
CANADA / JUDGMENT

R. v. Steele

2014 SCC 61

COURT

Supreme Court of Canada

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R. v. Steele

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[2014] 3 SCR 138

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Judges

McLachlin, Beverley; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard

On appeal from

Manitoba

Subjects

Criminal law

Notes

SCC Case Information: 35364

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. Steele, 2014 SCC 61, [2014] 3 S.C.R. 138

Date: 20141009

Docket: 35364

Between:

Her Majesty The Queen

Appellant

and

John Melville Steele

Respondent

- and -

Attorney General of Canada and Attorney General of Ontario

Interveners

Coram: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Reasons for Judgment:

(paras. 1 to 72)

Wagner J. (McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)

r. v. steele, 2014 SCC 61, [2014] 3 S.C.R. 138

Her Majesty The Queen Appellant

v.

John Melville Steele Respondent

and

Attorney General of Canada and

Attorney General of Ontario Interveners

Indexed as: R. v. Steele

2014 SCC 61

File No.: 35364.

2014: April 17; 2014: October 9.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for manitoba

Criminal law — Sentencing — Dangerous offender — Application for remand for assessment — Meaning of “serious personal injury offence” — Whether robbery committed by using threats of violence to a person falls within the meaning of “serious personal injury offence” — Criminal Code, R.S.C. 1985, c. C-46, ss. 343 (a), 752 “serious personal injury offence”, 752.1(1)

S robbed a drugstore, telling the cashiers that he had a gun. There is no evidence that he actually had a gun or that physical force was used. No one was injured. One of the cashiers testified that she had been scared during the robbery, while the other described her reaction as one of shock. S was convicted of robbery under s. 343 (a) of the Criminal Code on the basis that he had “use[d] . . . threats of violence to a person”. The Crown applied to the court to remand him for assessment pursuant to s. 752.1(1) of the Criminal Code . Both the trial judge and the Court of Appeal found that a threat of violence does not on its own constitute “the use or attempted use of violence” in accordance with subpara. (a)(i) of the definition of “serious personal injury offence” in s. 752 of the Criminal Code .

Held: The appeal should be allowed.

This case concerns the scope of the definition of a “serious personal injury offence” (SPIO) and, consequently, the threshold for entry into the dangerous and long-term offender system. A threat of violence that suffices to ground a conviction for robbery under s. 343 (a) does indeed constitute the use of violence against another person within the meaning of subpara. (a)(i) of the definition of an SPIO set out in s. 752 .

Indeterminate detention and long-term supervision are exceptional sentences which are reserved for individuals who pose an ongoing threat to the public. There are a number of procedural steps and substantive requirements before a court can find that an offender is a dangerous offender or a long-term offender. Before the court remands an offender for assessment, it must be satisfied that the offender has been convicted of an SPIO as defined in s. 752 . There also must be reasonable grounds to believe that the offender might be found to be a dangerous offender under s. 753 or a long-term offender under s. 753.1. Thus, the SPIO requirement plays a crucial role in the operation of the dangerous and long-term offender scheme.

The primary rationale for both indeterminate detention and long-term supervision under Part XXIV is public protection, and an overly narrow construction of the gateway provision would indeed undermine this purpose. However, the specific purpose of the SPIO requirement is to link the sentence to the predicate offence, and an overly broad construction would undermine this purpose and violate the fundamental principle of sentencing, that a sentence must be

proportionate to the gravity of the offence and the degree of responsibility of the offender. The SPIO requirement helps safeguard the constitutionality of the scheme. In interpreting the definition of an SPIO, effect must be given to the overall protective purpose of Part XXIV, while also furthering the specific purpose of the SPIO requirement by tying the punishment to the predicate offence and safeguarding the objective of proportionality.

Subparagraph (a)(i) of the definition in s. 752 does not invite a court to assess the seriousness of the violence the offender used or attempted to use; any level of violence is sufficient. 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. This interpretation is consistent with the gatekeeper function of the SPIO requirement.

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 and not a force-based one. This is not to say that the definition of violence must be a harm-based one in every case. Context will be paramount and 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. The scope of the expression “use or attempted use of violence” must ultimately be determined having regard to the context in which it is used.

There is no indication that the various parts of the definition of an SPIO in s. 752 are mutually exclusive. The fact that a proposed interpretation would bring some offences within the ambit of more than one part of the definition in s. 752 should not, in itself, justify narrowing the definition to avoid such overlaps. Subparagraph (a)(i) concerns violent acts — “the use or attempted use of violence” — and requires violent intent on the offender’s part. This part of the definition will apply to an offender who intentionally causes, attempts to cause or threatens to cause harm. Threats are included by virtue of the speaker’s intent that they be taken seriously. Subparagraph (a)(ii) relates solely to the effects of the conduct and, as such, will include offences involving negligence. Therefore, a harm-based approach to subpara. (a)(i) according to which threatening violence constitutes a form of use of violence is not inconsistent with the endangerment and psychological damage aspects of the definition in subpara. (a)(ii).

The exclusion of robbery from the offences listed in para. (b) of the definition is not relevant to the determination of legislative intent. There is no indication that Parliament intended to create an exhaustive list of all offences constituting SPIOs in all cases.

The Court of Appeal relied on the presumption that the use of different language suggests that the legislature intended different meanings and the principle that the same words have the same meaning throughout a statute; however, it failed to take into account the full context in which the expressions “uses violence” and “use of violence” appear in s. 343 and subpara. (a)(i) of the definition of an SPIO in s. 752. The two provisions are in unrelated parts of the Criminal Code ,

and they have distinct purposes and legislative histories. The Court of Appeal's approach is also inconsistent with the principles of statutory interpretation and would result in untold difficulties for trial judges seeking to establish the elusive dividing line between threats that are inherently violent and those that are not. It is moreover incompatible with the plain meaning and the purpose of the provision. All threats of violence are themselves violent, even though the seriousness of the violence may be quite limited. In seeking to distinguish violent from non-violent threats, courts are in effect reading in an objective minimum level of violence. The Court of Appeal's interpretation is inconsistent with the clear language of subpara. (a)(i) of the definition, which requires violence, not serious violence, and it risks undermining the overall purpose of Part XXIV by precluding courts from remanding potentially dangerous offenders for assessment.

Threats of violence to a person that are sufficient to ground a conviction for robbery under s. 343 (a) meet the "use . . . of violence" criterion in subpara. (a)(i) of the definition of an SPIO in s. 752 . By threatening to harm his victims while committing robbery, S used violence against them. Since the other requirements of the definition are clearly met, his offence qualifies as an SPIO.

