

CANADA / JUDGMENT

R. v. White

2022 BCCA 91

COURT

British Columbia Court of Appeal

DECIDED

11 March 2022

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2022 BCCA 91 R. v. White

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. White,

2022 BCCA 91

Date: 20220311

Docket: CA45870

Between:

Regina

Respondent

And

Jason Anthony White

Appellant

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated December 21, 2018 (R. v. White, 2018 BCSC 2440, Vancouver Docket 27126).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

J.A.M. Dickie

Place and Date of Hearing:

Vancouver, British Columbia

September 17, 2021

Supplementary Written Submissions filed:

September 28, October 8,

October 27 and November 2, 2021

Place and Date of Judgment:

Vancouver, British Columbia

March 11, 2022

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Voith

Summary:

The appellant challenges his designation as a dangerous offender pursuant to ss. 753(1)(a)(i) and (b) of the Criminal Code along with the indeterminate sentence imposed upon him under ss. 753(4) and (4.1). First, he argues the court had no jurisdiction to designate him as a dangerous offender under s. 753(1)(b). Second, that the judge erred in applying s. 753(1)(a)(i) by relying on non-patterned misconduct at the designation stage. Third, that the judge's analysis at the designation and penalty stages was skewed by an impermissible "disconnect" between the index offence, the established pattern, and the prospective assessment of risk.

Held: Appeal dismissed. The judge erred in designating the appellant a dangerous offender under s. 753(1)(b). However, this error did not materially prejudice the fairness of the proceeding or its outcome. The judge made no error when he found that the predicate offence formed part of an identifiable pattern of behaviour reflecting the appellant's long-standing history of violence towards women. Finally, while the judge focused on the appellant's risk for committing sexual violence in circumstances where the predicate offence was not found beyond a reasonable doubt to be sexually motivated, his analysis was not confined to that risk. Both the prospective assessment of risk and the manageability of that risk addressed the likelihood the appellant

would commit crimes of violence against women as he has in the past.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] Jason Anthony White appeals from decisions designating him a dangerous offender and sentencing him to an indeterminate period of incarceration.
- [2] Dangerous offender proceedings are comprised of two stages--a designation stage and a penalty stage. At the designation stage, the judge determines whether the statutory criteria for a dangerous offender finding have been proved beyond a reasonable doubt. If so, the proceeding moves to the penalty stage where the judge determines whether the future risk the offender has been found to pose can be adequately managed without imposing an indeterminate period of incarceration.
- [3] At the first stage of an application made pursuant to s. 753(1)(a)(i) of the Criminal Code, R.S.C. 1985 c. C-46 [Code] the Crown must prove four criteria beyond a reasonable doubt before a dangerous offender designation can be made: (1) the offender has been convicted of a "serious personal injury offence" within the meaning of s. 752(a) of the Code--what is known as the predicate offence; (2) the predicate offence must form part of a broader

pattern of violence; (3) the identified pattern of conduct must be shown to be very likely to continue and to result in harmful recidivism; and (4) the offender's conduct is intractable. The first two criteria look to the past. The last two criteria look to the future: *R. v. Boutilier*, 2017 SCC 64 at para. 26 [Boutilier].

- [4] The links between the predicate offence, the pattern of past conduct, and the risk that the same pattern of behaviour will likely continue are integral components of the analysis at the first stage. These links ensure that only offenders who are shown beyond a reasonable doubt to constitute a future, identifiable and specific threat to the life, safety or physical or mental well-being of other persons are labelled as dangerous: *R. v. Currie*, [1997] 2 S.C.R. 260 at paras. 22, 26, 30; 1997 CanLII 347 (SCC). As this Court put it in *R. v. Pike*, 2010 BCCA 401 at para. 78 [Pike], the pattern, of which the predicate offence forms a part, defines the prospective assessment of risk (see also *R. v. Patel*, 2020 BCCA 92 at paras. 216-223 [Patel]).
- [5] The appellant concedes the predicate offences he committed--attempted break and enter of a private dwelling and an assault causing bodily harm in relation to its 86-year-old female occupant--are serious personal injury offences that authorized the making of a dangerous offender application pursuant to s. 753(1)(a). He asserts, however, that the judge made material errors in principle at the designation and penalty stages of the hearing. He argues that the judge erred: (1) in relying on s. 753(1)(b)--a provision engaged by the commission of enumerated sexual assault-related offences and pursuant to which the threat assessment focuses on the risk of harm through sexual recidivism--as an alternative basis upon which a dangerous offender designation could rest; (2) in conducting the pattern analysis contemplated by ss. 753(1)(a)(i) and (ii) of the Code; (3) in conducting the prospective assessment of risk at the designation stage; and (4) in conducting the analysis required at the penalty stage of the application.
- [6] It is foundational to the appellant's argument that he was convicted of predicate offences not shown to have had "a sexual component". The appellant submits the predicate offences did not form part of the past pattern of behaviour found by the judge and could not form part of a past pattern of behaviour targeting women for sexual violence. From here, the appellant submits that the judge--distracted by the Crown's reliance on s. 753(1)(b) and by a risk assessment report that focussed almost exclusively on the risk of violent sexual recidivism--erred in conducting the prospective threat assessment at the designation stage and the manageability of that threat at the penalty stage based on a risk that he would commit violent sexual offences against women in the future. He argues that the judge's future risk assessment was not tethered to the predicate offences or the identified pattern. In the result, the appellant says the necessary links between the predicate offences, his past behavioural pattern, and the prospective risk assessment were not present in this case. Having been convicted of violent, non-sexual offences, the appellant says he was inappropriately found to be a dangerous offender and sentenced to an indeterminate period of imprisonment based on the judge's finding that the risk of violent sexual recidivism was high and could not be reduced to an acceptable level through the imposition of a determinate sentence followed by

a long-term supervision order. He submits that the legislation, as judicially interpreted, does not contemplate this result. Further, he submits this is not one of the rare cases in which it can be said that the identified errors in principle resulted in no substantial wrong or miscarriage of justice: *R. v. Johnson*, 2003 SCC 46 at para. 49 [Johnson]. In the result, he seeks an order pursuant to s. 759(3)(a)(ii) allowing the appeal and directing a new hearing.

[7] For the reasons set out below, I would dismiss the appeal.

II. The Legislative Context

[8] The Code provisions relevant to this appeal are set out below:

Definitions

752 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). (sévices graves à la personne)

Application for finding that an offender is a dangerous offender

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

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
- (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

- (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
- (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

Sentence for 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.

Sentence of indeterminate detention

(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.

If offender not found to be dangerous offender

- (5) If the court does not find an offender to be a dangerous offender,
 - (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
 - (b) the court may impose sentence for the offence for which the offender has been convicted.

III. Background

[9] The appellant has a lengthy and unrelenting history of criminal behaviour. His record is set out below:

Information #

Disposition Date

Offence

Disposition

YOUTH RECORD

628

1986-09-02

Sexual Assault x3 section 246.1

1 year open custody and 2 years probation

660

1986-09-02

Break, enter and commit theft x3 section 306

18 months probation

661

1986-09-02

Indecent Acts x3 section 169 & Trespass at Night section 173

18 months probation

1143

1987-08-05

Indecent Act

section 169

6 months open custody

1311

1989-01-03

Sexual Assault x3

section 246.1(1)

12 months closed custody and 2 years probation

ADULT RECORD

25478

1991-08-13

Possession of stolen property

section 355

\$200 fine

25649

1991-08-13

Assault

section 266

Mischief under \$1,000

section 430(4)

\$200 fine and 12 months probation

26084

1991-08-13

Theft under \$1,000 section 334(b)

\$100 fine

91-1595

1991-09-17

Possession of Narcotic

section 3(1) Narcotics Act

\$50 and 5 days in custody

2549B

1992-03-17

Breach of Probation section 740(1)

21 days custody

27389

1992-03-17

Mischief under \$1,000

section 430(4)

14 days custody

27400

1992-03-17

Break and enter with intent to commit

section 348(1)(a) & Possession of break-in instruments

section 351(1)

90 days custody

90 days custody

27942C

1992-06-25

Break and enter and commit theft

section 348(1)(b)

12 months custody

27947T

1992-06-25

Break and enter and commit theft

section 348(1)(b)

6 months custody

28433

1992-10-15

Escape Lawful Custody

section 145(1)(a)

2 months custody consecutive

28724

1992-12-15

Attempt theft under \$1,000

section 3334(b) & 463(d)

30 days custody consecutive

32514

1995-01-11

Dangerous driving section 249(1)(a) Driving over 0.08% section 253(b)

\$500 fine

\$500 fine

32878

1995-01-11

Assault causing bodily harm

section 267(1)(b)

4 months custody

32878A

1995-01-11

Breach of recognizance

section 145(3)

5 days custody

33882C

1995-04-26

Break and enter and commit theft

section 348(a)(b)

Break and enter with intent

section 348(1)(a)

Dangerous driving

section 249(1)(a)

12 months custody

12 months custody

4 months custody consecutive

33914

1995-05-17

Break and enter and commit theft

section 348(1)(b)

6 months custody concurrent

36930

1996-06-17

Break and enter with intent to commit theft

section 348(1)(a)

18 months custody

99-19250

1999-09-08

Escape Lawful Custody

section 145(1)(a)

4 months custody

Nanaimo

2005-01-12

Robbery

section 344

5 years concurrent with sentence serving and time served 29 months

37755-1

2005-01-12

Break and enter and commit sexual assault

section 348(1)(b)

Robbery

section 344

Jail 8 years on each charge concurrent and (credit for the equivalent of 10 years pre-sentence custody) and found to be a long-term offender as per section 753.1(3) CC and given a long-term supervision for 10 years; Mandatory 10 year Firearms Prohibition order

section 109 CC

231695-1

2014-07-09

Assault

section 266

Jail 1 day - actual pre-sentence time in custody 30 days

235971-1

2014-10-15

Assault

section 266

Jail 1 day - actual pre-sentence time in custody 30 days

239001

2015-12-04

Breach LTO

Section 753.3(1)

Jail 1 day, 204 days credited for time served

[10] What lies at the root of much of the appellant's criminal conduct is an entrenched sexual deviance that manifests itself in an irresistible desire to exercise power and control over women through conduct causing them physical and/or severe psychological harm.

