Tomita assessed Mr. Sohal's risk for future sexual offending based on the available information, using a statistical assessment tool called the STATIC-99R and a structured professional judgment risk tool called the Risk for Sexual Violence Protocol ("RSVP").

[57] The STATIC-99R is based on ten risk items, such as age at release from the index sexual offence, prior non-sexual violence offences, number of prior sexual offences, and stranger victims. The results of the STATIC-99R placed Mr. Sohal at the "highest nominal risk level", which Dr. Tomita described as "well-above average risk".

[58] The RSVP examines 22 risk factors organized in five categories: sexual violence history; psychological adjustment; mental disorder; social adjustment; and manageability. According to Dr. Tomita, the risk factors that appeared relevant to Mr. Sohal's risk of perpetrating future sexual violence included:

- **Chronicity of Sexual Violence:** Mr. Sohal's first sexual offence occurred when he was 17. His second occurred five months later. Mr. Sohal was subsequently in custody or under legal supervision until he was 22. Three-and-a-half years later he committed the predicate offence. In light of his relatively youthful age and recidivism, Dr. Tomita considered Mr. Sohal's sexual violence to be "chronic", meaning "kind of persistent over time and reoccurring" and "difficult to eradicate or reduce". In relation to this factor, he noted that Mr. Sohal's pattern of sexual offending crossed developmental spans, which he considered to be significant from a psychiatric perspective.

- **Physical coercion and sexual violence:** Mr. Sohal threatened physical harm with weapons in each of his sexual offences.

- **Psychological coercion and sexual violence:** In his youth offences, Mr. Sohal engaged in psychological coercion by using the promise of drugs to arrange meetings with two victims. Mr. Sohal provided the complainant in the predicate offence with cocaine and demanded sex later as repayment.

[59] As mentioned, given Mr. Sohal's refusal to participate in Dr. Tomita's assessment, there were gaps in the data concerning Mr. Sohal's functioning following the completion of his youth sentence. Although Dr. Tomita indicated that it was difficult to fully assess other risk factors, he assumed the following were present "until clarified by further evaluation":

- Extreme minimization or denial of sexual violence: In contrast to the youth proceedings, in these proceedings Mr. Sohal denied engaging in sexual violence.
  - Attitudes that support or condone sexual violence: The Youth Correctional and Forensic Records, including Mr. Sohal's self-reports, suggested that he had sexist or misogynistic attitudes and tended to objectify women. Further, when Mr. Sohal was on bail, a probation officer overheard him telling his grandparents that the officer was visiting in relation to "pussy" charges.
  - Sexual deviance: Several factors suggested that sexual deviance may have driven Mr. Sohal's actions. In particular, the similarities between his sexual offences reflected a pattern, Mr. Sohal disclosed that he had sexual fantasies about his youth offences before they occurred and there was no indication of a broader pattern of anti-social behaviour prior to the predicate offence. On the other hand, several factors suggested that an anti-social attitude and feeling of entitlement rather than sexual deviance may have driven Mr. Sohal's actions. In particular, there did not appear to be elements of sadistic or gratuitous violence, or unusual sexual activity demands. Without interviewing Mr. Sohal, Dr. Tomita could not make a definitive diagnosis of sexual deviance.
  - Problems with substance abuse: Drug and/or alcohol use was a feature of each of Mr. Sohal's sexual offences. He also provided cocaine to the complainant in the predicate sexual offence with some foresight that he was going to request repayment with sex from her. Mr. Sohal's ability to provide drugs to his victims was used to create opportunities to sexually assault them.
- [60] Dr. Tomita was unable to evaluate a number of other RSVP risk factors, including the presence of psychopathic personality disorder. Nevertheless, he provisionally concluded that Mr. Sohal's sexual offending was predominantly driven by antisocial and narcissistic entitlement coupled with sexist views of women. Dr. Tomita could not rule out sexual deviance. In his view, the possibility of sexual deviance required further assessment in a treatment context.
- [61] One of the critical risk factors that stood out to Dr. Tomita was the fact that Mr. Sohal offended against strangers, making detection and prevention very difficult to anticipate and manage. It was also notable that, despite the family distress that his previous sexual convictions caused, Mr. Sohal committed the predicate offence in his family home. Further, neither the risk of being caught by family members nor the complainant's ability to identify Mr. Sohal dissuaded him.
- [62] Dr. Tomita opined that, if Mr. Sohal were to reoffend, he would most likely reoffend in the same manner and cause psychological harm. Although there was no indication that Mr. Sohal's sexual violence would escalate to life-threatening levels, he could cause more serious levels of physical harm if he continued to use weapons.