Cases Cited

Discussed: *R. v. C.D.*, 2005 SCC 78, [2005] 3 S.C.R. 668; referred to: *R. v. Neve*, 1999 ABCA 206, 71 Alta. L.R. (3d) 92; *R. v. Goforth*, 2005 SKCA 12, 257 Sask. R. 123; *R. v. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263; *R. v. Thompson*, 2009 ONCJ 359 (CanLII); *R. v. Roy*, 2008 SKCA 41, 307 Sask. R. 276; *R. v. Jolicoeur*, 2011 MBQB 129, 265 Man. R. (2d) 225; *R. v. Currie*, [1997] 2 S.C.R. 260; *R. v. Cepic*, 2010 ONSC 561, 93 M.V.R. (5th) 129; *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *R. v. Smith*, 2012 ONCA 645 (CanLII); *R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555; *R. v. Goulet*, 2011 ABCA 230, 52 Alta. L.R. (5th) 241; *R. v. J.Y.* (1996), 141 Sask. R. 132; *R. v. O'Keefe*, 2011 NLCA 41, 309 Nfld. & P.E.I.R. 253.

Statutes and Regulations Cited

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Criminal Code, R.S.C. 1985, c. C-46, ss. 249(3) , 264.1(1) (a), (2) (a), 343 , 344 , 742.1 , Part XXIV, 752 "serious personal injury offence", 752.1(1), 753, 753.1, 754(1)(a), (b).

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APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Beard and Monnin JJ.A.), 2013 MBCA 21, 288 Man. R. (2d) 304, 564 W.A.C. 304, [2013] 5 W.W.R. 635, [2013] M.J. No. 77 (QL), 2013 CarswellMan 108, affirming a decision of McKelvey J., 2011 MBQB 181, 267 Man. R. (2d) 91, [2011] M.J. No. 250 (QL), 2011 CarswellMan 403. Appeal allowed.

Ami Kotler and Neil Steen, for the appellant.

J. David L. Soper and Amanda Sansregret, for the respondent.

Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Leslie Paine and Michelle Campbell, for the intervener the Attorney General of Ontario.

The judgment of the Court was delivered by

Wagner J. —

I. Introduction

- [1] Indeterminate detention and long-term supervision under Part XXIV of the Criminal Code, R.S.C. 1985, c. C-46, are exceptional sentences in our criminal justice system. They are reserved for individuals who pose an ongoing threat to the public and accordingly merit enhanced sentences on preventive grounds. Part XXIV outlines the process by which an offender may be designated as a dangerous offender or a long-term offender and be sentenced accordingly. Before either of these designations can be made, a number of conditions must be met. One such condition is that the offence that forms the basis for the dangerous offender or long-term offender application must be a “serious personal injury offence” as defined in s. 752 of the Criminal Code.
- [2] The term “serious personal injury offence” means, inter alia, an indictable offence involving “the use or attempted use of violence against another person” for which the offender may be sentenced to imprisonment for 10 years or more: s. 752, subpara. (a)(i) of the definition of “serious personal injury offence” (“SPIO”). On application by a prosecutor, where an individual has been convicted of such an offence, and if the court finds that there are reasonable grounds to believe that the individual might be found to be a dangerous offender or a long-term offender, the court must remand the individual for a psychological assessment: s. 752.1(1). This assessment then forms the basis for an application for a finding that the individual is a dangerous offender or a long-term offender.

- [3] This case concerns the scope of the definition of an SPIO and, consequently, the threshold for entry into the dangerous and long-term offender system. The offender, Mr. Steele, robbed a drugstore, telling the cashiers that he had a gun. There is no evidence that he actually had a gun or that physical force was used. Mr. Steele was convicted of robbery under s. 343 (a) of the Criminal Code on the basis that he had “use[d] . . . threats of violence to a person”. The Crown, viewing this as an SPIO, gave notice of its intention to apply to the court to remand Mr. Steele for assessment pursuant to s. 752.1(1) . Mr. Steele’s offence clearly meets two of the requirements of the definition of an SPIO referred to above: robbery is an indictable offence for which the offender may be sentenced to imprisonment for 10 years or more (see s. 344). The question is whether the offence — which involved threats of violence to a person, but no physical force — meets the other requirement of that definition: that of involving “the use or attempted use of violence against another person”.
- [4] Both the trial judge and the Court of Appeal answered this question in the negative. They found, in essence, that a threat of violence does not on its own constitute “the use or attempted use of violence”. For the reasons that follow, I respectfully disagree.
- [5] A threat of violence that suffices to ground a conviction for robbery under s. 343 (a) does indeed constitute the use of violence against another person within the meaning of subpara. (a)(i) of the definition of an SPIO set out in s. 752 . By threatening to harm his victims while committing robbery, Mr. Steele used violence against them. Since the other requirements of the definition are clearly met, his offence qualifies as an SPIO.
- [6] In the result, I would allow the Crown’s appeal. The other requirements for the Crown’s application for remand for an assessment have not been contested, which means that all the requirements are met. I would therefore grant the application and order that Mr. Steele be remanded for assessment pursuant to s. 752.1(1) of the Criminal Code .

II. Relevant Statutory Provisions

- [7] The dispute over the definition of an SPIO arises in the context of the Crown’s application for remand for an assessment, which is a step that must be taken before applying for a finding that an offender is a dangerous offender or a long-term offender:

752.1 (1) [Application for remand for assessment] On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

[8] The requirements of the definition of an SPIO must be met both at the stage of the application for an assessment (s. 752.1(1)) and, subsequently, at that of the application for a finding that the offender is a dangerous offender (s. 753(1)). The definition reads as follows:

752. [Definitions] In this Part,

...

“serious personal injury offence” means

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

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

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

[9] The offence of robbery under s. 343 encompasses a number of different acts. Section 343 reads as follows:

343. [Robbery] Every one commits robbery who

- (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
- (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
- (c) assaults any person with intent to steal from him; or
- (d) steals from any person while armed with an offensive weapon or imitation thereof.

III. Background

[10] The key facts are not in dispute. At approximately 1:35 p.m. on May 28, 2010, Mr. Steele entered a drugstore with his face concealed by a tightly drawn hoodie, as could be seen on a surveillance videotape. He approached the checkout counter and said something like, “Give me the money. It’s a robbery. I have a gun”. The cashier was unable to open the register and requested the assistance of another cashier, who opened it and positioned the cash tray so that Mr. Steele could reach it. Mr. Steele left the store approximately one minute and ten seconds after entering it. He was at the checkout counter for 39 seconds.

- [11] No weapon was seen in Mr. Steele's possession either inside or outside the store. No one was injured. One of the cashiers testified that she had been scared during the robbery, while the other described her reaction as one of shock.
- [12] Mr. Steele was convicted of robbery, disguise with intent and failure to comply with a probation order: 2011 MBQB 67. The Crown then applied to the court to remand him for assessment pursuant to s. 752.1(1) of the Criminal Code .