[11] The appellant's criminal record was admitted at the hearing and made the subject of written Admissions of Fact. I will only address the circumstances of previous offences that are of relevance to the disposition of this appeal.

Youth Record

[12] In 1986, when the appellant was 15 years old, he was convicted of three counts of sexual assault. In each of these cases, the appellant groped middle-aged women unknown to him. On one occasion, the appellant grabbed the victim with such force that he winded her. On another occasion, the assault knocked the woman down. The degree of violence associated with these sexual assaults was noted by Dr. Lohrasbe in a psychiatric report he prepared in

1999. While he agreed that these three early incidents were examples of frotteurism, he noted that "the incidents involved more violence than is typically the case among frotteurs, who are content to touch, stroke or grope, and rarely knock their victims over, or inflict pain."

- [13] Later in 1986, the appellant was convicted of three counts of breaking and entering a dwelling house and committing therein the indictable offence of theft, along with three related counts of committing an indecent act. On one occasion, the appellant entered the apartment of a woman living in a complex for senior citizens and approached her with his pants pulled down to his ankles. On another, the appellant broke into the apartment of a younger woman and rummaged through clothing she kept in her bedroom dresser drawer. The victim encountered the appellant as he stood near her bed. He was not wearing pants and his shirt was pulled up over his face. He fled when she screamed, taking with him articles of her clothing. The last offence committed in 1986 involved pre-teen sisters. The appellant broke into a residence and entered a bedroom shared by the victims. He was wearing a ski mask. He unsuccessfully attempted to persuade one of the sisters to remove her panties. When she refused, he pulled his pants down and exposed himself before taking flight.
- [14] A psychological assessment was prepared by Dr. Roy O'Shaughnessy for use on sentencing for these offences. Dr. O'Shaughnessy opined that the appellant "shows evidence of multiple paraphilia i.e., a psychiatric disorder essentially describing individuals who have developed a deviant sexual arousal pattern." Dr. O'Shaughnessy concluded that the break and enters were sexually motivated, that the appellant was an obvious danger to the public, and that he would remain so for "a long time to come."
- [15] After being sentenced for these offences and while incarcerated at the Burnaby Containment Centre, the appellant participated in a sex offender treatment program for youths run by Forensic Psychiatric Services.
- [16] In 1987, the appellant committed a further indecent act, exposing his genitals to two young girls. This offence was committed less than a month after the appellant's release from custody. The appellant repeated a program for sexual offenders while incarcerated for this offence. He was also prescribed anti-libidinal medication because of concerns he would reoffend. The appellant decided to stop taking this medication in 1988. A psychiatric report prepared by Dr. Wes Friesen in 1987 noted that the appellant's paraphilias--including exhibitionism and frotteurism--were well-entrenched and that his repressed feelings of aggression and rage would place him at risk not only for reoffending but doing so in an increasingly aggressive fashion.

- [17] In 1988, the appellant groped three other middle-aged women, knocking one of them to the ground. He was convicted of three additional counts of sexual assault. A psychiatric report prepared by Dr. Robert Briggs in 1988 noted that the appellant's aggressive arousal and sexual arousal had become linked. The appellant was released from youth custody in December 1989.

Adult Record and Correctional History

- [18] Between 1989 and 1994, the appellant was convicted of many other criminal offences including the assault of a taxi driver, the assault causing bodily harm of a male homeowner who interrupted the appellant during a break and enter, and three other break and enters, one of which involved a private dwelling. On that occasion, the homeowners were roused at 4:30 a.m. to find the appellant crouching at the end of their bed.
- [19] In 1994, when the appellant was 22 years of age, he broke into the apartment of a diminutive 74-year-old woman and brutalized her, including by beating and sexually assaulting her in a prolonged, highly intrusive, and degrading attack. I will not detail the offences committed by the appellant on this occasion. The Crown submitted in the court below that it was open to the judge to find the requisite pattern based on this offence and the predicate offence standing alone--a submission we need not, in my view, consider on appeal.
- [20] In describing what led up to the 1994 offences in a "Crime Autobiography" prepared by the appellant while incarcerated and in treatment, he said that after consuming some alcohol and drugs, he drove around a residential neighbourhood looking to do a break and enter. He settled on an apartment complex, parked a block away and walked down an unlit pathway to the back of the building. He took steps to ensure that he would not be detected. He said that he was looking for a unit with an open window or sliding door that would allow him easy entry. He said he hoped to be able to steal a wallet or purse. He found a unit with a partially open patio door. He crept to the bedroom window of the unit and saw the female victim, lying in bed. He also saw a purse hanging from the front door. He entered the victim's residence. When confronted by the victim, he became angry and viciously attacked her. He left with her purse when the attack ended. Before doing so, he disabled the phone so she could not call for help. The appellant recounted how he became "very excited" by terrorizing her. I see no need to further detail the content of this document. It is among the most bone-chilling first-person accounts of the brutalization of another human being I have ever encountered.
- [21] As one would expect, the offence caused the victim severe psychological damage. She never set foot in her apartment again.
- [22] While semen was recovered from the victim's anus and vagina, the police were unable to identify the appellant as the perpetrator of the 1994 offences until 1996 when his DNA was matched to the crime scene.

- [23] In 1995 and 1996--before being apprehended for the 1994 offence--the appellant was convicted of four other residential break and enters. On one of these occasions, the appellant entered the bedroom of a sleeping couple. The appellant fled after removing a blanket covering the feet of a woman. On another occasion, the 71-year-old female occupant awoke to find the appellant crawling on her apartment floor towards the door.
- [24] In 1998, the appellant was tried and convicted of breaking and entering a dwelling house and committing therein the indictable offence of sexual assault and one count of robbery in relation to the brutal 1994 attack.
- [25] The Crown applied to have the appellant (then known by the surname Rindero) declared a dangerous offender under ss. 753(1)(a) and (b). Dr. Lohrasbe prepared the assessment report pursuant to s 752.1 of the Code. He noted the existence of three unifying features associated with offences committed by the appellant as a youth. First, the offences involved acting out on sexually deviant thoughts. Second, the offences involved the expression of anger by the appellant in conjunction with his sexual deviancy. Third, the appellant's victims were substantially older females. Dr. Lohrasbe concluded that there was an extremely high risk the appellant would engage in future acts of sexual violence with the most likely victims being older females. He cautioned that the risk for sexual violence should be considered "indefinite" in nature.
- [26] In 1999, the appellant was designated a dangerous offender under ss. 753(1)(a) and (b) and sentenced to an indeterminate period of imprisonment. With reference to the residential break and enters the appellant committed before his arrest for the 1994 offences, the sentencing judge found that the appellant roused the occupants (by turning on lights or removing their bedcovers as they slept) "for the thrill of confrontation" and "without regard to the danger of a violent encounter." He was satisfied there was a sexual component to the break and enter offences, as the appellant acknowledged being sexually aroused by his conduct:
- [35] The psychiatric evidence is that Mr. Rindero has multiple paraphilia. He was, even as an adolescent, active in exhibitionism and frotteurism. I accept the psychiatric evidence that there is no cure for paraphilia there can never be more than hope that it will be controlled. Mr. Rindero has, almost from his infancy, engaged in harmful and antisocial behaviour . . . I am satisfied that there is a sexual component to Mr. Rindero's entering the dwelling houses of others at night, and entering their bedrooms. That was Dr. O'Shaughnessy's opinion in 1986. It continues to be Dr. O'Shaughnessy's opinion. Dr. O'Shaughnessy testified that committing break and entries is high risk behaviour for Mr. Rindero, given his sexual arousal. The sexual component to Mr. Rindero's break and entries is, in my opinion, consistent with Mr. Rindero's unrelenting pattern of breaking into houses at night, and entering occupied bedrooms, as often as not rousing occupants. The sexual component of the break and enters is, in my opinion, confirmed by the sexual nature of the attack on [the victim of the 1994 offence] and with the sexual indecency of his contact with [the two sisters]. As an adolescent under treatment, Mr. Rindero had reported to his treating

psychiatrists that the break and entry offences sexually aroused him. Dr. Lohrasbe testified that Mr. Rindero's getting an erection during his altercation with [the victim of the 1994 offence], and his sustained sexual assault upon her during the course of a break and entry, was not only clearly abnormal, but a link to the earlier sexual offences of which Mr. Rindero has been [convicted]. Dr. Lohrasbe said that he had absolutely no problem in saying there was a pattern in the 1994 attack . . . and the earlier 1986 and 1988 incidents. He said the time interval between the earlier offences and 1994 emphasized the depth of the deviancy. He said they were not different offences, but part of a pattern. I accept that opinion. I am of the opinion that the assaults Mr. Rindero committed in 1986 . . . and his attack on [the victim of the 1994 offence] are all a pattern of repetitive behaviour. The age of [the victim of the 1994 offence] is also persuasive that his attack upon her was part of a pattern of repetitive behaviour. I agree with the opinion of Drs. O'Shaughnessy and Lohrasbe who testified that they were of the opinion that Mr. Rindero was sexually excited by females much older than he was, and that he was targeting assaults upon females much older than he was. I do not accept the submission advanced on Mr. Rindero's behalf that they were not targets because of their age, but victims for other reasons. The vicious attack [in 1994] was, in my opinion, a culmination of Mr. Rindero's pattern of repetitive pattern behaviour.