- [63] Given his risk profile, in Dr. Tomita's view, Mr. Sohal likely required a high-intensity sexual offender treatment program followed by maintenance programs both in custody and in the community. Such programs are only available through federal corrections. Dr. Tomita was of the view that Mr. Sohal required further assessment of his sexual behaviour history. If Mr. Sohal were able to be motivated, open and transparent, Dr. Tomita anticipated that any sexual deviance would be treatable.
- [64] Given the data gaps, Dr. Tomita found it difficult to provide an opinion on Mr. Sohal's current level of treatability. In his report, Dr. Tomita acknowledged that Mr. Sohal's history demonstrated that he had the ability to conform to institutional expectations or community conditions, and would presumably enter and complete sex offender treatment if directed to do so. However, Dr. Tomita stated that it was an "open question" whether he would derive a risk-reducing benefit from treatment.
- [65] In his testimony, Dr. Tomita did not say that Mr. Sohal's prior treatment had no risk-reducing benefit, but he testified that Mr. Sohal's prior treatment "was not risk-reducing enough to prevent another offence." Further, he testified that Mr. Sohal's denial of sexual violence in the predicate offence would make treatment more difficult but would not preclude treatment.
- [66] Dr. Tomita subsequently spoke to Mr. Sohal's ability to abide by legal supervision and addressed whether he would derive a risk-reducing benefit from treatment:

Q I take it whether or not Mr. Sohal is able to abide by legal supervision, whether it's in the community or in the institution goes to his - goes to the ability to manage his risk; is that correct?

A Yes.

Q It doesn't necessarily go to address whether or not the treatment that he needs will be of any real risk-reducing benefit.

A Yes, treatment and legal supervision are two different things. So I think you've asked me, legal supervision could contain a risk which never changes.

Q Yes.

A Treatment could actually reduce that risk in some way.

- [67] In cross-examination, Dr. Tomita confirmed that, while on bail and in the correctional facility, Mr. Sohal had exhibited a number of positive behaviours, such as helping his grandparents, being polite in his interactions with his bail supervisor, seeking and maintaining employment in the institution and helping another inmate obtain a mattress. Dr. Tomita did not agree that these behaviours went to risk, stating that someone can be polite and high risk. He also did not agree they were indicators of Mr. Sohal's treatability.

[68] Ultimately, Dr. Tomita provisionally concluded that Mr. Sohal presented a moderate to high risk to reoffend with sexual violence. Dr. Tomita further opined that Mr. Sohal's pattern of sexual offending suggested a likelihood of chronic risk. Even assuming some degree of responsiveness to future treatment, the absence of obvious explanations for Mr. Sohal's behaviour (such as undetected severe substance use or a more problematic level of personality dysfunction) indicated that his risk is "narrowly located within a sexually offending context."

[69] Dr. Tomita recognized that Mr. Sohal's past performance indicated that he was likely to respond well to legal supervision. According to Dr. Tomita "[t]he main difficulty is whether Mr. Sohal's risk will be contained once any period of legal supervision ends."

[70] Finally, Dr. Tomita concluded his report by stating:

Given the uncertainties, it is difficult to draw any firm conclusions about how long Mr. Sohal's future risk will remain significant. From a psychiatric perspective, Mr. Sohal's risk-relevant clinical conditions are likely to be of long duration. Personality and sexual preferences do not change with the passage of time. Maladaptive behaviours produced by personality and sexual preference, however, can lessen over time as evidenced by lower rates of sexual offending in older groups of offenders but this is not a consideration in Mr. Sohal's case as he is still in his twenties. In this light, a long period of parole supervision is likely to be necessary as a community risk management strategy.

## Reasons for Judgment

[71] After a brief introduction, the judge set out the positions of the parties. She then detailed the circumstances of Mr. Sohal's youth offences, the youth sentence imposed, the circumstances of the predicate and other offences and the evidence adduced during the sentencing hearing.

[72] Understandably, the judge dedicated a significant portion of her judgment to a review of Dr. Tomita's evidence. For the reasons stated at the outset, I will not address Mr. Sohal's submissions regarding the judge's alleged misapprehension of various aspects of that evidence. Accordingly, I will not highlight the passages or findings Mr. Sohal puts at issue.

[73] The judge began her analysis by reviewing the legal principles governing the designation and sentencing of dangerous offenders. Of particular relevance to Mr. Sohal's appeal, at para. 133, she held:

[133] Before designating an offender as dangerous, a sentencing judge must be satisfied on the evidence that "the offender poses a high likelihood of harmful recidivism" and that his conduct is "intractable", meaning behaviour that the offender is unable to surmount: Boutilier at para. 27. At the designation stage of the analysis, the sentencing judge must conduct a prospective assessment of dangerousness.

[74] Mr. Sohal acknowledges that the judge correctly stated the standard of proof regarding future risk within this passage but he takes issue with two subsequent passages.

[75] With respect to designations under s. 753(1)(a)(i), Mr. Sohal objects to the following statement made by the judge regarding the standard of proof for assessing his future risk:

[145] The Crown need only to establish beyond a reasonable doubt that there is a "reasonable possibility"--not a certainty or probability--that the offender will cause death, injury, or severe psychological damage by failing to restrain his behaviour in the future: Tremblay at para. 98. Ultimately, it is for the sentencing judge, rather than psychiatrists called by the Crown or defence, to determine the key elements of a pattern and the likelihood of reoffence: Dow at para. 29.

[Emphasis added.]

[76] With respect to designations under s. 753(1)(b), Mr. Sohal objects to the following statement made by the judge regarding the standard of proof for assessing his future risk:

[148] The court must be satisfied beyond a reasonable doubt of the likelihood, rather than the certainty, that the offender will cause future injury, pain, or other evil to other persons: M.O.B. at paras. 23-25. In this context, "likelihood" means more than simply a possibility, it means more probably than not: R. v. Allan, 2009 BCSC 1245 at para. 194.