A. Manitoba Court of Queen's Bench, 2011 MBQB 181, 267 Man. R. (2d) 91

- [13] McKelvey J. denied the Crown's application. She began her analysis by noting that the legislature has not specified that robbery is an SPIO, as it has done in para. (b) of the definition of an SPIO with respect to certain sexually based offences. She then said that there was no evidence that Mr. Steele's conduct had endangered or been likely to endanger the lives or safety of the cashiers or that severe psychological damage had been inflicted on them within the meaning of subpara. (a)(ii) of the definition. The case therefore turned on subpara. (a)(i). Did Mr. Steele's conduct involve the use or attempted use of violence against the cashiers?
- [14] On this question, McKelvey J. acknowledged two lines of authority. According to the first, that of *R. v. Neve*, 1999 ABCA 206, 71 Alta. L.R. (3d) 92, the "use or attempted use of violence" threshold requires that the violence be "objectively serious" (para. 76). The second, that of *R. v. Goforth*, 2005 SKCA 12, 257 Sask. R. 123, and *R. v. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263, rejects this requirement. McKelvey J. noted (at para. 11) that "[t]he case law is trending towards an acceptance of [the latter approach]", according to which the expression "use or attempted use of violence" encompasses all violent conduct irrespective of how serious it is.
- [15] McKelvey J. nevertheless found that the "implied threat of violence" (para. 28) in the case at bar fell short of the subpara. (a)(i) threshold. She noted that no one had been injured. Although Mr. Steele's hands were in his pockets when he uttered the threat, he had done nothing that could be likened to pulling out a weapon. McKelvey J. accepted that the two cashiers had experienced shock and fear as a result of Mr. Steele's actions, but nevertheless concluded that those actions had not constituted the use or attempted use of violence. In reaching this conclusion, she relied on the reasoning of other courts that had found that similar threats of violence failed to meet the SPIO threshold: e.g., *R. v. Thompson*, 2009 ONCJ 359 (CanLII); *R. v. Roy*, 2008 SKCA 41, 307 Sask. R. 276; *R. v. Jolicoeur*, 2011 MBQB 129, 265 Man. R. (2d) 225.

B. Manitoba Court of Appeal, 2013 MBCA 21, 288 Man. R. (2d) 304 (per Scott C.J.M. and Beard and Monnin JJ.A.)

- [16] The Manitoba Court of Appeal, per Scott C.J.M., unanimously upheld McKelvey J.'s decision. The definition of robbery in s. 343 (a) refers to a person who "uses violence" or "uses . . . threats of violence", whereas subpara. (a)(i) of the definition of an SPIO in s. 752 refers to the "use . . . of violence" or the "attempted use of violence". Scott C.J.M. reasoned that these

differences in language imply that not all robberies involve the use or attempted use of violence. He discussed *R. v. C.D.*, 2005 SCC 78, [2005] 3 S.C.R. 668, in which this Court had adopted a definition of the expression “violent offence” as used in s. 39(1) (a) of the Youth Criminal Justice Act, S.C. 2002, c. 1 (“YCJA”), that included threats to cause bodily harm, but found that that case should be distinguished. In his opinion, the fact that s. 343 (a) refers to the use of both violence and threats of violence means that there must be some difference between the two.

[17] After surveying the various types of threats that might support a robbery conviction under s. 343 (a), Scott C.J.M. noted that whether or not violence was used or attempted is a factual determination, and a matter for the trial judge. He agreed with McKelvey J. in endorsing the holding in *Goforth and Lebar* that the issue is not whether the violence used in committing the predicate offence was objectively serious. What must be determined, according to the court in *Lebar*, is “whether the evidence proves that violence was actually used” (Scott C.J.M., at para. 70, quoting *Lebar*, at para. 50). Although he agreed in substance with this approach, Scott C.J.M. found that the court had sidestepped the distinction between the concepts of use of violence and attempted use of violence referred to in subpara. (a)(i) of the definition of an SPIO in s. 752 . The use of violence to a person in committing robbery will also constitute a use of violence within the meaning of that provision. Where, on the other hand, robbery is committed by the use of threats of violence against a person, the question is whether those threats also constitute the attempted use of violence within the meaning of subpara. (a)(i).

[18] In this regard, Scott C.J.M. approved the approach adopted in *Thompson*, at para. 28:

In the myriad of factual circumstances that can constitute criminal offences, there is often a threat of violence, sometimes explicit and sometimes implicit. There may be instances when that threat of violence is so real that one could reasonably characterize it as an attempted use of violence. In other words, very little more need be done by the offender before the threat becomes actual use. To try and distinguish an attempt from a threat on such facts may be nothing more than semantics. However, in other cases, the threat of violence may be so remote from any actual perpetration of violence such that it cannot reasonably amount to an attempted use. [Emphasis added.]

[19] Scott C.J.M. proposed the following approach for determining whether a given threat amounts to an attempted use of violence (para. 85):

[S]ome degree of physical action must be part of a threat for it to constitute the “attempted use of violence”. That is, there needs to be some indication of imminent apparent danger to a person or some overt act directed towards the actual use of violence against a person for a threat of violence to also constitute the attempted use of violence.

- [20] Finally, Scott C.J.M. noted that McKelvey J.'s findings of fact had not been challenged, and because the threat of violence was not associated with either imminent danger or "any, even minimal, overt physical act", he upheld the trial judge's decision (para. 86). The threat, while sufficient to ground a conviction for robbery under s. 343 (a), did not constitute the use or attempted use of violence for the purposes of the definition of an SPIO and did not trigger the sentencing procedures under Part XXIV.

IV. Issue

- [21] Does robbery committed by using threats of violence to a person within the meaning of s. 343 (a) of the Criminal Code constitute an SPIO in accordance with subpara. (a)(i) of the definition of that expression set out in s. 752 ?

V. Analysis

- [22] To determine whether an offence constitutes an SPIO, it is necessary to review the elements of the offence, but it may also be necessary, if that review is insufficient, to consider the factual circumstances in which the offence was committed. Certain offences automatically constitute SPIOs regardless of the manner in which they are committed: s. 752 , para. (b) of the definition of "serious personal injury offence"; see *R. v. Currie*, [1997] 2 S.C.R. 260, at paras. 21-22. There are other offences that always constitute SPIOs in that one of their elements automatically satisfies the descriptive criteria set out in para. (a) of the definition of an SPIO. One example would be where personal violence or endangerment forms part of the definition of the offence: see, e.g., *R. v. Cepic*, 2010 ONSC 561, 93 M.V.R. (5th) 129, at para. 18. Robbery is clearly not one of this second type of offences, since it can involve the use of violence or threats of violence to a person or property, whereas subpara. (a)(i) of the definition of an SPIO refers only to the use or attempted use of violence against another person: see *Lebar*, at para. 65.
- [23] Thus, the question is whether a robbery committed as in the instant case — by using threats of violence to a person, but without using actual physical violence — satisfies the criterion of "use or attempted use of violence against another person" set out in the definition. I conclude that it does. I reach this conclusion in light of the modern principle of statutory interpretation that the words of legislation must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *E. A. Driedger, Construction of Statutes* (2nd ed. 1983), at p. 87.
- [24] I will begin by discussing the purpose of the SPIO threshold and its function within the scheme of Part XXIV. I will then consider the plain meaning of the term "violence" in the context of the Criminal Code and other legislation. Finally, I will discuss the statutory context of the provision in which the phrase "use or attempted use of violence" appears, including the other provisions of the definition of an SPIO and the provision that defines the offence of robbery. Taken together, these considerations support the view that threats of

violence to a person that suffice to ground a conviction for robbery meet the violence criterion in the definition of an SPIO. Because robbery is an indictable offence for which the offender may be sentenced to imprisonment for 10 years or more, all the criteria of subpara. (a)(i) of the definition of an SPIO are satisfied.