- [27] The appellant's appeal from conviction for the 1994 offences was dismissed in reasons indexed as 2001 BCCA 336.
- [28] The appellant's appeal from his designation as a dangerous offender and indeterminate sentence was allowed in reasons indexed as 2002 BCCA 619. This Court found that the judge failed to consider the availability of the long-term offender provisions that came into force following commission of the predicate offence, and whether there was a reasonable possibility the appellant's intractable conduct, driven by his deviant predilections, could nevertheless be controlled through anti-libidinal medication and close community supervision. A new hearing was ordered.
- [29] In advance of that hearing, the appellant completed the High-Intensity Sexual Offender Program offered by the Correctional Services of Canada, although his participation was noted as being "less than adequate" and his risk was not considered to have been appreciably reduced by this intervention. The appellant subsequently completed a maintenance program for sex offenders.
- [30] In a psychological assessment prepared by Dr. Joanne Nadeau in 2003, it was noted that anger appeared to be a key element in the appellant's violent sexual offences.
- [31] Dr. Lohrasbe prepared an updated forensic assessment in 2004 for use on the new hearing. Relying on risk assessment tools prepared by the Correctional Service of Canada, Dr. Lohrasbe reported that the appellant scored at the 77th percentile on the Psychopathy Checklist - Revised (PCL-R), indicating that he was at high risk for violent recidivism. The Violence Risk Assessment Guide (V-RAG) also indicated a high risk for violent recidivism. Given the nature of the predicate offence, Dr. Lohrasbe's opinion on risk assessment focused

on the risk for violent sexual recidivism, which he considered to remain high and unmanageable within a community setting for the foreseeable future.

- [32] Dr. Lohrasbe testified on the rehearing that the appellant had demonstrated motivation to address his deviancy and had made some progress to that end. He could not rule out a reasonable possibility that the appellant would continue to take rehabilitative strides.
- [33] The judge concluded (under the differently constituted legislative regime then in place) that there was a reasonable possibility of eventually controlling the appellant's risk upon his release. In reasons for judgment given January 12, 2005, he found the appellant to be a long-term offender and sentenced him to 18 years' imprisonment for the 1994 offences. The appellant was credited with 10 years for time served in pre-sentence custody. A 10-year long-term supervision order was imposed.
- [34] The appellant remained in custody until his warrant expiry date on January 10, 2013, the Parole Board of Canada being satisfied that, if released, he would likely commit an offence causing the death of or serious harm to another person before the sentence expired.
- [35] When the appellant was released on the long-term supervision order, a residency condition was imposed by the Parole Board. The appellant was placed in Belkin House (Enhanced), a Community Residential Facility located in downtown Vancouver that provides the strictest level of supervision available.
- [36] The appellant's long-term supervision order was suspended on five occasions. Pursuant to s. 135.1 of the Corrections and Conditional Release Act, S.C. 1992, c. 20, the Parole Board may suspend a long-term supervision order and authorize the apprehension and committal to custody of an offender who breaches a condition of the order. The period of commitment must not exceed 90 days. Failure without reasonable excuse to comply with a long-term supervision order is also a criminal offence that attracts a maximum penalty of 10 years' imprisonment where the Crown proceeds by indictment: s. 753.3(1).
- [37] In the summer of 2013, the appellant left a hostile and defiant message with his female counsellor. The long-term supervision order was suspended for one month.
- [38] On November 19, 2013, the appellant assaulted a male work supervisor at a construction site. The order was suspended for three months, and the appellant was subsequently convicted of assault.
- [39] On June 27 and July 3, 2014, the appellant attended at a SkyTrain and a Canada Line station located in downtown Vancouver and sprayed the backs of two female commuters with white hand lotion (the "SkyTrain assaults"). The order was suspended for a further three months. The appellant was convicted of two counts of common assault in relation to these incidents.
- [40] The order was suspended again on May 6, 2015, and the appellant was committed to custody after he breached its terms by purchasing alcohol. The appellant was eventually released from custody in December 2015 and returned to Belkin House.

- [41] The appellant committed the predicate offences on April 7, 2016. Despite attempting to disguise his appearance, he was quickly identified as the perpetrator of the offences from video surveillance footage.
- [42] The appellant did not return to Belkin House after the commission of this offence, in violation of the curfew condition of his long-term supervision order.
- [43] The appellant was arrested on April 9, 2016, at a construction site while attempting to commit suicide by hanging himself.
- [44] The appellant pleaded guilty in December 2016 to breaching the curfew condition of his long-term supervision order by being unlawfully at large between the date of the predicate offence and the date of his arrest.

The Predicate Offence

- [45] The appellant was, of course, bound by the long-term supervision order when the predicate offences were committed. The circumstances of those offences were detailed by the judge in his reasons for conviction:
- [7] [the victim] lives at [address omitted] together with her son and daughter-in-law and their adult children. [She] is 86 years old. On the evening of April 7, 2016, she was returning home to the residence from temple. The home was vacant at the time but for a downstairs tenant who lived in a suite separate from that where [the victim's] family resided. She walked across the front lawn to a pathway leading to the back of the home with the intention of entering through the back door. Motion-activated lights came on as she proceeded down a pathway towards the back door on, I believe, the west side of the home. The surveillance cameras captured [the appellant] walking down the pathway to the back of the home.
- [8] Later, those same cameras captured his exit along the same pathway. [The victim's] entry into the home through the back door was captured on another camera, which I pause to note, is part of a home video system with eight separate cameras of reasonably high quality. The camera at the rear of the home captures images at face level as opposed to overhead. In addition to the surveillance system, the residence was alarmed. To deactivate the alarm, entry of a PIN number within a prescribed time was required.
- [9] [The victim] testified she was in the process of disarming the alarm or had just completed it when [the appellant] began trying to gain entry. The door through which she had entered remained open or ajar as she was disarming the alarm. The back door opens onto the porch, not into the house.
- [10] Within seconds of [the victim] entering into the residence, the surveillance depicts the arrival of the [appellant] at the back door. He first pauses and then seems to peruse what is happening inside. The back door to the . . . residence was a mullioned glass allowing someone standing on the porch to observe all of the happenings inside. The [appellant] can then be seen struggling at the back door trying to gain access, but he never achieved it. He is

depicted alternately aggressively pulling the door towards him trying to open it or then pushing his shoulder against the door and possibly, although this is not a certainty, kicking at the door. Something likely occurred to scare him away. Possibly it was the home alarm, although [the victim] testified she had completely disarmed the system. Possibly it was her screaming.

- [11] The [appellant] never gained entry to the premises but was thwarted by [the victim] who was still at the back door disarming the alarm. In the process of attempting entry, as I noted, there can be seen a pulling back and forth with [the victim] presumably on the other side of the door inside it, although not visible.
- [12] [The victim] testified that throughout her left hand was at the side of the door and that, at some point, it slipped onto the sill of the door and later became jammed as between the doorframe and the door itself. In that process, her hand was cut causing a significant injury to her. Her grandson and granddaughter variously described it as a cut exposing tendon or bone. In any event, it resulted in hospital treatment including stitches, some form of covering, whether a cast or bandage, and a reasonably extensive period of physiotherapy thereafter.
- [46] In his reasons on the dangerous offender application, and with reference to the victim's successful efforts to block the appellant's entry into her home, the judge noted that the video surveillance depicts the appellant as being in a state of "unrestrained rage". Having viewed the video myself, it is an apt characterization of the appellant's emotional state at the time.
- [47] The offence significantly traumatized the elderly victim who characterized it as a life-altering experience that undermined the independence she previously enjoyed. As she put it, "I was very independent prior to this event. But [now] . . . I [feel] vulnerable and dependent on others [and] I am scared to leave my home by myself."
- [48] The appellant, who testified on the dangerous offender hearing, gave an account of the predicate offence which the judge summarized in his oral reasons for judgment on the dangerous offender application:
- [90] Mr. White, after telling the authorities at Belkin House that he was going to the Pacific Centre Mall, boarded a SkyTrain and went to the Oakridge Station where he purchased beer at a government liquor store in contravention of the conditions of his long-term offender designation.
- [91] According to Mr. White . . . he began to have ideations concerning theft of a bicycle or scooter. These apparently arose from discussions with a co-worker.
- [92] He travelled into a residential neighbourhood proximate to Oakridge Centre.
- [93] He testified that he observed a vehicle slowing down to drop off a passenger. Because he was several houses down the street, Mr. White testified his view of the passenger was obscured by the minivan that dropped the passenger off in front of an unlit residence.