[Emphasis added.]

[77] The judge next addressed Mr. Sohal's refusal to participate in the s. 752.1 assessment. She noted that he was not obliged to participate and that no adverse inference could be drawn from his refusal. At the same time, relying on R. v. M.O.B., 1999 BCCA 84 at para. 28, R. v. Akerman, 2002 BCSC 1323 at para. 98, rev'd on other grounds at 2004 BCCA 434, and R. v. McDonald, 2015 BCSC 2088 at para. 37, she noted that Mr. Sohal was "not entitled to the benefit of the most favourable inferences in the face of knowledge gaps flowing from [his] non-participation."

[78] The judge then turned to consider whether the Crown had established that Mr. Sohal was a dangerous offender under s. 753(1)(a)(i) and/or s. 753(1)(b).

[79] The judge first noted that Mr. Sohal's conviction for sexual assault with a weapon satisfied the first element of the test under both s. 753(1)(a)(i) and s. 753(1)(b), namely, that he be convicted of a "serious personal injury offence." That finding is not at issue on appeal.

[80] She next considered whether Mr. Sohal's youth offences plus the predicate offence established the pattern of repetitive behaviour required under s. 753(1)(a)(i). Although noting that youth convictions typically involve diminished moral culpability, she did not find a "high degree of diminished moral culpability" in Mr. Sohal's case. She reasoned that Mr. Sohal's youth offences had been committed ten months and five months "before he was no longer a 'young person' as defined in s. 2 of the Youth Criminal Justice Act" and that he "[had] served the entirety of his youth sentence and completed sex offender treatment after

becoming an adult."

- [81] The judge discounted the eight-year gap between Mr. Sohal's youth offences and the predicate offence, noting the limited opportunity Mr. Sohal had to reoffend between the completion of his youth sentence and the commission of the predicate offence.
- [82] Based on the high degree of similarity between each of the sexual offences committed by Mr. Sohal, the judge was satisfied beyond a reasonable doubt of the necessary pattern of repetitive behaviour under s. 753(1)(a)(i).
- [83] The judge then briefly noted that under s. 753(1)(b) "the Crown must show that the offender's past conduct shows a failure to control his or her sexual impulses, and a likelihood that the offender will cause future harm by failing to control his sexual impulses." She concluded that Mr. Sohal's youth record "evinced a clear failure to control his sexual impulses in the past." She paused to summarize:
- [172] In summary, I am satisfied beyond a reasonable doubt that Mr. Sohal has engaged in a pattern of repetitive behaviour, of which the predicate offence forms a part that demonstrates a failure to restrain his behaviour in the past. I am also satisfied beyond a reasonable doubt that Mr. Sohal has failed to control his sexual impulses in the past
- [84] On the "critical question" of the likelihood that Mr. Sohal would fail to restrain his behaviour or control his sexual impulses in the future, the judge noted Dr. Tomita's concern that Mr. Sohal's previous participation in a sexual offender program had not prevented him from reoffending. She then accepted Dr. Tomita's conclusions that Mr. Sohal posed a chronic risk, the risk was difficult to eradicate or reduce and he was "likely" to reoffend with sexual violence. She also found that if Mr. Sohal repeated his conduct in the future, his victims would suffer psychological harm and/or injury.
- [85] Ultimately, the judge concluded that the Crown had proven beyond a reasonable doubt that Mr. Sohal should be designated a dangerous offender under both s. 753(1)(a)(i) and s. 753(1)(b). She put her conclusion this way:
- [176] Ultimately, I am satisfied beyond a reasonable doubt that Mr. Sohal's conduct is deep-seated and intractable, and that he should be designated a dangerous offender under either s. 753(1)(a)(i) or s. 753(1)(b). Past sex offender treatment did not prevent Mr. Sohal from reoffending. While evidence of future treatability remains uncertain due to Mr. Sohal's nonparticipation in the assessment, there is no persuasive evidence that his future treatment prospects are any better.
- [86] Finally, the judge turned to determining the appropriate penalty.
- [87] After setting out the applicable legal principles, the judge noted that neither party sought an indeterminate sentence. As set out earlier in these reasons, the Crown sought a fixed jail sentence of six to eight years followed by a ten-year LTSO. On the other hand, in view of what was said to be his "demonstrated exceptional circumstances", Mr. Sohal sought a jail

sentence of two years less a day. Even though she did not expressly say so, it is evident from the balance of the judge's reasons that she accepted the position of the parties that an indeterminate sentence was not required to manage the risk posed by Mr. Sohal.