A. Purpose of the SPIO Requirement

- [25] The Crown emphasizes that the SPIO requirement serves as a gateway in that it is applied before an offender is assessed for dangerousness and before an application can be made for a finding that he or she is a dangerous offender or a long-term offender. The “use or attempted use of violence” criterion must therefore, the Crown argues, be interpreted broadly to ensure that offenders who might meet the criteria are not excluded from being assessed, which would undermine the goal of public protection.
- [26] Mr. Steele counters that the SPIO requirement performs an important function in Part XXIV by ensuring that offenders may only be sentenced to indeterminate detention for sufficiently serious crimes. He argues that an overly broad construction of this requirement would frustrate the scheme’s objective of proportionality.
- [27] As I will explain, both these purposive arguments have merit. The general purpose of Part XXIV is public protection, and an overly narrow construction of the gateway provision would indeed undermine this purpose. However, the specific purpose of the SPIO requirement is to link the sentence to the predicate offence, and an overly broad construction would undermine this purpose and jeopardize the objective of proportionality. My interpretive approach must be sensitive to both the general and the specific purpose. I will now discuss each of these purposes in detail and will conclude that the seriousness requirement of subpara. (a)(i) of the definition of an SPIO is satisfied by a textual and contextual interpretation of the words “use or attempted use of violence”, and that it would be wrong to read in an objective minimum level of violence.
- (1) General Purpose of the Dangerous and Long-term Offender Provisions
- [28] Part XXIV of the Criminal Code authorizes the indeterminate detention of individuals who are found to be “dangerous offender[s]” on the basis that their past conduct and patterns of behaviour show that they constitute a threat to the life, safety or physical or mental well-being of other persons (s. 753(1) (a)), or that their failure to control sexual impulses means that they are likely to cause injury, pain or other evil to other persons (s. 753(1) (b)). It also authorizes the long-term supervision of individuals who are found to be “long-term offender[s]” where a sentence of imprisonment of two years or more would be appropriate, there is a substantial risk that the individuals will reoffend, and there is a reasonable possibility of eventual control of that risk in the community (s. 753.1(1)).
- [29] The primary rationale for both indeterminate detention and long-term supervision under Part XXIV is public protection. Both sentences advance the “dominant purpose” of preventive detention identified by Dickson J. in *Hatchwell v. The Queen*, [1976] 1 S.C.R. 39, at

p. 43, namely “to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb”. When the constitutionality of the dangerous offender provisions came before this Court in *R. v. Lyons*, [1987] 2 S.C.R. 309, La Forest J., wrote at p. 329, “[Part XXIV] merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person” (emphasis in original). Lamer C.J. subsequently explained this rationale as follows in *Currie*, at para. 26: “Parliament has thus created a standard of preventive detention that measures an accused’s present condition according to past behaviour and patterns of conduct.” See also *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 19.

- [30] Parliament amended Part XXIV in 1997 to create the category of “long-term offenders” and make it possible to supervise such offenders in the community, thus establishing an alternative to the indeterminate detention of persons designated as “dangerous offenders”. Long-term offenders, those who meet the criteria specified in s. 753.1(1), may be ordered to be subject to supervision in the community for a specified period (maximum of 10 years) after the expiry of a determinate sentence, which must be for a term of two years or more: s. 753.1(3). The purpose of the long-term supervision provisions is twofold: to protect the public and to rehabilitate offenders and facilitate their reintegration into the community: *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 50.
- [31] In *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, Iacobucci and Arbour JJ. considered the purpose of the long-term supervision provisions and the relationship between them and the dangerous offender provisions. At the time, the use of the word “may” indicated that, even if all the criteria were met, designation as either a long-term offender or a dangerous offender was discretionary. The Court held that, in light of the discretionary nature of a finding that an offender was a dangerous offender and given the principles of sentencing in s. 718.2 of the Criminal Code, a judge was required to consider finding an offender to be a long-term offender — inquiring in particular into the possibility of eventual control of the risk posed by the offender in the community — before imposing the harsher punishment applicable to a dangerous offender (para. 28; *Sipos*, at para. 22). Subsequent to the Court’s decision in *Johnson*, Parliament acted in 2008 to eliminate the judge’s discretion in the context of a dangerous offender application. The word “shall” now indicates that if a court is satisfied that the criteria in s. 753(1) have been met, it must find the offender to be a dangerous offender. In eliminating this discretion, however, Parliament built in a new flexibility regarding the consequences of such a finding. Before 2008, a court that found an offender to be a dangerous offender was obliged to (“shall”) impose a sentence of detention for an indeterminate period (*Johnson*, at para. 5). Today, a court that makes such a finding has the option of imposing an indeterminate sentence, a determinate sentence of two years or more combined with long-term supervision for up to 10 years, or a sentence for the offence for which the offender has been convicted: s. 753(4). It may impose one of the latter two sentences only if it is satisfied that the sentence will adequately protect the public: s.

753(4.1) .

(2) Specific Purpose of the SPIO Requirement in the Dangerous and Long-term Offender Scheme

- [32] There are a number of procedural steps that must be taken before a court can find that an offender is a dangerous offender or a long-term offender. First of all, the prosecutor must apply to have the offender remanded for assessment: s. 752.1(1) . An assessment report must then be filed before the prosecutor can apply for a finding that the offender is a dangerous offender or a long-term offender: ss. 753(1) or 753.1(1). The prosecutor must give notice to the offender outlining the basis on which it is intended to found the application: s. 754(1)(b). The Attorney General of the province must consent to the application: s. 754(1)(a). All these procedural protections enhance the overall fairness of the scheme. See Lyons, at pp 362-63, for a discussion of the procedural safeguards provided for in Part XXIV.
- [33] There are also substantive requirements to be met. Before the court remands an offender for assessment, it must be satisfied, first, that the offender has been convicted of an SPIO as defined in s. 752 . Second, there must be reasonable grounds to believe that the offender might be found to be a dangerous offender under s. 753 or a long-term offender under s. 753.1. The SPIO requirement comes into play once again at the stage of the application for a finding that the offender is a dangerous offender, as the court must be satisfied that the offence is an SPIO before making such a finding: s. 753(1).
- [34] Thus, the SPIO requirement plays a crucial role in the operation of the dangerous and long-term offender scheme. The sentences that can be imposed under Part XXIV, including indeterminate detention and long-term supervision, serve the purposes of both prevention and punishment. To the extent that the sentence is based on a risk established in light of past conduct and patterns of behaviour, it is preventive. As La Forest J. held in Lyons, preventive detention under Part XXIV “represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased” (p. 329).
- [35] These sentences are also punitive, however, and in this regard, the function of the SPIO requirement is twofold: first, it serves as a “gatekeeper” for entry into the dangerous or long-term offender system (s. 752.1(1)); second, if the Crown applies for a finding that the offender is a dangerous offender, it serves as a requirement for the making of such a finding (s. 753(1)). If the punitive purpose of these sentencing options were outweighed entirely by their preventive purpose, they might violate the fundamental principle of sentencing, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The SPIO requirement helps safeguard the constitutionality of the scheme: Lyons, at p. 338. As Lamer C.J. put it in Currie, “[t]he [SPIO] requirement acts as a gatekeeper to ensure that the sentence is not disproportionate to the offence” (para. 31; see also Goforth, at para. 44).