- [94] The video displayed at trial was replayed during the sentencing hearing. It depicted the elevation of a sidewalk from the roadway and the reasonably clear depiction of what can only be described as a diminutive person in traditional Indo-Canadian garb walking slowly from the minivan from the front of the house towards the back along a lit pathway. That person was the complainant . . . who at the time of the predicate offence was 86 years of age.
- [95] Her arrival in front of the family residence and her entry into the backyard is captured on video from across the street from [the victim's] residence. Security lighting went on as she approached the home. To enter her home via the backyard, she had to walk up several steps from the sidewalk leading to the back door of her home.
- [96] Despite the change in elevation and the motion-activated lighting coming on, Mr. White testified before me that he was unable to observe the person, whom he ultimately followed down that same pathway into the resident's backyard, was a female person.
- [97] Mr. White later can be seen on camera surreptitiously following behind the complainant at a distance. He had inverted his coat to disguise his appearance.
- [98] According to his testimony, when he entered the backyard, all plans to see whether there was a scooter or a bicycle lying around evaporated. He began to think in terms of "casing the residence" for a future break-in.
- [99] When he arrived at the back porch, he was captured on security surveillance at [the victim's] residence. The back doorway of [her] residence had a clear-paneled glass door through which Mr. White observed the complainant as she had her back to him entering the security code of the alarm system. He said he observed her to see whether he could determine what the security code was so he could return later and break in.
- [100] Instead, as clearly depicted in the video, Mr. White attempted to gain entry to the back of the house. He said his plan once again shifted and he was going to try and enter and grab [the victim's] purse - by this time, he had identified her as a female - and do nothing more.
- . . .
- [106] He said that he had no idea that the person entering the home was an elderly woman and that he did not know, until she turned around to face him just prior to the altercation at the door, her age and sex. Nonetheless, after coming to the conclusion that he was dealing with an elderly female, he persisted after fully comprehending the nature of the person on the other side of it.
- [107] Mr. White says he abandoned the plan to enter the home and grab [the victim's] purse not as a result of fear of capture, but rather that he left her realizing, albeit late in the day, as it were, that he was reverting to his criminal past.
- [108] Despite realizing the home's occupant was an elderly female, he denies that there any sexual component to the decision to try and enter the complainant's house.

The Dangerous Offender Application

- [49] In its written Notice of Application to have the appellant declared a dangerous offender and sentenced to an indeterminate period of imprisonment, the Crown relied solely on ss. 753(1)(a)(i).
- [50] Inexplicably--and without objection from the appellant's counsel (not counsel on this appeal) or any inquiry by the trial judge--the Crown proceeded with the application as if it were made pursuant to ss. 753(1)(a)(i), (ii), (iii) and (b). The judge described the Crown's submissions under ss. 753(1)(a)(ii) and (iii) as "tepid, at best." He concluded that he did not need to address the application of ss. 753(1)(a)(ii) and (iii) to this case. In my view, nothing turns on the Crown's decision to expand the scope of its application--apparently at the hearing--by relying on ss. 753(1)(a)(ii) and (iii).
- [51] It is common ground on appeal that the Crown could not seek to have the appellant declared a dangerous offender pursuant to ss. 753(1)(b). The Crown can only initiate a dangerous offender application pursuant to s. 753(1)(b) where the predicate offence is a "serious personal injury offence" described in paragraph (b) of the definition of that expression in s. 752. "Serious personal injury offence" is defined under s. 752(b) to mean an offence or attempt to commit an offence mentioned in s. 271 (sexual assault), s. 272 (a sexual assault with a weapon or causing bodily harm), or s. 273 (aggravated sexual assault). As the appellant was not convicted of a "serious personal injury offence" within the meaning of s. 752(b), he could not be declared a dangerous offender under that provision.
- [52] At the Crown's behest, however, the judge treated the application as engaging both ss. 753(1)(a)(i) and (b). Indeed, he designated the appellant a dangerous offender under both provisions.
- [53] The appellant traces the "disconnect" between the predicate offence, the pattern, and the prospective risk assessment undertaken by the judge to two things: (1) the Crown's ill-considered decision to invoke s. 753(1)(b) in aid of its application; and (2) the assessment report and other evidence adduced by the Crown on the hearing that caused the threat assessment to go askew by focussing it almost exclusively on the risk of sexual recidivism. I will have more to say about this in addressing the grounds of appeal.
- [54] The hearing spanned 14 days. Ten witnesses were called, including Dr. Patrick Bartel, a forensic psychologist, who prepared the assessment report pursuant to s. 752.1 of the Code. The appellant participated in the assessment and testified at the hearing.
- [55] Although Dr. Bartel appears to have relied on criminal conduct neither proven by the Crown nor admitted by the appellant, I am satisfied that nothing turns on this issue. The appellant does not suggest otherwise.

[56] In support of his argument that the threat assessment undertaken by the judge in this case was not tied to the predicate offences or the identified past pattern of behaviour, the appellant places particular reliance on the extent to which Dr. Bartel focused on the risk that he would commit sexually violent acts in the future. On this point, I note that Dr. Bartel prefaced his risk assessment with these remarks:

For this assessment, I am addressing Mr. White's risk for future sexual violence. Although much of his history involves convictions for Break and Enter and Assault, both self-report and collateral information suggest that many of his previous B&E and Assault offences were committed with intent for sexual arousal. It is also important to note that many of the risk factors that I have considered in formulating my opinion with regard to Mr. White's risk apply equally to sexual and nonsexual violence.

[Emphasis added.]

[57] Dr. Bartel explained in his evidence that he focused on the appellant's risk for sexual violence because "that was most concerning and most salient for these proceedings." He reiterated that the risk factors he examined are also predictive of violent offending generally. Dr. Bartel was not cross-examined on the validity of his opinion that many of the risk factors he considered were equally predictive of sexual and non-sexual violence.

[58] Dr. Bartel concluded the appellant had limited insight into his behavioural motivations, a deficit which he considered to encompass both his history of sexual offending and the predicate offence.

[59] The appellant's deviant thought patterns and limited insight are illustrated by the comment he made to Dr. Bartel that he targeted older women for sexual assaults by groping them because he believed they would be less likely to contact the authorities and more likely to enjoy the experience.

[60] With reference to these earlier offences, the appellant said he liked "the jolt, the audacity" of what he was doing. The appellant acknowledged that the break and enter offences he committed in late adolescence and early adulthood were undertaken with the ulterior motive to observe women while they were sleeping because it gave him a sense of power and control over his victims which he found sexually arousing.

[61] The motivation driving the appellant's pattern of offending against women was found by Dr. Bartel to be sourced in his sexual deviance and in a related desire to exert power and control over his victims:

Q. Do you have an opinion as to whether [anti-libidinal medications] would be effective for Mr. White?

...

A. Well, I -- I am doubtful and I do not think it would be effective in controlling his risk. That's partly because some of his sexual offending -- patterns have not necessarily been strictly sexual in nature but combined with power and control issues. Those were motivating factors according to what he told me.

[62] The appellant told Dr. Bartel that his motivation behind the break and enters he committed prior to the predicate offence was not necessarily sexual gratification, but to get an adrenaline rush from doing something brazen and alarming.

[63] With respect to the SkyTrain assaults, the appellant told Dr. Bartel that he "got off on the boldness" of squirting white lotion on his female victims because he considered it to simulated ejaculation. Moments later, the appellant denied any sexual motivation behind these assaults.

[64] Diagnostically, the appellant was found to meet the criteria for multiple paraphilias, which describe patterns of recurrent, intense, sexually arousing fantasies, sexual urges, or behaviours that are maladaptive and cause distress or impairment to the individual and/or harm to others. The appellant's paraphilic presentation was assessed as being "unique and unusual" in that he has presented with a variety of paraphilia and deviant interests or behaviours over the course of his life, including: exhibitionism (arousal at exposing himself to others), frotteurism (arousal at rubbing against others), voyeurism (arousal at secretly observing others), sadomasochism (arousal at violence or physical coercion) and gerontophilia (arousal when in the presence of older women). Although the appellant denied experiencing sexually deviant thoughts at the time of the assessment, Dr. Bartel opined that the behavioural evidence would suggest otherwise.

[65] Dr. Bartel found evidence of an antisocial personality disorder given the appellant's lifelong history of criminal acts and his reckless disregard for the safety of others. The appellant scored at the 82nd percentile on the PCL-R when compared with male prison inmates. The PCL-R is not a risk measure, per se, but identifies and rates personality features predictive of risk. Dr. Bartel testified that the rating scale has been shown to be a relatively good predictor of violence. The appellant was assessed as scoring in the "high moderate" range on the PCL-R.

[66] The appellant's risk was also assessed using the Static-2002R, an actuarial measure designed to address the long-term potential for sexual recidivism amongst adult male sexual offenders. Dr. Bartel said the Static-2002R has been shown to have good predictive validity with respect to sexual recidivism and moderate predictive validity with respect to non-sexual violence. The appellant was assessed on this measure as being at a high risk for sexual reoffending.

[67] Dr. Bartel placed more reliance on the Risk for Sexual Violence Protocol (RSVP), a structured professional guideline for assessing risk of sexual violence. The appellant was assessed to be "at very high risk for future sexual offending."