- [88] The judge concluded that she was foreclosed by s. 753(1)(b) from imposing the sentence sought by Mr. Sohal. She further rejected Mr. Sohal's submission that, based on his age and strong prospects for rehabilitation, he had established "exceptional circumstances". She held:
- [184] There is no evidence that he has strong prospects for rehabilitation, and Dr. Tomita opined that he poses a chronic risk of reoffending with sexual violence. Dr. Tomita indicated that Mr. Sohal is only likely to make progress in sexual offender treatment if he is open about his sexual deviance, which he has yet to do. As Ms. McCulley indicated in her evidence, the treatment programs that Mr. Sohal completed prior to sentencing for the predicate offence do not address his risk factors, and may be an attempt at impression management leading up to the dangerous offender hearing.
- [89] After accepting Dr. Tomita's opinion that Mr. Sohal posed a "moderate to high" risk of reoffending with sexual violence and that his risk was chronic, it was "clear" to the judge that a conventional sentence in custody alone would not sufficiently protect the public. In her view, without the intensive supervision of an LTSO, Mr. Sohal "would not be adequately supported or supervised." To meet the goals of protecting the public and reintegrating Mr. Sohal back into the community, the judge concluded it was necessary for Mr. Sohal to be subject to the maximum ten-year period of long-term supervision.
- [90] The judge then set about determining the appropriate period of incarceration to be followed by the ten-year LTSO. While recognizing the individualized nature of determining a fit sentence, the judge reviewed a significant number of authorities cited by the parties to impose a sentence that was "similar to others imposed on persons in similar situations who do similar things."
- [91] In order to compare Mr. Sohal's case to those cited by the parties, she identified the following aggravating factors:
- the victim was 18 years of age at the time of the offence [and] Mr. Sohal was 26. Given the disparity in the age[s], the victim was particularly vulnerable;
  - the victim was getting over an illness and had a medical device in her arm at the time of the offence. While Mr. Sohal was forcing her to have sexual intercourse with him, he held onto her arms at the site of the IV shunt. She was injured so badly, she had to go to the hospital;
  - Mr. Sohal had unprotected sexual intercourse with the victim and his semen was found in her vagina. This exposed her to the risk of a sexually transmitted disease and an unwanted pregnancy;

- the victim did not want to consume cocaine and only took some because of Mr. Sohal's insistence and over her protests. This occurred shortly before the commission of the offence and the victim stated that the cocaine had an effect on her. Mr. Sohal forced her to consume cocaine again during the offence, this time off his penis;
- Mr. Sohal pushed the victim to the floor during the offence causing her to hit her head on the wall injuring her head; and
- the offence had a significant psychological impact on the victim as evidenced by her victim impact statement.

[92] While recognizing that an element of an offence cannot be an aggravating factor, the judge noted that Mr. Sohal's use of the imitation firearm had been "psychologically coercive and distressing" to the complainant. She also found that Mr. Sohal's criminal record was aggravating.

[93] The judge then found that the only mitigating factors were the continued support Mr. Sohal was receiving from his family, his attempts at rehabilitation (even if not directed to his risk factors for re-offending) and his offer of employment.

[94] The judge concluded that the appropriate custodial sentence for the predicate offence was six years. The judge commented that the sentence would "bring home to Mr. Sohal and others the utter unacceptability of this kind of offence [without being] so long as to put the prospect of rehabilitation and reintegration into the community completely beyond his reach." She imposed concurrent six-year custodial sentences for the unlawful confinement and uttering threats counts. She gave Mr. Sohal credit for the time he had already served in custody.

[95] The judge then made the LTSO and ancillary SOIRA, DNA, and firearms prohibition orders. The judge did not specify which ancillary orders were made in relation to which specific counts. As a result, the warrant of committal attached the ancillary orders to all three counts. The judge also ordered disclosure of her reasons, a trial transcript and Dr. Tomita's report to Correctional Service Canada ("CSC").

## Standard of Review

[96] Outside of the dangerous offender context, an appellate court will not interfere with a sentence imposed at trial unless "(1) the sentence is demonstrably unfit, or (2) the sentencing judge made an error in principle that had an impact on the sentence ... Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor": *R. v. Friesen*, 2020 SCC 9 at para. 26, citing *R. c. Lacasse*, 2015 SCC 64 at paras. 41, 44; see also *R. v. Russell*, 2019 BCCA 51 at para. 5.

[97] Within the dangerous offender context, the standard of review is different.

- [98] Appellate review of a dangerous or long-term offender designation is "somewhat more robust" than a "regular" review of a sentence. However, some deference is still owed to the sentencing judge. Errors of law are reviewed on a standard of correctness while errors of fact are reviewed on a standard of reasonableness: Boutilier at para. 81; R. v. R.A.O., 2021 BCCA 384 at para. 13.
- [99] A dangerous offender designation and findings essential to the designation, including the assessment of the offender's future risk and amenability to treatment, are questions of fact. Absent a material error in law, such findings are entitled to deference and will only be overturned if they are unreasonable: Boutilier at paras. 81, 85-88; R. v. T.L.P., 2021 BCCA 36 at para. 71.

## Analysis

Did the judge err by adopting too low a standard of proof for assessing future risk?