- [36] These two purposes, one of them general and the other specific, are in conflict. In interpreting the definition of an SPIO, I must give effect to the overall protective purpose of Part XXIV, while also furthering the specific purpose of the SPIO requirement by tying the punishment to the predicate offence and safeguarding the objective of proportionality. Whereas an unduly narrow interpretation of the words “use or attempted use of violence” could preclude courts from remanding potentially dangerous offenders for assessment and thereby undermine the goal of public protection, an unduly broad interpretation of those words would dilute the gatekeeper function of the SPIO requirement and jeopardize the scheme’s objective of proportionality.
- [37] The Crown relies on the Court’s statement in *Currie* that the SPIO requirement “merely triggers the [s. 753(1)(b)] application process. There remains a second stage to [s. 753(1)(b)], at which point the trial judge must be satisfied beyond a reasonable doubt of the likelihood of future danger that an offender presents to society before he or she can impose the dangerous offender designation and an indeterminate sentence” (*Currie*, at para. 25). This comment was made in the context of a finding that an offender is a dangerous offender on the basis of s. 753(1)(b) — that is, in relation to the commission of one of the sexual offences enumerated in para. (b) of the definition of an SPIO in s. 752 — but the same logic applies to a finding made under s. 753(1)(a), which provides that the predicate offence must “for[m] a part” of a pattern of behaviour underlying the threat the offender constitutes or be “associated with” particularly brutal behaviour relied on as evidence of that threat. In every case, the sentence is based on past conduct or patterns of behaviour, but it cannot be divorced entirely from the predicate offence.
- (3) Words “Use or Attempted Use of Violence” Do Not Include a Requirement of Objective Seriousness
- [38] This Court’s statement in *Lyons* (at p. 324) that the offences falling within the definition of an SPIO are “very serious violent crimes” reflects the importance of the SPIO requirement in the overall scheme. Some courts took this statement to mean that in every case the predicate offence must on its own warrant the kind of punishment imposed under Part XXIV, but this represents an incorrect reading of *Lyons*. As this Court explained in *Currie*, at para. 28, the words “very serious violent crime” were used in relation to the specific facts of *Lyons* and did not require that all predicate offences fit that description. A predicate offence must be serious, but the degree of seriousness intended by Parliament is exhaustively set out in the definition of an SPIO in s. 752 .
- [39] Paragraph (a) of the definition in s. 752 requires, first, that the offence be an indictable offence, second, that the maximum sentence for the offence be imprisonment for 10 years or more and, third, that the offence involve (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person. In subpara. (a)(i), the word “violence” is not qualified, which means that the criteria may be satisfied even if the violence in question is not in itself “serious” (see *Goforth*, at

para. 21; Lebar, at para. 67; *R. v. Smith*, 2012 ONCA 645 (CanLII), at para. 2). The degree of seriousness intended by Parliament exists if all three requirements of the definition are met. Thus, an offence that involves the use or attempted use of violence against another person is not an SPIO under para. (a) of the definition if it is not an indictable offence or if it is not punishable by a sentence of imprisonment for 10 years or more. Just as para. (b) of the definition does not invite the court to assess the manner of commission of the enumerated offences, subpara. (a)(i) does not invite it to assess the seriousness of the violence the offender used or attempted to use; any level of violence is sufficient.

- [40] This interpretation is consistent with the gatekeeper function of the SPIO requirement. An offender who commits an indictable offence for which he or she may be sentenced to imprisonment for 10 years or more and that involves the use or attempted use of violence against a person commits what Parliament has defined as an SPIO; it is not necessary to further inquire into the level of the violence in question. If the offender is remanded for assessment and is then found, on the basis of past conduct and patterns of behaviour, to be a dangerous offender or a long-term offender, it cannot be said that the offender was “picked up off the street because of his past criminality (for which he has already been punished), or because of fears or suspicions about his criminal proclivities, and then subjected to a procedure in order to determine whether society would be better off if he were incarcerated indefinitely” (Lyons, at p. 328). Rather, the punishment “flows from the actual commission of a specific crime, the requisite elements of which have been proved to exist beyond a reasonable doubt” (ibid.). See also Johnson, at para. 23, in which the Court mentioned that dangerous and long-term offender proceedings form part of the sentencing process.
- [41] 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.

B. Plain Meaning of the Term “Violence” in the Context of the Criminal Code and Other Legislation

- [42] The question of what constitutes violence is as old as the criminal law itself. It is a moral question as much as a legal one, and no doubt society’s answer to it has changed in tandem with evolving social mores. I will not attempt — nor am I required — to answer it definitively. However, in interpreting the words “use or attempted use of violence” in subpara. (a)(i) of the definition of an SPIO, I must endeavour to ascertain their “plain meaning”. In this regard, I am aided by dictionary definitions as well as by judicial interpretations from a variety of contexts involving both the Criminal Code and other legislation. I will explain a conflict that exists between harm-based definitions of violence that focus on acts by which a person causes, attempts to cause or threatens to cause harm, and force-based definitions

that focus on the physical nature of the act. Building upon this Court's reasoning in C.D. and subsequent cases, I conclude that the prevailing definition of violence is a harm-based one.

- [43] In C.D., Bastarache J. began his discussion of the definition of “violence” by noting that there is disagreement with respect to its grammatical and ordinary meaning. After quoting one dictionary definition of “violence”, namely “[t]he exercise of physical force so as to inflict injury on, or cause damage to, persons or property” (The Oxford English Dictionary (2nd ed. 1989), at p. 654), Bastarache J. noted that violence is ordinarily understood not only in terms of the use of force, but also in terms of the effects of that use. This conflict is reflected in judicial definitions, as Prof. Teresa Scassa explains:

It is significant that the Criminal Code , which one might assume to be the “bible” of the control of violence in society, offers no definition of violence. It is, surprisingly, perhaps the most “assumed” term within the entire Code. Offences which one might consider the most “violent” of all crimes, such as murder and assault, do not mention violence. Rather, they talk about concrete, measurable things like “death” and “bodily harm.”