[68] Addressing the circumstances of the predicate offence, Dr. Bartel opined that it is possible very serious sexual violence would have been inflicted on the victim had the appellant been able to enter her home. He made these observations about the index offence, its connection to the appellant's history of offending, and what this heralded for the future:

With regard to the index offence itself, reports indicate that there were no overt sexual assaultive behaviours involved. Furthermore, Mr. White denies any sexual intent in committing the offence, stating instead that he was only motivated to steal the purse of the victim. It is difficult to determine the veracity of Mr. White's statements regarding his motivations. The index offence itself may indeed have been sexually motivated. The nature of the offence was very similar to Mr. White's previous sexual advances in that it involved a brazen attempted break-in into the residence of the vulnerable female. Even if the offence wasn't sexually motivated at the outset, the successful commission of his break-in attempt would have created a very similar context and likelihood for serious sexual violence should he have been able to enter the residence of the elderly victim without the risk of being caught to find himself alone with her. In my opinion, that he permitted himself to entertain and then act on criminal impulses, make him as likely to commit a sexual offence as a simple Break and Enter offence . . .

With regard to the nature of Mr. White's risk, it is my opinion that he is at high risk for impulsive and unpredictable sexual violence against stranger females. The typology of offending could vary from non-contact offending to very serious and violent offending . . . Particularly concerning is the potential harm he poses to elderly females. Here, there is the possibility of very serious and grievous harm to any victim . . . It is also important to note that his risk is long term and, in my opinion, will only be confidently managed and controlled should he become physically incapacitated in some way.

. . . It is my opinion that Mr. White would not benefit from any further treatment as it pertains to lowering his risk.

. . . his offending pattern appears to be as much related to thrill seeking and power/control as it does to sexual arousal and drive . . .

With many high-risk offenders, an important and sometimes workable option is the provision of close monitoring and supervision combined with supportive housing. This is particularly the case with individuals with predictable patterns of offending behaviours . . . In Mr. White's case, his offending pattern is unpredictable both in terms of the victim choice and the behaviours . . . effective supervision and monitoring in the community [would be] extremely difficult, as was seen repeatedly on his last LTSO.

[Emphasis added.]

[69] Dr. Bartel reiterated this point in examination-in-chief:

Q. Did you see similarities between the index offence and previous offences?

A. Yes.

Q. What were --

A. The similarities I saw were a pattern of breaking in or attempted breaking into a residence, knowing that there was a -- a female inside, in this case an elderly female. And that is similar to some of his -- some, not all, but some of his previous sexual offending behaviours, that context of breaking into the home of a vulnerable female or a female just in general.

[70] Dr. Bartel was cross-examined on whether he considered the SkyTrain assaults to form part of an identifiable pattern of past behaviour by the appellant. He gave this evidence:

A. He has a lifelong pattern of sexual deviance, where he has acted on sexual deviance and I'm basing my opinion mostly on his history of sexual deviance combined with a deviant sexual act that occurred two or three -- three deviant sexual acts that occurred on the SkyTrain that was very odd and -- and unusual.

Q. All right. And it -- and when you say odd and unusual, because it doesn't really fit with his pattern?

A. It does fit with his pattern, in that he has a pattern of very diverse and different types of sexual offending over the course of his life that went -- that has gone -- that has included exposure, groping and fondling, violent sexual offence, voyeurism and squirting lotion on unsuspecting females.

[71] The appellant acknowledged in his evidence on the hearing that he knew the victim was an elderly female person when she turned to face him at the back door just before the violent struggle began. He could tell she was terrified as he attempted to break into her home. The appellant also acknowledged that he targeted elderly women for sexual assault as a youth, but said, "[n]ow I have zero attraction to or arousal towards elderly." He testified that he did not realize the victim had been injured when he fled the scene.

[72] On the appellant's version of the predicate offences, the assault was committed when the victim responded to his attempt to break and enter with resistance. With respect to the 1994 sexual assault and robbery, the appellant testified that he did not enter the victim's residence intending to sexually assault her. He said that he did so simply to steal her purse. He acknowledged that he beat and sexually assaulted the victim when his unlawful entry into her private dwelling was met with resistance.

[73] The appellant denied that the SkyTrain assaults were sexually motivated. He testified that he stopped committing offences of this kind on his own accord because "I felt what I was doing was wrong, wasn't pleasurable to me, I wasn't getting any - any -- payoff from doing this." The appellant agreed in cross-examination that the "payoff" he was looking for was "pleasure, satisfaction, excitement."

Reasons for Sentence

1. The Appellant's Motivation for Committing the Predicate Offences

- [74] The judge's factual findings concerning the appellant's knowledge of the victim's age and gender when he began following her, and his motivation and intentions when the predicate offences were committed, were not always expressed as clearly as they might have been.
- [75] Despite the victim's diminutive size, shuffling gait, and the fact that she was wearing a headscarf and full gown as she walked down the laneway to the back entrance of her residence, the appellant maintained that he did not know the person he followed was an elderly female until she turned and looked at him from the inside of her home. The judge rejected this evidence saying:
- [174] I agree with [Crown counsel] that the video depiction of the elevation causing [the victim] to rise above the level of the minivan which delivered her, her slow stride, her attire, and all visible because of the lighting which was activated by sensory motion, lead me to the conclusion Mr. White knew, at least at some time before he followed her, that who he would encounter later on was an elderly female.
- [175] Common sense informs me he would not follow an able-bodied male into a backyard of such a person's residence.
- [176] The complainant's attire, coupled with her diminutive size and her shuffling gait, makes it probable she was of advanced years.
- ...
- [179] Instead, I conclude Mr. White followed [the victim] into the backyard knowing, or at least suspecting, she was female, elderly, and entering an otherwise unoccupied home. I conclude the latter because of the security lighting coming on, and her entry into a home that was otherwise unlit.
- [76] The appellant testified that he was wandering around the victim's residential neighbourhood with the intention of stealing a scooter or a bicycle from someone's backyard. He said he followed the victim down the pathway to the rear entrance of her home with the intention of stealing the code to her home security system and returning later to commit a break and enter. The appellant acknowledged that his plan shifted and that he decided to enter the victim's home and steal her purse but "do nothing more." He testified that the predicate offences were not sexually motivated.
- [77] The judge rejected the appellant's version of events on this point noting that he had "no faith . . . [the appellant] accurately recounted his motivation or intentions in entering into the complainant's backyard." Later in his reasons, the judge explicitly rejected the appellant's contention that he followed the victim to the back of the house for the sole purpose of committing a theft:

- [180] That conclusion is supported, at least by inference, from the evidence of Dr. Bartel. Dr. Bartel, while acknowledging that Mr. White was not charged with a sexual offence, expressed reservations as to the completeness of the disclosure Mr. White made given the pending sentencing and the similarity between the chosen mode of entry into the premises of an elderly person with the catastrophic result which resulted in 1994.
- [181] Similarly, I conclude that the events leading to his conviction of the two incidents occurring at the SkyTrain station were of a sexualized nature.
- [182] I disbelieve Mr. White's testimony when he says there were no sexual motivation [behind the SkyTrain assaults].
- [183] All of the above informs my conclusion that Mr. White's actions on the evening of the predicate offence constitute a "pattern or repetitive behaviour" as described in *R. v. Pike*, 2010 BCCA 401.
- [184] I am satisfied the attempted break and enter into the complainant's residence was in furtherance of an extensive history of breaking and entering that has occurred over Mr. White's criminal past. Support for this conclusion is found in the criminal record and the various convictions for break and enter . . .
- ...
- [186] This offence, that is, the offence on April 7, 2016, is part of an ongoing pattern of breaking and entering into vulnerable elderly females' homes. As noted, I reject Mr. White's more benign explanation.
- [187] I conclude Mr. White entered into the backyard of [the victim's] residence for the express purpose of attempting to gain entry while [the victim] was in the home. Whether or not he had it on his mind as he followed her to engage in some form of sexual activity were he to gain entry is not determinative for the purpose of s. 753(1)(a)(i).
- [188] History has demonstrated and Mr. White conceded that his criminal thinking escalated over the course of the evening of the offences for which he was convicted. History has also demonstrated that when confronted with resistance, his violence escalates to the point demonstrated in the 1994 conviction.
- [189] The fact that on the evening of April 7, 2016, he failed to gain entry to the victim's] home in no way ameliorates the concern I have regarding his future behaviour.
- [Emphasis added.]
- [78] When the judge turned to consider the application of s. 753(1)(b), he said, "I cannot conclude, beyond reasonable doubt, that there was a sexual component to the offender's convictions by me." Based on this remark, the Crown conceded on appeal that the judge did not find the predicate offences to be sexually motivated.

[79] Absent the concession, I may have come to different interpretation of the judge's reasons on this issue. He rejected the appellant's testimony that the predicate offences were motivated by a desire to commit theft. He noted the similarities between the predicate offences and the offence committed in 1994. He then found that the SkyTrain offences were "similarly" sexually motivated. But I acknowledge the existence of ambiguity in the judge's reasons on this point. In the circumstances, I have determined that the fairest course is to proceed on the footing that no finding was made below that the appellant followed the victim with the intention of gaining entry to her residence and sexually assaulting her. In coming to this conclusion, I have placed considerable reliance on the position taken by Crown counsel with conduct of the application (not Crown counsel on appeal) that he was not asking the judge to find the Crown had proved beyond a reasonable doubt the appellant intended to sexually assault the victim. That the judge did not definitively resolve this issue is consistent with the position taken by Crown counsel on the application that it was unnecessary for him to do so. As I have noted, the judge did not, in any event, consider the issue to be determinative of the application to have the appellant declared a dangerous offender under s. 753(1)(a)(i).