## The positions of the parties

- [100] Mr. Sohal submits that the judge erred by adopting too low a standard of proof for assessing his future risk. He says that, in Boutilier, the Supreme Court of Canada "hammered home the high degree of likelihood of future harm that the Crown must prove in order to justify designation." He notes that in Boutilier, the Court: (1) held that to designate an offender as "dangerous" under s. 753(1) the sentencing judge must be satisfied that there is a "high likelihood of harmful recidivism"; (2) emphasized a passage from Lyons that the pattern of conduct must be "very likely to continue"; and (3) held that only offenders "who pose a tremendous future risk" are to be designated as dangerous: Boutilier at paras. 25-27, 46 (emphasis added).
- [101] With respect to s. 753(1)(a)(i), Mr. Sohal submits that the judge expressly adopted too low a standard of proof at para. 145 of her reasons when she accepted a submission made by the trial Crown (not Crown counsel on appeal) that "[t]he Crown need only to establish beyond a reasonable doubt that there is a "reasonable possibility"--not a certainty or probability--that the offender will cause death, injury, or severe psychological damage by failing to restrain his behaviour in the future" (emphasis added).
- [102] With respect to s. 753(1)(b), Mr. Sohal submits that the judge adopted too low a standard of proof at para. 148 of her reasons by finding that the Crown only needed to establish a "likelihood" that Mr. Sohal will cause injury, pain or other evil in the future by failing to control his sexual impulses, where she defined "likelihood" to mean "more probably than not" (emphasis added).

- [103] The Crown acknowledges that the judge misstated the applicable standard of proof for assessing future risk under s. 753(1)(a)(i). That standard is clearly not a "reasonable possibility". The Crown notes, however, that the judge found the criteria of ss. 753(1)(a)(i) and 753(1)(b) were both met on the same factual foundation and to the statutory standard of "likelihood". The Crown therefore submits that the issue is whether the judge erred in defining "likelihood" as meaning "more probably than not."
- [104] The Crown notes that the judge relied on *R. v. Allan*, 2009 BCSC 1245 at para. 194 in support of her statement at para. 148 that "'likelihood' means more than simply a possibility, it means more probably than not." The Crown further notes that the statement in *Allan* was drawn from *R. v. Neve*, 1999 ABCA 206 where the Alberta Court of Appeal held:
- [114] Moving from the behavioural component of the pattern contemplated under s. 753(a)(i), we turn to the lack of restraint element. To qualify as part of the pattern, the impugned conduct must show that the offender has failed to restrain his or her behaviour in the past (and that this has led to death, injury or severe psychological damage or at least a likelihood of this harm) and that there exists a likelihood of causing death, injury or severe psychological damage through a failure to restrain that behaviour in the future. Likelihood, in this context, means more than simply a possibility. At the very least, it means more probable than not. [We note that in *Lyons*, supra at 338, the Court used the "very likely" formulation when dealing with this issue, but in other cases, *Jones*, supra, and *Currie*, supra, it used the term "likelihood".]
- [Underlining in original. Italics added.]
- [105] The Crown maintains that *Neve* remains good law and highlights a number of post-Boutilier trial court decisions that have used the "at least more probable than not" language drawn from *Neve*: *R. v. Dadmand*, 2018 BCSC 729 at para. 27, aff'd on other grounds in 2022 BCCA 162; *R. v. Clayton*, 2018 BCSC 1671 at para. 19, aff'd on other grounds in 2023 BCCA 33.
- [106] In the alternative, the Crown submits that the appeal should be dismissed because the judge's findings of fact lead "inexorably" to the conclusion that Mr. Sohal be designated as a dangerous offender.
- [107] If the Court concludes that the judge adopted too low a standard of proof for assessing Mr. Sohal's future risk, the Crown submits that it is open to the Court to either: (1) designate and sentence Mr. Sohal as a long-term offender; or (2) remit the Crown's application to designate and sentence Mr. Sohal as a dangerous offender for a new hearing. On the latter point, the Crown submits that there is no authority in the Code to remit a narrow question. In other words, if there is to be a new hearing, it must be an unrestricted hearing of the Crown's application to designate and sentence Mr. Sohal as a dangerous offender.

**The same standard of proof applies to ss. 753(1)(a)(i) and 753(1)(b)**

- [108] Although Boutilier was decided in the context of an application under s. 753(1)(a) not s. 753(1)(b), I agree with the positions implicitly taken by the parties that the same standard of proof regarding future risk applies under the two subsections at issue on this appeal.
- [109] First, both ss. 753(1)(a)(i) and 753(1)(b) use the language of "likelihood" in relation to future risk. Next, Lyons applied the "very likely" standard to the predecessors to both of these subsections. Finally, in *R. v. Skookum*, 2018 YKCA 2 at para. 57, the Court of Appeal of Yukon held that Boutilier "leaves little room for doubt" that the approach to determining the future threat posed by an offender must be the same under the two subsections.

The standard is higher than "more probably than not"

- [110] In Lyons, the Supreme Court of Canada rejected arguments that the predecessor dangerous offender regime of the Code contravened various rights guaranteed by the Charter. In addressing whether the regime constituted cruel and unusual punishment contrary to s. 12 of the Charter, Justice La Forest for the majority examined the "substantive ways" in which the legislation accommodated the "conflicting interests" of protecting society from dangerous criminals and not subjecting an offender to a grossly disproportionate punishment:
43. First, the legislation applies only to persons convicted of a "serious personal injury offence" as defined in s. 687. These offences all relate to conduct tending to cause severe physical danger or severe psychological injury to other persons. Significantly, the maximum penalty for all these offences must be at least ten years' imprisonment. Secondly, it must be established to the satisfaction of the court that the offence for which the person has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct, or a failure to control sexual impulses. Thirdly, it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subparagraph of s. 687 is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. Finally, the court has the discretion not to designate the offender as dangerous or to impose an indeterminate sentence, even in circumstances where all of these criteria are met.