(T. Scassa, “Violence Against Women in Law Schools” (1992), 30 Alta. L. Rev. 809, at p. 816, cited in C.D., at para. 30.)

- [44] I would add that even dictionary definitions of “violence” vary, reflecting both harm-based and force-based approaches. For instance, Le Petit Robert dictionary (new ed. 2012) contains the following definition of the French expression “faire violence” (do violence): “agir sur [quelqu’un] ou le faire agir contre sa volonté, en employant la force ou l’intimidation” ([translation] “act so as to influence a person or to cause the person to act in a manner contrary to his or her wishes, by using force or intimidation”) (p. 2717 (emphasis added)). The variance among definitions of violence — both those found in dictionaries and those adopted by judges — highlights the need to interpret the word in the context in which it is used.
- [45] In C.D., the Court was being asked to interpret the scope of the term “violent offence” as used in s. 39(1) (a) of the YCJA with respect to the imposition of custodial sentences on young persons. Bastarache J. concluded that in the context of the YCJA , the term “violent offence” means “an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm” (para. 17). This definition is notable for its emphasis on the harmful effects of violence rather than on the nature of the force that was applied. Thus, threats of bodily harm are included even if physical force has not been used. Bastarache J. explained that a harm-based approach encompasses both physical and psychological harm, whereas a force-based approach would apply only to those “harm-causing” offences that also involve the use, attempted use or threatened use of force (para. 66). This definition of “violent offence” also excludes certain acts that might otherwise fall within the ordinary meaning of the word “violence”. For instance, it excludes crimes against property even though such offences are generally considered to involve “violence” to property (paras. 33 and 51). It also excludes relatively minor assaults committed without

causing, attempting to cause or threatening to cause bodily harm, whereas a force-based definition would tend to encompass such assaults (para. 64).

[46] Some of the reasoning in *C.D.* was statute-specific. For instance, Bastarache J. favoured a harm-based approach in part to include certain offences — e.g. murder committed without the direct application of physical force — that in his view ought to fall within the definition of “violent offence” but that might not be included by a force-based approach (paras. 58-65). However, he also made some general observations in support of his adoption of a harm-based definition. He stated that such a definition “better accords with . . . the ‘usual’ definition of violence, which tends to focus on its effects (i.e. harm) rather than on the means employed to produce the effects (i.e. force)” (para. 67). The inclusion of threats of bodily harm in the definition of “violent offence” “accords with the commonly held view that a threat to cause bodily harm is, at base, an act of violence” (para. 85). He added the following:

The view that threats of bodily harm are essentially acts of violence is likely based on the fact that threatening to cause bodily harm can often perform the same function as actually causing it, in that both can instill the level of fear in the victim that is needed to achieve the offender’s goal: see [*R. v. McCraw*, [1991] 3 S.C.R. 72], at pp. 81-82. In this sense, it can be said that irrespective of whether an offender threatens to cause bodily harm or actually causes bodily harm, in both cases he or she is “wielding violence” to satisfy his or her object(s). [para. 85]

I would endorse these observations of Bastarache J. and would note that the harm-based approach he articulated draws additional support from several recent decisions rendered by this Court in a variety of contexts, including those of the offence of uttering threats, the violence exception to freedom of expression, and the offence of robbery.

[47] First, a recent case concerning the offence of uttering threats provided for in s. 264.1(1) (a) of the Criminal Code supports the proposition that threats of violence are inherently violent, not simply a means of communicating future violence. In *R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931, the Court confirmed the elements of the offence of uttering threats:

[I]t is not necessary to prove that the threats were conveyed to their intended recipients (prohibited act) or that the accused intended the threats to be so conveyed (fault element). Further, it is not necessary to prove that anyone was actually intimidated by the threats (prohibited act) or that the accused specifically intended to intimidate anyone (fault element). The concept of the “closed circle” is therefore legally wrong. Threats are tools of intimidation and violence. As such, in any circumstance where threats are spoken with the intent that they be taken seriously, even to third parties, the elements of the offence will be made out. [Emphasis added; para. 24.]

In other words, the act of threatening 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.

- [48] Incidentally, this does not mean that the offence of uttering threats under s. 264.1(1) (a) is an SPIO. Even if the offence were found to meet the violence requirement (“use or attempted use of violence”) of subpara. (a)(i) of the definition of an SPIO, it is not punishable by a sentence of imprisonment for 10 years and therefore fails to meet the seriousness requirement: s. 264.1(2) (a).
- [49] Second, in C.D., Bastarache J. discussed this Court’s decisions with respect to freedom of expression and the question whether threats of violence fall outside the scope of constitutionally protected speech (para. 31). In *R. v. Keegstra*, [1990] 3 S.C.R. 697, Dickson C.J. had held that only “expression communicated directly through physical harm” could be considered violence and be excluded from the protection of s. 2 (b) of the Canadian Charter of Rights and Freedoms on that basis (p. 732). It was unclear from the early cases whether the “violence exception” extended to threats of violence, but any lingering uncertainty was eliminated in *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, in which McLachlin C.J. held: “This Court’s jurisprudence supports the proposition that the exclusion of violence from the s. 2 (b) guarantee of free expression extends to threats of violence” (para. 70). The same rationale for excluding expression conveyed by physical violence from the protection of s. 2 (b) also applies to threats of violence.
- [50] Third, Bastarache J. in C.D. discussed the different forms of robbery under s. 343. Regarding s. 343(b), he mentioned that the expression “personal violence” in the phrase “wounds, beats, strikes or uses any personal violence” had been interpreted to require something more than a mere technical assault. On the other hand, the phrase “uses violence or threats of violence” in s. 343(a) had been interpreted to include simple assault (para. 32). Putting aside, for a moment, technical arguments about the construction of each of the provisions, I would note that Parliament included threats of violence among the violent acts that elevate the offence of theft to that of robbery. In this regard, I agree with the comment of Epstein J.A. in *Lebar*: “Section 343(a) applies to a robbery committed with violence. It is categorically a crime of violence — violence is an essential element of an offence under that section” (para. 33).
- [51] 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.