2. The Pattern Analysis

[80] Subsection 753(1)(a)(i) requires proof beyond a reasonable doubt that the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing a pattern of repetitive behaviour, of which the predicate offence(s) form a part, showing a past failure of behavioural restraint and a likelihood that the offender will cause death or injury to other persons, or inflict severe psychological damage on other persons, through failure in the future to restrain that behaviour.

[81] The judge described the past pattern of behaviour engaged in by the appellant in different ways at different points in the judgment. For convenience, I will extract and group the behavioural patterns identified by the judge:

i. A pattern of nighttime break-ins to residential dwellings occupied at the time of the offence;

[190] The predicate offence falls within a pattern demonstrating his failure to restrain his behaviour; a pattern of predatory attitudes towards elderly vulnerable females and a pattern of nighttime break-ins into private dwelling homes that are occupied.

ii. A pattern of break-ins to private dwellings occupied by vulnerable, elderly females

[186] This offence, that is, the offence on April 7, 2016, is part of an ongoing pattern of breaking and entering into vulnerable elderly females' homes. As noted, I reject Mr. White's more benign explanation.

iii. A pattern of breaking and entering occupied homes to steal, or worse, assault the occupants

[195] I agree with the Crown that throughout his lifetime of crime, Mr. White has demonstrated a protracted and intractable pattern of criminal behaviour of which the index offence forms a part; that is, he is unable to restrain those behaviours even in the most controlled of circumstances and informs my decision that future behaviour is likely to result in either injury or severe psychological damage to others.

[196] I further agree with the Crown that the continued pattern of breaking and entering into occupied homes to steal, or worse, assault the occupants, despite all the assistance provided through programs while in custody demonstrates the intractability of Mr. White's behaviour despite his apparent compliance with therapy and his outward appearance of calm while at Belkin House.

iv. A pattern of violent offences against women; many of whom are elderly and more vulnerable than the general population of women

[200] I adopt the submission of [Crown counsel] where he says that the pattern of offences committed by Mr. White demonstrate a significant pattern of offences against women; many of whom are elderly and more vulnerable than the general population of women.

[201] Mr. White's pattern of offending is demonstrated by the following:

- a. Sexual Assault May 18, 1986 - Female victim, 56 years old;
- b. Sexual assault April 2, 1986 - Female victim, 64 years old;
- c. Sexual Assault October 2, 1985 - Female victim, 57 years old;
- d. Break and Enter and Indecent Act, 1986 - Female Victim of Seniors Complex;
- e. Break and Enter and Indecent Act, March 3, 1986 - Female Victim;
- f. Break and Enter & Indecent Act, August 11, 1986 - Female Victims x2 - these victims were pre-teen girls;
- g. Indecent Act, July 15, 1987 - Female Victim x2 - Victims aged 13;
- h. Sexual Assault, October 5, 1988 - Female Victim, 59 years old;
- i. Sexual Assault, October 5, 1988 - Female Victim;
- j. Sexual Assault, October 5, 1988 - Female Victim, aged 64;
- k. Break and Enter and Commit Aggravated Sexual Assault and Robbery, Female Victim, 79 years old;
- l. Break and Enter, April 22, 1995 - At least one female victim;
- m. Break and Enter, June 17, 1996 - Female Victim;
- n. Assault, June 27, 2014 - Female Victim;

- o. Assault, July 3, 2014 - Female Victim; and
- p. Attempt Break and Enter and Assault Causing Bodily Harm, April 7, 2016 - Female Victim, aged 86, specifically the predicate offence.

[202] Here, the pattern is repeated by his preference for elderly female victims toward whom he has behaved violently.

[203] As noted, the offences against the younger women in the SkyTrain station are, in my view, crimes of violence against women for the reasons I have already stated.

[82] Later, the judge observed that the appellant is capable of escalating his conduct to sexual violence when he encounters resistance from the victim.

3. The Prospective Assessment of Risk

Section 753(1)(a)(i)

[83] The judge considered treatment prospects at the designation stage but noted that the appellant continued to offend after participating in a variety of different programs. He accepted the opinion of Dr. Bartel that "a willingness to undergo treatment and/or genuine desire to resist impulses such as those I find dictate Mr. White's criminal history, provide no assurance that treatment will achieve the desired goal." He concluded that the appellant's behavioural disorder was intractable and that he "is at high risk to reoffend." As such, the judge was satisfied beyond a reasonable doubt that the appellant constitutes an ongoing threat to the life, safety or physical or mental well-being of other persons within the meaning of s. 753(1)(a)(i).

Section 753(1)(b)

[84] In conducting the analysis under s. 753(1)(b), the judge accepted the proposition that an offender may be found to be a dangerous sexual offender even if the failure to control sexual impulses in the future is likely to arise only in certain opportunistic circumstances. He noted that the appellant's elevation of violence to sexual violence seemed to occur "when a victim is resisting, as did [the victim] in the 1994 conviction." The judge again considered the appellant's treatment prospects in deciding whether to make the designation. He concluded that past treatment for sex offenders had not served to ameliorate the risk the appellant poses to women and found, at least implicitly, that further treatment interventions would not do so now. He concluded that the appellant would likely cause injury, pain, or other evil to women in the future by failing to control his sexual impulses. He relied on the SkyTrain offences in support of this conclusion, which he found to be sexually motivated.

4. The Penalty Stage

- [85] Having designated the appellant a dangerous offender, the judge considered whether there was a reasonable expectation that additional treatment would reduce the appellant's risk to an acceptable level such that an indeterminate sentence should not be imposed. His approach to this issue is consistent with the analytical framework set out in *Boutilier* at paras. 42-45, 57, 60, 65.
- [86] The judge noted that the appellant continued to reoffend, including by committing the Skytrain common assaults, after participating in treatment for sex offenders and while subject to intensive community-based supervision. He concluded the evidence did not give rise to a reasonable expectation that the risk the appellant would reoffend by committing a serious personal injury offence could be reduced to an acceptable level by any sentence other than a sentence of indeterminate imprisonment.

IV. Grounds of Appeal

- [87] Against this background, the appellant advances three grounds of appeal:
1. The court had no jurisdiction to designate the appellant a dangerous offender under s. 753(1)(b);
 2. The judge erred in applying s. 753(1)(a)(i) by relying on non-patterned misconduct at the designation stage; and
 3. The judge's analysis at the designation and penalty stages under s. 753(1)(a)(i) was skewed by an impermissible "disconnect" between the index offence, the established pattern, and the prospective assessment of risk.

V. Analysis

No Jurisdiction to Designate the Appellant Dangerous under s. 753(1)(b)

- [88] This point is conceded by the Crown on appeal. The sentencing judge--who did not receive from counsel the assistance to which he was entitled--erred in designating the appellant a dangerous offender under s. 753(1)(b). The issue is whether this error materially prejudiced either the fairness of the proceeding or its outcome. For reasons I will develop, I am satisfied that it did not.

Reliance on Non-Patterned Misconduct at the Designation Stage

- [89] The appellant concedes on appeal that the evidence established a pattern of nighttime break-ins into occupied, private dwellings. He says this is the narrow pattern of past behaviour the judge identified at paragraph 190 of his reasons (reproduced herein at paragraph 81). He further concedes that the index offence--a nighttime residential break-in of an occupied dwelling that was not shown to be sexually motivated--forms part of this pattern. He submits, however, that neither the index offence nor the identified pattern reflects a history of sexualized violence against women.

- [90] In supplementary written submissions filed at the request of the Court, the appellant conceded the judge also found at paragraph 201 of his reasons (reproduced herein at paragraph 81) a pattern of offences against women. He submits, however, that the pattern the judge purported to identify is impermissibly broad. He argues that the past offences grouped together by the judge at paragraph 201 cannot properly constitute a pattern within the meaning of s. 753(1)(a)(i). He says the judge erred in principle by not identifying the "essential characteristics" of the additional pattern he found and by including in his pattern analysis: (1) instances of sexual and non-sexual violence (the appellant submits that the SkyTrain common assaults were improperly lumped together with past sexual assaults targeting older women); (2) sexual assault-related offences targeting both younger and older women committed in markedly different contexts; and (3) at least one and perhaps two break and enters that did not involve any assaultive or overtly threatening behaviour. I note that the appellant did not take issue with the judge's decision to include within the pattern break and enters that involved the commission of an indecent act directed towards a female occupant. I take from this an acknowledgement by the appellant that such acts are inherently violent because they instill fear and cause harm.
- [91] The thrust of the appellant's submission is this: the designation criteria in s. 753(1)(a) are not designed to catch recidivism generally, but an identifiable and well-defined pattern of behaviour from which it can confidently be predicted that the offender will likely cause harm in the future by engaging in criminal conduct consistent with his past pattern: *R. v. Lyons*, [1987] 2 S.C.R. 309 at 328, 364; 1987 CanLII 25 (SCC); *R. v. Dow*, 1999 BCCA 177 at para. 25 [Dow]; *Pike* at para. 90; *Patel* at para. 222. In essence, the appellant submits that the judge's pattern analysis lacks the analytical rigour the provision requires.
- [92] I am not persuaded that the judge committed material error in principle in his approach to the pattern analysis.
- [93] I begin my analysis by framing this ground of appeal with five propositions that reflect settled law.
- [94] First, while it is necessary to particularize the pattern, the particularization should not be so detailed as to obscure the common characteristics that underlie past behaviours. As this Court put it in *Dow* at para. 25, "there may be differences between each example, some of them quite distinctive, so long as the differences leave the key significant relevant elements of the pattern in place." The pattern should be described in such a way as to provide a basis to predict the likelihood of the same type of behaviour occurring in the future: *Pike* at para. 90. What is key is that there be a past pattern of repetitive behaviour, also evident in the predicate offence, demonstrating a failure of behavioural restraint and the likelihood that the offender will cause death or injury to, or inflict severe psychological damage on, other persons by failing to restrain that behaviour in the future: *Dow* at paras. 21, 24.