[Emphasis added.]

- [111] In *Boutilier*, the Court upheld the constitutionality of the current dangerous offender regime. Justice Côté for the majority relied heavily on *Lyons*. She held that the prospective risk assessment in the current regime had not changed: at para. 24. She subsequently articulated the standard of proof regarding future risk to be "high likelihood" to ensure that only offenders who pose a "tremendous future risk" are designated as dangerous and face indeterminate detention:
- [26] In *Lyons*, Justice La Forest read the objective element of the designation -- the requirement that the predicate offence be a "serious personal injury offence" -- together with the subjective element -- the "threat" assessment -- and concluded that four criteria were "explicit" from the language of s. 753(1): (1) the offender has been convicted of, and has to be sentenced for, a "serious personal injury offence"; (2) this predicate offence is part of a broader pattern of violence; (3) there is a high likelihood of harmful recidivism; and (4) the violent conduct is intractable (p. 338). The last three criteria are part of the assessment of the "threat" posed by the offender. The last two of these are future-oriented, and Justice La Forest explained them as follows:
- Thirdly, it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subparagraph of s. [688, now 753] is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. [Emphasis added by Côté J.; p. 338.]
- [27] The language of s. 753(1), which led Justice La Forest to develop the four criteria outlined above, has never been amended since its enactment in 1977. Before designating a dangerous offender, a sentencing judge must still be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand "intractable" conduct as meaning behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness.
- [46] In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects. Had the prospective aspects of the dangerousness criteria been removed by the 2008 amendments, the constitutionality of the provision might have required a deeper analysis. But that is not the case. The sentencing judge erred in concluding otherwise. Accordingly, this Court need not revisit its decision in *Lyons* as to the constitutionality of s. 753(1).

[Underlining in original. Italics added.]

- [112] I pause to note that I do not read Boutilier as suggesting that a "tremendous future risk" means anything other than a high likelihood of harmful recidivism.
- [113] In any event, determining whether the dangerous offender regimes, past and present, passed constitutional muster, Justices La Forest and Côté could have repeated the statutory language of "likelihood" in relation to the required assessment of an offender's future risk throughout their reasons, but they did not. Rather than repeat a standard commonly understood to mean "more probably than not", as a matter of constitutional imperative, La Forest J. cast the standard as "very likely" and Côté J. as "high likelihood". They must be taken to have meant what they stated and what they stated is a standard that lies meaningfully above the balance of probabilities but below proof beyond a reasonable doubt.
- [114] This Court is, of course, bound to apply the standard of proof set out in Lyons and endorsed in Boutilier. Insofar as the Neve formulation of "[a]t the very least, more probable than not" includes "likely" (as distinct from "very likely" or "high likelihood"), it has been overtaken and should no longer be used.

### **The designation must be set aside**

- [115] In this case, the judge initially identified the correct standard of proof, namely "high likelihood", for assessing Mr. Sohal's future risk at para. 133 of her reasons. However, she subsequently identified too low a standard of proof, namely "reasonable possibility" at para. 145 and "more probably than not" at para. 148. Beyond identifying an erroneously low standard of proof, reading the judge's reasons generously and as a whole, in my view, she also applied an erroneously low standard of proof.
- [116] Sections 759(1) and (2) of the Code set out the grounds of appeal available to an offender and the Crown respectively in relation to dangerous offender and long-term offender proceedings. Section 759(3) sets out the powers of this Court on appeal. It provides:
- (3) The court of appeal may
    - (a) allow the appeal and
      - (i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or
      - (ii) order a new hearing, with any directions that the court considers appropriate; or
    - (b) dismiss the appeal.

[117] In *R. v. Johnson*, 2003 SCC 357, the Supreme Court of Canada considered the scope of an appeal court's power to dismiss an appeal under s. 759(3)(b). The Court recognized that not every error of law will necessitate a new hearing. The Court adopted the following passage from this Court's decision in *R. v. Mitchell*, 2002 BCCA 48 at para. 63:

it would defy common sense to presume that Parliament intended to preclude the court of appeal from dismissing an appeal where a sentencing judge makes a trivial or immaterial error in the course of dangerous or long-term offender proceedings. While the court of appeal is given the power to order a new hearing, it is not bound to do so simply because the appellant is able to point to an error on the part of the sentencing judge. Rather, the court must assess the nature and effect of the error to determine whether it justifies the substitution of a different sentence, a new hearing or a dismissal of the appeal.

[118] The Court in *Johnson* determined that "the same high standard" established by the curative proviso contained in s. 686(1)(b)(iii) of the Code applies in the context of s. 759(3)(b). As a result, where the sentencing judge has erred in law, an appeal will be dismissed only where "there is no reasonable possibility that the verdict would have been any different had the error of law not been made": at para. 49.

[119] Here, the judge's misstatements of the standard of proof for assessing future risk would not be problematic if, as the Crown invites this Court to conclude, her findings of fact would inevitably have led to the same outcome. But, accepting without deciding that the judge did not misapprehend Dr. Tomita's evidence, I am unable to reach that conclusion.