C. Statutory Context Supports a Harm-Based Definition That Encompasses Threats of Violence

- [52] Having established that the purposive arguments are in conflict, that it is therefore necessary to consider the plain meaning of the words as well as the statutory context, and that the plain meaning generally favours a harm-based definition of violence that includes threats, I will now discuss the context in detail. The scope of the expression “use or attempted use of violence” must ultimately be determined having regard to the context in which it is used: C.D., at para. 33; Lebar, at para. 38.
- [53] Currently, the definition of an SPIO is relevant only to the dangerous and long-term offender scheme in Part XXIV of the Criminal Code, but this was not always the case. Between 2007 and 2012, s. 742.1 of the Criminal Code referred to that definition for the purpose of excluding certain offenders from the imposition of conditional sentences. In interpreting the definition for this purpose, some courts reasoned that the context of s. 742.1 called for a different interpretive approach: see, for example, Lebar; R. v. Goulet, 2011 ABCA 230, 52 Alta. L.R. (5th) 241. I mention this in passing because, although some of the SPIO jurisprudence was developed in that context, the definition of an SPIO is no longer relevant to the imposition of such sentences and must therefore be interpreted solely in the context of its role in the dangerous and long-term offender scheme.
- [54] Mr. Steele relies heavily, as did the Court of Appeal, on contextual arguments and the corresponding principles of statutory interpretation, and in particular on the presumption against tautology and the presumption of consistent expression. I must address the following arguments: First, it is argued that the words “conduct . . . inflicting or likely to inflict severe psychological damage” in subpara. (a)(ii) of the definition of an SPIO would be redundant if the words “use or attempted use of violence” in subpara. (a)(i) are not interpreted narrowly. Second, according to the Court of Appeal, the fact that robbery is excluded from the offences enumerated in para. (b) of the definition of an SPIO indicates that not every robbery is an SPIO. Third, the Court of Appeal stated that because the definition of robbery in s. 343(a) refers to the use of both violence and threats of violence, there must be some difference between the two and that, in light of the presumption of consistent expression, the reference to the use of violence in the definition of an SPIO therefore excludes threats of violence. With respect, I disagree with each of these arguments, for the following reasons.
- (1) Subparagraph (a)(ii) of the Definition of an SPIO in Section 752
- [55] Subparagraph (a)(ii) of the definition of an SPIO refers to “conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person”. Mr. Steele argues that if subpara. (a)(i) of the definition is interpreted more broadly, it would apply to less serious instances of the very conduct to which subpara. (a)(ii) applies, thereby rendering the “severe psychological damage” portion of the definition redundant. If this argument is taken a step further, it

might be argued that subpara. (a)(ii) targets violent activity on the basis of its harm or effects — i.e. danger to life or safety or severe psychological damage — whereas subpara. (a)(i) targets violent activity on the basis of the force that was applied — i.e. use or attempted use of violence.

- [56] With respect, after considering the relationship between subparas. (a)(i) and (a)(ii) of the definition, I am led to the opposite conclusion. As a preliminary matter, there is no indication that the various parts of the definition of an SPIO in s. 752 are mutually exclusive: see *R. v. J.Y.* (1996), 141 Sask. R. 132 (C.A.), at para. 22. On the contrary, I can think of many scenarios in which an offence causing the harms outlined in subpara. (a)(ii) would clearly also involve “the use or attempted use of violence”. The same can be said about para. (b) of the definition, which lists a number of sexual offences to include them in the definition of an SPIO. The offences enumerated in para. (b) will of course often also meet the qualitative criteria of subparas. (a)(i) and (a)(ii). The fact that a proposed interpretation would bring some offences within the ambit of more than one part of the definition in s. 752 should not, in itself, justify narrowing the definition to avoid such overlaps.
- [57] Furthermore, to the extent that redundancy is a problem in the case at bar, I would suggest that the Court of Appeal’s interpretation of subpara. (a)(i) adds to the redundancy rather than reducing it. By confining the expression “use or attempted use of violence” to physical action or danger, the Court of Appeal has rendered it largely indistinguishable from the expression “conduct endangering or likely to endanger the life or safety of another person” in subpara. (a)(ii). The Court of Appeal held that there must be “some degree of physical action” for a threat to amount to an attempted use of violence: “[T]here needs to be some indication of imminent apparent danger to a person or some overt act directed towards the actual use of violence against a person for a threat of violence to also constitute the attempted use of violence” (para. 85). Scott C.J.M. endorsed the reasoning in *Thompson*, in which a similar distinction was made between violent and non-violent threats on the basis of proximity to the “actual perpetration of violence” (para. 77). With respect, this interpretation artificially limits the ordinary harm-based meaning of the “violence” concept in subpara. (a)(i) and transforms that provision into a replication of the dangerousness portion of subpara. (a)(ii). As Bastarache J. stated in *C.D.*, “[t]he fact that violent conduct is different from dangerous conduct is made quite clear in . . . s. 752 ” (para. 79).
- [58] I agree that the effect of my interpretation will be to include certain offences causing less-than-severe psychological damage within the scope of subpara. (a)(i). However, this does not render the reference to “severe psychological damage” in subpara. (a)(ii) redundant. In other words, the endangerment and severe psychological damage referred to in subpara. (a)(ii) do not merely form a narrower subset of “the use or attempted use of violence”. In my view, the two provisions are qualitatively different owing, in part, to the required level of intent. Subparagraph (a)(i) concerns violent acts — “the use or attempted use of violence” — and requires violent intent on the offender’s part. This part of the definition will apply to an offender who intentionally causes, attempts to cause or threatens to cause harm. Threats are

included by virtue of the speaker's intent that they be taken seriously. Subparagraph (a)(ii), on the other hand, relates solely to the effects of conduct. It does not refer to violence in general, or even to intent. Thus, numerous courts have properly included offences involving negligence — for example, dangerous operation of a motor vehicle, vessel or aircraft causing bodily harm (s. 249(3)) — within the scope of subpara. (a)(ii) on the basis that they caused one of the effects in question: see, e.g., *Cepic*; *R. v. O'Keefe*, 2011 NLCA 41, 309 Nfld. & P.E.I.R. 253. Conversely, although I will not decide this issue, I would have difficulty concluding that a negligence-based offence involves “the use or attempted use of violence”.

- [59] I would note that in *C.D., Bastarache J.* excluded offences for which bodily harm need merely be reasonably foreseeable from the definition of “violent offence”. He reasoned: “. . . I do not support the inclusion of a ‘reasonable foreseeability of bodily harm’ aspect in the definition of ‘violent offence’ because, in my view, whether an offence is likely to result in bodily harm is really a question of whether the offence is dangerous rather than whether it is violent, and these two concepts are quite distinct from one another” (para. 79 (emphasis added)). He relied on s. 752 in support of this proposition.
- [60] In conclusion, a harm-based approach to subpara. (a)(i) according to which threatening violence constitutes a form of use of violence is not inconsistent with the endangerment and psychological damage aspects of the definition in subpara. (a)(ii).
- (2) Paragraph (b) of the Definition
- [61] I have already briefly addressed the argument that the exclusion of robbery from the offences listed in para. (b) of the definition is relevant to the determination of legislative intent. With respect, this argument is based on two false premises. First, robbery may be committed by way of threats of violence to property and such threats are clearly excluded from the definition of an SPIO, which means that Parliament could not have categorically defined robbery as an SPIO even if it considered the threats to be violent. Second, Parliament identified three sexual offences each of which categorically qualifies as an SPIO in para. (b). There is no indication that Parliament intended to create an exhaustive list of all offences constituting SPIOs in all cases. Rather, as this Court stated in *Currie*, para. (b) serves to make it clear that the enumerated sexual offences, whatever form they may take, are inherently serious and may trigger a dangerous offender application (para. 22).
- [62] The reason why Parliament included a list of sexual offences is surely not that sexual offences are not otherwise covered by the expression “use or attempted use of violence”. The more reasonable view is that Parliament included the list to make it clear that such offences will constitute SPIOs in all circumstances, even those that are committed with minimal physical force and that do not result in bodily harm. Furthermore, the view that Parliament, in enacting para. (b) of the definition, was rejecting a narrow approach that might exclude some sexual offences is consistent with my interpretation of subpara. (a)(i), which rules out a similarly narrow approach in the context of threats of violence.