- [95] Second, where, as in this case, the offender has a lengthy, entrenched, and diverse history of committing violent acts against women, the similarity requirement embedded in the pattern analysis is less exacting. In *R. v. Neve*, 1999 ABCA 206 at para. 113 [Neve], the Court put it this way: "the requirement for similarity in terms of kinds of offences is not crucial when the incidents of serious violence and aggression are more numerous": see also *R. v. Jones*, [1993] O.J. No. 1321 at paras. 3-4 (C.A.); 63 O.A.C. 317; *R. v. Hogg*, 2011 ONCA 840 at paras. 39-40, 43 [Hogg]; *R. v. Szostak*, 2014 ONCA 15 at para. 57. In cases of this kind, it will often be unnecessary to bring to the pattern analysis the same rigorous identification of similarities that may be required when fewer instances of misconduct are in play: see, for example, *R. v. Walsh*, 2017 BCCA 195 at paras. 35, 44.
- [96] Third, the pattern analysis is tied to past behaviour, not past offences: *R. v. McCallum*, 2016 SKCA 96 at para. 46, leave to appeal ref'd [2017] S.C.C.A. No. 37236 [McCallum]. The inquiry mandated by s. 753(1)(a)(i) will often be more nuanced than simply looking at the offender's criminal record and categorizing past behaviour by reference to the nature of the conviction entered. The pattern analysis must necessarily take account of the context in which an offender has miscondacted himself in the past. As the Alberta Court of Appeal pointed out in *Neve* at para. 118, "whether something is likely to be repeated in the future is linked not only to what happened in the past but why it happened."
- [97] Fourth, while it is for the sentencing judge to determine whether a pattern exists, how that pattern is revealed in the offender's past conduct, and whether the predicate offence forms part of the established pattern, expert evidence may be relevant to the interpretation of past conduct and the pattern analysis: *Neve* at para. 181.
- [98] Finally, it must be borne in mind that what are sometimes referred to as "sexual offences" are in fact offences of violence, behaviourally manifested in conduct that violates the sexual integrity of the victim. Put differently, violence is inherent in the act of applying force of a sexual nature. This has been accepted in relation to child victims: *R. v. L.M.*, 2008 SCC 31 at para. 26. It is no less true in the case of adult victims.
- [99] With these foundational principles in mind, I turn now to address the appellant's arguments.
- [100] In my view, the judge found an identifiable pattern--the same pattern he was invited to find by the Crown on the hearing of the dangerous offender application--in paragraph 201 of the reasons for sentence (reproduced herein at paragraph 81). As the judge noted, the appellant's past behaviour reflects a significant and long-standing pattern of violence towards women, with a preference for older female victims who are more vulnerable. That the pattern includes sexual and non-sexual violence against women is inconsequential in the circumstances of this case. I do not consider that the judge was required in this case to define the past pattern of behaviour more closely, even though it may have been possible for him to have done so.

- [101] Further, the judge was not required in this case to treat as falling outside the appellant's past pattern of behaviour acts of non-sexual violence directed towards women. While I might take issue with the inclusion of the break and enter committed on April 22, 1995, in the pattern analysis, nothing of significance flows from the judge's decision to include this offence in the pattern. The error, if there be one, is of no consequence. The pattern identified by the judge was sufficiently particular to enable assessment of whether it had been shown beyond a reasonable doubt that the appellant would likely offend violently against women in the future.
- [102] I see no error in the judge's decision to include the predicate offence in the pattern. The judge found the appellant knew his victim was an elderly woman before he attempted to enter her home by force. He engaged her in a violent encounter that caused her significant physical injuries and severe psychological harm. While the offence was not proven to have a sexual component, the judge rejected the appellant's assertion that his plan was to enter the victim's residence, grab her purse "and do nothing more." He noted that when confronted with resistance, the appellant's resort to violence escalates. The judge concluded that the appellant was out of control with anger when he was unable to force his way into the victim's residence. Further, he knew the terrorizing effect he was having on the victim yet persisted in trying to gain entry. The fact that he failed to do so did not ameliorate the judge's concern about his future behaviour. In my view, it was unnecessary for the judge to conclude that the appellant was motivated to sexually assault the victim. He seriously assaulted her, and I cannot read the reasons of the judge as supporting anything other than a conclusion by him that the appellant would have physically harmed the victim to an even greater extent had he been successful in forcibly entering her home.
- [103] Additionally, what connects the predicate offence to the established pattern is the stimulation, "jolt" or adrenaline rush the appellant experiences by targeting women--often older women--for predatory assaults or other acts designed to terrorize and harm them. While the appellant's behaviour does not always escalate to sexual violence, it is clearly motivated by the same irresistible and deviant desire to exert power and control over his victims. The judge found as much, and this finding is supported by the evidence. As Dr. Bartel noted, "his offending pattern appears to be as much related to thrill seeking and power/control as it does to sexual arousal." In short, the evidence adduced on the hearing leaves no doubt that the appellant's sexual deviance and aggressive tendencies are inextricably linked. His irresistible desire to exercise power and control over women unite the offences the judge included within the pattern and explain why the appellant persistently offends as he does.
- [104] Related to this point, the judge was also entitled to give weight to Dr. Bartel's opinion that there are, from a psychological perspective, similarities between the index offence and the appellant's past pattern of behaviour, even though the index offence did not result in sexualized violence.

[105] In conclusion, I see no material error in the judge's identification of the pattern contemplated by s. 753(1)(a)(i), nor do I see any error in his conclusion that the predicate offence formed part of the identified pattern.

Disconnect Between the Pattern and the Prospective Assessment of Risk (Designation Stage) and the Pattern and the Manageability of Risk (Penalty Stage)

[106] What lies at the heart of this ground is an argument that the prospective assessment of risk at the designation stage and the manageability of that risk at the penalty stage (short of the imposition of an indeterminate sentence) improperly focused on the risk of sexual re-offence in circumstances where the predicate offence was a violent offence that was not proven to be sexually motivated.

[107] The appellant submits that the required analysis at both stages was skewed by the Crown's erroneous decision to invoke s. 753(1)(b) as an additional gateway to a dangerous offender designation, and by Dr. Bartel's focus on the risk of sexual assault-related recidivism. Put differently, the appellant submits that the prospective assessment of risk was based on a perceived threat (sexual recidivism) not shown to be operative at the time of the commission of the index offence. He relies on Pike at paras. 76-82 and Patel at para. 224 in support of the proposition that the prospective assessment of risk cannot be grounded in a perceived threat unrelated to the predicate offence and the past pattern of behaviour of which the predicate offence forms a part. The appellant says this error flowed through to the penalty stage where the inquiry into community-based manageability of the appellant's behaviour improperly focused on the risk of violent sexual re-offence.

[108] In his supplementary written submissions, the appellant advanced this additional argument: that s. 753(1) contemplates two categories of dangerousness-- dangerousness resulting from violent behaviour and dangerousness resulting from sexual behaviour. He relies on Boutilier at para. 16 in support of this proposition.

[109] I do not understand the appellant to go so far as to suggest that where the predicate offence is a violent non-sexual offence, a past offence involving sexual violence could never form part of a pattern that includes the predicate offence. Nor do I understand him to suggest that the prospective assessment of risk could never include consideration of violent sexual recidivism where the predicate offence involves violent behaviour without a sexual component. Indeed, there are many examples of cases where a dangerous offender designation rests on a violent, non-sexual predicate offence that has been found to form part of a pattern that includes past sexual violence: see, for example, Dow, where the predicate offences--violent offences not found to be sexually motivated--formed part of the offender's past pattern of violence against women that included three prior sexual assaults.

[110] Further, I do not understand the appellant to resist the proposition that had the trial judge found the predicate offences to be sexually motivated, he could have conducted the prospective risk assessment under s. 753(1)(a)(i) having regard to the risk of sexual recidivism: see, for example, Hogg, where a dangerous offender designation was upheld

under s. 753(1)(a)(i) because the predicate offences--two counts of assault with a weapon and one count of assault-- even though not offences of sexual violence, were found to be sexually motivated.

[111] I do, however, understand the appellant to argue that his history of violent sexual offending could not form the foundation for the threat assessment in this case because the predicate offence was a non-sexual offence that was not shown to be sexually motivated.

[112] I am unable to give effect to this ground of appeal.

[113] First, I do not accept that Boutilier stands for the proposition that there are two distinct categories of dangerous offenders--those who are likely to commit violent offences and those who are likely to commit sexual offences.

[114] The appellant relies on the following passage from the reasons of Justice Côté in Boutilier:

[16] Section 753(1) contemplates two categories of dangerousness: (a) dangerousness resulting from violent behaviour (as in Mr. Boutilier's case), and (b) dangerousness ensuing from sexual behaviour. Only the former category is at issue in this appeal.

[115] These remarks were made by way of general introduction to the dangerous offender provisions on an appeal where neither the interpretation of the definition of "serious personal injury offence" in s. 752 nor the interaction between ss. 753(1)(a) and (b) were before the Court. They cannot fairly be read as broadly as the appellant suggests.