[120] To be sure, Mr. Sohal's case has many troubling features:

Mr. Sohal has a history of perpetrating predatory, sexually violative and harmful sexual violence on young women; His offending has included offending against strangers, which makes detection and prevention more difficult; His offending has cut across developmental stages; His offending has continued in a very brazen fashion in his family home and despite his previous sexual offender treatment; and Given Mr. Sohal's decision not to participate in the court-ordered assessment or testify during the sentencing hearing, the judge found there was no persuasive evidence regarding his treatability.

[121] Against this backdrop, the judge dealt with the "critical question" of "the likelihood that Mr. Sohal will fail to restrain his behaviour or control his sexual impulses in the future" at paras. 173-176:

[173] Dr. Tomita evaluated Mr. Sohal's risk of reoffending using the RSVP and the STATIC-99R. He was not able to evaluate the adjustment risk factors in the RSVP given that he could not interview Mr. Sohal. His refusal to participate in the assessment did not limit Dr. Tomita's ability to perform a risk assessment using the STATIC-99R. Based on these assessments, Dr. Tomita found that Mr. Sohal posed a moderate to high risk of reoffending with sexual violence. He found that the risk factors identified as a result of Mr. Sohal's previous convictions were present during the predicate offence. As a result, Dr. Tomita concluded

that Mr. Sohal's risks in relevant conditions are likely to be of long duration and will not change with the passage of time.

- [174] Dr. Tomita noted that Mr. Sohal had completed a Sex Offender Treatment Program as a young offender. The program facilitator indicated that Mr. Sohal responded well to treatment and presented a moderate risk for sexual recidivism. Dr. Tomita was concerned that participation in the Sexual offender treatment program did not prevent Mr. Sohal from reoffending with sexual violence and indicated that Mr. Sohal will likely only receive a benefit from treatment if he honestly discusses issues of sexual deviance. To date, he has not done so and there was concern during the previous sex offender treatment that he was not forthcoming about sexual deviant interests.
- [175] I accept Dr. Tomita's conclusion that Mr. Sohal poses a chronic risk and is likely to reoffend with sexual violence. I accept that this risk is difficult to eradicate or reduce. I also find that, should Mr. Sohal repeat his conduct in the future, his victims would suffer psychological harm and/or injury.
- [176] Ultimately, I am satisfied beyond a reasonable doubt that Mr. Sohal's conduct is deep-seated and intractable, and that he should be designated a dangerous offender under either s. 753(1)(a)(i) or s. 753(1)(b). Past sex offender treatment did not prevent Mr. Sohal from reoffending. While evidence of future treatability remains uncertain due to Mr. Sohal's nonparticipation in the assessment, there is no persuasive evidence that his future treatment prospects are any better.
- [Emphasis added.]
- [122] As can be seen, the judge expressly accepted Dr. Tomita's opinion that Mr. Sohal poses a "chronic risk". She also found that his risk "is difficult to eradicate or reduce" and that his conduct "is deep-seated and intractable." However, a low or moderate risk of harmful recidivism can also be chronic, difficult to eradicate, deep-seated and intractable.
- [123] More importantly, on the critical question of future risk, the judge based her designation explicitly on Dr. Tomita's conclusion that Mr. Sohal is "likely" to reoffend with sexual violence. Dr. Tomita, who is a forensic psychiatrist and not a lawyer, appears to have used "likely" in its ordinary sense. It is therefore evident that the judge did not set her mind to or answer the necessary question of whether Mr. Sohal was "very" or "highly" likely to reoffend with sexual violence.
- [124] In my view, on the judge's factual findings, the answer to the correct question admits of more than one reasonable possibility. In other words, the judge could have found beyond a reasonable doubt that Mr. Sohal posed a high likelihood of harmful recidivism or that there was a reasonable doubt about whether that was the case. Accordingly, I would allow the appeal and set aside Mr. Sohal's designation as a dangerous offender.

## A new hearing is required

[125] In the event that this Court allowed the appeal on the predicate offence, Mr. Sohal submitted that the Court should take no further action, leaving him bound only by the determinate six-year jail sentence imposed by the judge. On the other hand, the Crown submitted that the Court should either sentence Mr. Sohal as a long-term offender or remit the Crown's application to designate Mr. Sohal as a dangerous offender for a new hearing. Section 759(3)(a) empowers this Court to impose each of the outcomes advanced by the parties, but I am of the view that a new hearing is required.

[126] I would not accede to Mr. Sohal's submission that the Court take no further action. Without commenting on the strength of the Crown's case, while a dangerous offender designation was not inevitable, even if the judge misapprehended aspects of Dr. Tomita's evidence (a question that I need not decide), that designation was available on the whole of the record. In such circumstances, the interests of public safety would not be served by simply setting aside the judge's designation and leaving only Mr. Sohal's determinate sentence in place.

[127] I would also not accede to the Crown's position that this Court designate and sentence Mr. Sohal as a long-term offender. This is not a case like *Skookum* where the Court of Appeal of Yukon set aside a dangerous offender designation and designated the offender to be a long-term offender. In that case, unlike this one, the sentencing judge's factual findings precluded a dangerous offender designation but supported a long-term offender designation. Accordingly, a new hearing was neither necessary nor appropriate: *Skookum* at paras. 67-68. Here, however, the judge's factual findings were not responsive to the correct question regarding Mr. Sohal's future risk. As such, the judge's factual findings do not preclude a dangerous offender designation and a new hearing is required on that issue.