(3) Section 343(a)

- [63] The Court of Appeal relied heavily on the need for consistency in the interpretation of s. 343(a) and subpara. (a)(i) of the definition of an SPIO in s. 752 . This argument is appealing at first glance. It can be summarized as follows: Section 343(a) refers to the use of violence and the use of threats of violence. Subparagraph (a)(i) of the definition refers to the use of violence and the attempted use of violence. Threats of violence are not mentioned in subpara. (a)(i). If s. 343(a) is read disjunctively, there must be some difference between the use of violence and the use of threats of violence. As a result, the question is whether the expression “uses . . . threats of violence” in s. 343(a) is equivalent to the expression the “attempted use of violence” in subpara. (a)(i) of the definition. The Court of Appeal cited the presumption that the use of different language suggests that the legislature intended different meanings and the principle that the same words have the same meaning throughout a statute.
- [64] With respect, I find this argument to be an overly technical one that fails to take into account the full context in which the expressions “uses violence” and “use of violence” appear in the two provisions. First, the argument is based on a strictly disjunctive reading of the words “uses violence or threats of violence” in s. 343(a) that suggests that the expressions “violence” and “threats of violence” have different meanings. But in s. 343(b), the list “wounds, beats, strikes or uses any personal violence” is clearly not disjunctive — the words “uses any personal violence” encompass the other acts in the list. In my view, the contextual information from s. 343(b) suggests that Parliament may well have included threats of violence in s. 343(a) as a way to make it clear that threats of violence were to be included among the violent acts that would be included in the definition of robbery (see Sullivan, at p. 214).
- [65] Second, even a strictly disjunctive reading of the words “uses violence or threats of violence” in s. 343(a) does not lead inexorably to the conclusion that the expression “use . . . of violence” in subpara. (a)(i) of the definition of an SPIO means the same thing as “uses violence” in s. 343(a). The two provisions are in unrelated parts of the Criminal Code , and they have distinct purposes and legislative histories. As Ruth Sullivan notes, “[s]ome statutes, like Insurance Acts or the Criminal Code , are frequent[ly] amended decade after decade. It is not surprising, then, that inadvertent variations occur within a single Act. It is even more likely that they would occur within the statute book as a whole” (p. 222). If s. 343(a) were to be interpreted disjunctively, the use of violence would have to be understood as the use of physical violence in order to exclude threats of violence from the definition. As I mentioned above, however, the meaning of the word “violence” is not limited to physical violence everywhere it appears in the Criminal Code or in other legislation. For instance, as this Court stated in *McRae* (at para. 24), threats are themselves “tools of intimidation and violence” in the context of s. 264.1(1) (a). Thus, even if the word “violence” in s. 343 (a) is interpreted using a force-based definition, that is, as meaning uses physical violence or threats of physical violence, this need not preclude courts from interpreting the same word

in a contextually sensitive manner in subpara. (a)(i) of the definition of an SPIO in s. 752 .

- [66] In short, I find that threats of violence to a person (and not threats to property) that are sufficient to ground a conviction for robbery under s. 343(a) meet the “use . . . of violence” criterion in subpara. (a)(i) of the definition of an SPIO in s. 752 . This approach is consistent with the broader understanding of robbery as the crime of theft committed with violence.

D. Conclusion: Robbery Committed by Using Threats of Violence to a Person is a Serious Personal Injury Offence

- [67] Not all robberies are SPIOs. Robbery committed by using violence or a threat of violence to property is clearly excluded. Robbery committed by using violence to a person is clearly included. In the case bar, in the context of a robbery committed by using a threat of violence to a person, the trial judge and the Court of Appeal attempted to draw a line. Although the Court of Appeal was not prepared to conclude categorically that threats are not violent, it held that some, but not all, threats are violent. Something more than a mere verbal threat is required: “[T]here needs to be some indication of imminent apparent danger to a person or some overt act directed towards the actual use of violence” (para. 85 (emphasis added)).
- [68] I have rejected this view for the numerous reasons given above. In short, a threat of violence is itself a form of violence, and the respondent’s context-based arguments have not persuaded me to depart from this premise in interpreting subpara. (a)(i) of the definition of an SPIO.
- [69] Finally, the Court of Appeal’s interpretation would have undesirable consequences. In seeking to distinguish between violent and non-violent threats, the Court of Appeal referred to a number of cases in which courts have grappled with this very question. Threatening to “splat” the clerk of a cheque cashing business (Thompson), raising a baseball bat in a threatening manner in confronting two police officers (Roy), and saying “[m]oney and cigarettes in the bag” while making an implied threat of violence if this demand were not met (Jolicoeur, at para. 25), have all been held not to satisfy the “use or attempted use of violence” criterion, because they lacked the requisite physical act or danger. On the other hand, an offender who had committed robbery by producing a knife and holding it close to the victim satisfied the criterion despite the absence of physical injury (Lebar). It would be possible to list other examples of cases in which trial judges have endeavoured to distinguish violent from non-violent threats on the facts of the cases before them. At the end of the day, however, I conclude that such an exercise is not just difficult, but pointless.
- [70] The Court of Appeal’s approach is inconsistent with the principles of statutory interpretation I discussed above. It would result in untold difficulties for trial judges seeking to establish the elusive dividing line between threats that are inherently violent and those that are not. Finally, in my view, it is incompatible with the plain meaning and the purpose of the provision. All threats of violence are themselves violent, even though the seriousness of the violence may be quite limited. In seeking to distinguish violent from non-violent threats, courts are in effect reading in an objective minimum level of violence. This is inconsistent

with the clear language of subpara. (a)(i) of the definition, which requires violence, not serious violence, and it risks undermining the overall purpose of Part XXIV by precluding courts from remanding potentially dangerous offenders for assessment.

- [71] When, in committing the robbery, Mr. Steele threatened the cashiers by saying “I have a gun”, he used violence against another person within the meaning of subpara. (a)(i) of the definition of an SPIO.

VI. Disposition

- [72] I would allow the appeal without costs. Mr. Steele was convicted under s. 343(a) of robbery, an offence that satisfies the criterion set out in subpara. (a)(i) of the definition of a “serious personal injury offence” in s. 752 . Since the other requirements for the Crown’s application for remand for an assessment have not been contested, I would grant the application and order that Mr. Steele be remanded for assessment pursuant to s. 752.1(1) .

Appeal allowed.

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