[116] The definition of "serious personal injury offence" in s. 752(a) is broad enough to capture all forms of serious violent offending. As the Court noted in *R. v. Steele*, 2014 SCC 61 at para. 56, the offences enumerated in subparagraph (b) of the definition of "serious personal injury offence" will often meet the qualitative criteria of subparagraphs (a)(i) and (ii). It is, therefore, open to the Crown to commence an application under s. 753(1)(a) following an offender's conviction for violent sexual conduct falling within the definition of "serious personal injury offence" set out in s. 752(a). Indeed, it is open to the Crown to commence a dangerous offender application under s. 753(1)(a) and (b) where the predicate offence is an offence of sexual violence, including one enumerated in the definition of "serious personal injury offence" in s. 752(b). There are many examples of dangerous offender designations being made under both s. 753(1)(a) and (b) following an offender's conviction for a sexual assault related offence: see, for example, *R. v. Hexamer*, 2019 BCCA 285, leave to appeal ref'd [2020] S.C.C.A. No. 38858 (S.C.C.). The appellant's concession that the threat assessment could conceivably include consideration of violent sexual recidivism where, as in *Dow*, the predicate offence involves violent behaviour without a sexual component, undermines his position on this point.

[117] In addition, it is noteworthy that the definition of "serious personal injury offence" in s. 752(b) does not include many other violent sexual offences enumerated in the Code, including sexual interference, invitation to sexual touching, and sexual exploitation. Had Parliament intended s. 753(1)(b) to be the sole means through which an offender could be

declared dangerous for violent sexual offending, it would have provided an expanded definition of "serious personal injury offence" in s. 752(b), and excluded offences included within this expanded definition from the reach of s. 752(a). In addition, it would have included within this expanded definition offences proven to have been committed for sexual purpose (for example, choking, to overcome resistance). It did neither of these things.

- [118] Second, and more importantly for present purposes, there is nothing in the language of s. 753(1)(a)(i) that confines the prospective risk assessment to any particular type of harm, and nothing in the language of the provision that excludes from its reach the risk of harm inflicted through future acts of sexual violence. Section 753(1)(a)(i) is, in this respect, unlike s. 753(1)(b). The threat assessment contemplated by s. 753(1)(a)(i) is not limited to any category of future risk. It requires proof beyond a reasonable doubt that the offender has engaged in a pattern of repetitive behaviour, of which the predicate offence forms a part, showing a failure of behavioural restraint and a likelihood that the offender will cause death, injury, or severe psychological damage to others through failure in the future to restrain the behaviour the pattern reveals. By contrast, the threat assessment contemplated by s. 753(1)(b) requires proof beyond a reasonable doubt of a more narrowly defined type of harm--that the offender is likely to cause harm to others through failure in the future to control their sexual impulses.
- [119] Third, I reject the appellant's proposition--foundational to many of his arguments--that violence and sexual violence are distinct and should have been treated so in this case because the predicate offence was not shown beyond a reasonable doubt to be sexually motivated. The appellant's submission ignores the judge's acceptance of Dr. Bartel's evidence that his offending pattern of behaviour is driven as much by his need to exert power and control over women as it is by sexual arousal. That the past and likely future behaviour of the appellant will involve both violent and sexually violent acts directed at women does not, in my view, have the effect of unmooring the prospective assessment of risk from either the predicate offence or the past pattern of behaviour. Rather, the assessment of risk conducted in this case takes account of the appellant's lengthy and diverse criminal history and the likelihood that he will, consistent with his past pattern, offend violently against women in the future.
- [120] Fourth, although Dr. Bartel focused on the risk of sexual recidivism, he emphasized in his report (under the subheading "Risk Assessment") and in his testimony that many of the factors he considered in formulating his opinion as to the future risk the appellant poses to the community "apply equally to sexual and nonsexual violence." As noted earlier, Dr. Bartel was not challenged on this point in cross-examination.
- [121] In short, I see no "disconnect" in this case between the predicate offence, the past pattern of behaviour identified by the judge and the prospective assessment of risk. Indeed, in conducting the prospective assessment of risk required pursuant to s. 753(1)(a)(i), the judge focused on the likelihood that the appellant would commit crimes of violence against

women in the future. While the judge's threat assessment included the risk that the appellant would commit acts of sexual violence against women, it was not confined to that risk. As the judge noted in paragraph 202 of his reasons (reproduced herein at paragraph 81), the predicate offence is an example of the pattern being repeated because it targeted a woman for violence and reflects the appellant's preference for older female victims.

[122] Having defined the pattern of past behaviour as the commission of violent offences against women (with a preference for older female victims), the judge concluded that "history has demonstrated there are no measures by which the community can be adequately protected from Mr. White's propensity to seriously reoffend in the nature contemplated by the section." There is no doubt that the judge's assessment of whether the appellant's risk could be reduced to an acceptable level without imposing an indeterminate sentence included the risk of sexual recidivism and the appellant's unresponsiveness to previous treatment programs for sex offenders. Given the appellant's history of violent sexual offending and diverse pattern of criminal behaviour, I do not see how it could be otherwise. The judge said this:

[231] At the Penalty Stage, the sentencing judge must impose an indeterminate sentence unless satisfied there is a reasonable expectation lesser measures will adequately protect the public. That said, the least intrusive sentence required to achieve the protection of the public is the appropriate sentence.

...

[245] Here, with a view to Mr. White's history combined with the opinion of Dr. Bartel and my assessment, all of the factors I have noted in these reasons for judgment including my rejection of Mr. White's motivation in the testimony offered, the evidence does not leave me with a reasonable expectation that the risk of Mr. White reoffending by commission of a serious personal injury offence can be controlled so as to reduce it to an acceptable level. Age is a factor noted by Dr. Bartel with sexual offences such as have been committed by Mr. White. It appears the passage of time is the greatest assurance of a reduction in the risk of reoccurrence. That said, no timeline was offered to guide me in assessing what might occur in the future for Mr. White.

[246] Given the course of Mr. White's treatment and apparent success in completing programs whilst in custody and in Belkin House, Dr. Bartel did not express a view that any further treatment known to him would ameliorate the risk he poses to an acceptable level. I am satisfied that the updated sexual offender program referenced in the evidence could be offered to Mr. White during a determinate sentence, but even if coupled with a further LTSO, that program is substantially the same as he has already successfully completed and, as demonstrated, his supervision under the provisions of an LTSO have not ameliorated his criminal behaviour.

[247] Even presuming electronic monitoring could inform the Parole Board of Mr. White's whereabouts at any given time, I am satisfied on the evidence there is no current technology or manpower available that would ameliorate his risk even knowing where he was moment by moment. Self-regulation is required, but this is glaringly absent for Mr. White. As is clear from Johnson, mere optimism that an offender who is willing to take treatment programs will eventually become rehabilitated is insufficient reason to impose a determinate sentence with post-release supervision.

[248] I conclude there is no reasonable possibility that Mr. White can be controlled in the community so as to ameliorate his ongoing risk to reoffend in a significant fashion. This conclusion is supported by the combination of historical events which have taken place since his original release in January 2013, coupled with the opinion of Dr. Bartel . . . In arriving in the conclusion that the appropriate sentence for Mr. White is an indeterminate sentence, I have considered the available options and conclude an indeterminate sentence is the only sentence which adequately provides for the safety of the community.

[Emphasis added.]

[123] I take from the judge's discussion at the penalty stage that he focused on whether there was a reasonable expectation that a sentencing measure other than an indeterminate period of incarceration would reduce, to an acceptable level, the risk that the appellant would commit a serious personal injury offence in the future. I do not consider the judge's analysis at this stage of the proceeding to be focused exclusively on the risk of sexual recidivism. Rather, the threat assessment was tied to the identified pattern and included the risk that the appellant would violently reoffend against women. I am fortified in this conclusion by the judge's reiteration of his rejection of the appellant's explanation that he intended to steal the victim's purse but do nothing more to her. Although the judge did not find beyond a reasonable doubt that the predicate offences were sexually motivated, he must be taken to have concluded that the appellant would have physically harmed the victim had he been able to gain entry to her home. The emphasis the judge placed on this issue at the penalty stage demonstrates that his assessment of whether the appellant could be managed in the community encompassed the identified root causes of his behaviour--the need to exert power and control over women--and the risk that the appellant's deviant predilection would manifest itself in the future through violent behaviour (including sexually manifested violence) likely to cause harm to women. So understood, I see no disconnect between the predicate offence, the identified pattern of past behaviour and the analysis conducted by the judge at the penalty stage.

VI. Conclusion

- [124] While the judge erred in declaring the appellant a dangerous offender under s. 753(1)(b), he also found the appellant to be a dangerous offender under s. 753(1)(a)(i). I am satisfied the error did not have a material impact on the fairness of the hearing or the result: Johnson at para. 49.
- [125] On the evidence before him, the judge was entitled to conclude at the designation stage that the predicate offence formed part of the appellant's past pattern of committing violent acts against women, many of whom are older, and that the appellant was, based on this pattern, likely to cause significant harm to women by failing to restrain his behaviour in the future. I see no disconnect in the analysis that was conducted at either the designation or penalty stages of the proceeding.
- [126] As I see no reversible error in principle in the decisions to declare the appellant a dangerous offender and sentence him to an indeterminate period of imprisonment, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Voith"

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