[128] In my view, the appropriate remedy in this case is to set aside the dangerous offender designation, accompanying six-year custodial sentence, LTSO and ancillary orders imposed with respect to the predicate offence and order a new hearing of the Crown's application to designate and sentence Mr. Sohal as a dangerous offender.

Did the judge err by stating she was precluded from imposing a determinate sentence of less than two years?

[129] As noted earlier, I will largely not address Mr. Sohal's additional grounds of appeal related to his designation and sentencing as a dangerous offender. The one exception relates to an interpretive error committed by the judge in finding that she was statutorily precluded from imposing the sentence sought by Mr. Sohal at the sentencing hearing. I consider it important to identify the error lest a future sentencing judge fall into error by relying on the judge's interpretation.

[130] During the sentencing hearing, Mr. Sohal sought a determinate sentence of two years less a day. He submitted that his circumstances were exceptional based on his age, strong prospects for rehabilitation, and motivation to make changes in his life.

[131] At para. 183 of her reasons, the judge held that s. 753(1)(b) of the Code prevented her from imposing the sentence sought by Mr. Sohal. I believe the judge intended to refer to s. 753(4)(b) but, either way, this was an error.

[132] Section 753(1)(b) speaks to the requirements that must be established for an offender to be designated a dangerous offender. It does not speak to sentencing. Section 753(4), on the other hand, provides:

(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.

[133] Following a designation, s. 753(4)(b) precludes the imposition of a sentence of less than two years' imprisonment, but only when the judge determines that a fixed sentence plus an LTSO is the appropriate and fit sentence. As can be seen, s. 753(4)(c) provides a sentencing judge with the discretion to impose any sentence for the offence committed by the offender, despite the offender's designation as a dangerous offender. In this case, under s. 272(2)(b) of the Code, Mr. Sohal was guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years. There was no minimum sentence. Accordingly, the sentence proposed by Mr. Sohal was theoretically available to the judge.

Did the judge err in imposing six-year custodial sentences for uttering threats and unlawful confinement?

[134] At the sentencing hearing, the Crown sought concurrent jail sentences of one and two years respectively for Mr. Sohal's uttering threats and unlawful confinement convictions. Mr. Sohal sought concurrent jail sentences of two years less a day on all counts. Despite the positions taken by the parties, the judge imposed concurrent six-year jail sentences on the uttering threats and unlawful confinement counts. The Crown concedes that the judge erred in doing so.

[135] With respect to the uttering threats conviction, the maximum sentence was five years. With respect to both offences, the judge gave no reasons to justify the sentences she imposed.

[136] In these circumstances, without endorsing the appropriateness of the outcome proposed by the parties, I would accede to their joint position on this aspect of Mr. Sohal's appeal and impose the sentences sought by the Crown at the sentencing hearing.

Was there statutory authority to attach all of the ancillary orders to the non-predicate offences?

- [137] As noted above, the judge did not specify which ancillary orders were made in relation to which specific counts. As a result, the warrant of committal attached the SOIRA, DNA and firearms prohibition orders to all three counts.
- [138] Respectfully, the court was not authorized to make SOIRA orders under s. 490.012 of the Code in connection with either the unlawful confinement or uttering threats counts and these orders must be set aside. The court was also not authorized to make a firearms prohibition order under s. 109(3) of the Code in connection with the uttering threats count and that order must also be set aside.
- [139] On the other hand, there was statutory authority under s. 109(3) of the Code to make the lifetime firearms prohibition order in connection with the unlawful confinement count and under s. 487.051 to make the DNA orders in connection with both the unlawful confinement and uttering threats counts. These ancillary orders will therefore not be set aside.

### Conclusion and Disposition

- [140] For all of these reasons, I would: (1) allow Mr. Sohal's appeal; (2) set aside his designation as a dangerous offender; (3) set aside his sentence on the predicate offence, including the ancillary orders; and (4) order a new hearing of the Crown's application to designate and sentence Mr. Sohal as a dangerous offender.
- [141] I would also set aside the concurrent six-year jail sentences imposed on Mr. Sohal for uttering threats and unlawful confinement and substitute concurrent one and two-year jail sentences respectively in relation to these convictions.
- [142] Finally, I would set aside the SOIRA orders made in connection with the unlawful confinement and uttering threats counts as well as the lifetime firearms prohibition order in connection with the uttering threats count. I would not set aside the lifetime firearms prohibition order in connection with the unlawful confinement count or the DNA orders in connection with both the unlawful confinement and uttering threats counts.
- [143] Having reduced the custodial sentences on the non-predicate offences, Mr. Sohal has now satisfied those sentences in full. To ensure there is authority in place to continue to detain Mr. Sohal on the predicate offence pending his appearance in the trial court, I would make an order under s. 759(3)(a)(ii) of the Code directing the Registrar of the Court to issue the process necessary to convey, commit and remand Mr. Sohal into the custody of a Provincial Facility to be brought before the Supreme Court on or before July 1, 2023 to be dealt with according to law. At that time, scheduling and, if necessary, bail issues can be addressed.
- [144] I extend my thanks to counsel for the high quality of their submissions.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Fitch"

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