COURT OF APPEAL OF YUKON

Citation: *R. v. Skookum*,
2018 YKCA 2

Date: 20180312
Whitehorse Docket: 16-YU797

Between:

Regina

Respondent

And

Anthony Charlie Skookum

Appellant

Restriction on Publication: Publication of information that could disclose identity of the complainants has been prohibited by court order pursuant to s. 486.4(2) of the *Criminal Code.*

Pursuant to s. 16(4) of the *Sex Offender Information and Registration Act* [*SOIRA*], no person may disclose any information collected pursuant to an order under the *SOIRA* or the fact that information relating to a person is collected under the *SOIRA*.

Before: The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch

On appeal from: An order of the Territorial Court of Yukon, dated November 10, 2016 (*R. v. Skookum*, 2016 YKTC 62, Whitehorse Docket 15-00325).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Vancouver, British Columbia October 16, 2017
Written Submissions Received:	January 16, 29 and 31, 2018
Place and Date of Judgment:	Vancouver, British Columbia March 12, 2018

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

Summary:

Appeal from an order designating the appellant a dangerous offender and sentencing him to an effective term of six years' imprisonment followed by a ten-year long-term supervision order in relation to a conviction for sexual assault. Held: appeal allowed in part. The sentencing judge erred in principle by: (1) failing to consider the appellant's treatment prospects at the designation stage in accordance with R. v. Boutilier, 2017 SCC 64; and (2) concluding that the threshold for designating an offender a dangerous offender is "fairly low". The dangerous offender designation is set aside. A new dangerous offender hearing is neither necessary nor appropriate because, on the factual findings made by the sentencing judge relating to the appellant's treatment prospects, he could not properly be designated a dangerous offender. Those same factual findings establish, however, that the appellant meets the criteria for designation as a long-term offender. The appellant's counsel acknowledged this in the court below. Accordingly, a finding that the appellant is a long-term offender is substituted pursuant to s. 759(3)(a)(i) of the Criminal Code. With respect to the determinate sentence, the appellant submitted that, whether or not this Court set aside the dangerous offender finding, it was obliged to assess the fitness of the sentence imposed by applying the well-established standard of review on appeals from sentence. Adoption of this approach would lead to dismissal of the appeal from the determinate sentence. The appellant's submissions on this point, however, do not properly reflect the role of this Court in these circumstances. Having set aside the dangerous offender designation and substituted a finding that the appellant is a long-term offender, the task of this Court is not to review the fitness of the sentence imposed in the court below, but to impose the sentence it considers fit and appropriate. Weighing the objectives and principles of sentencing applicable to this case, a sentence of 50 months' imprisonment, followed by a ten-year period of long-term supervision is imposed – the same sentence imposed by the sentencing judge. The appellant's history of violent offending and the substantial risk he poses to the public require the imposition of this penalty. A lesser sentence would not give proper expression to the purposes and principles of sentencing.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] On November 10, 2016, the appellant was found to be a dangerous offender following an application by the Crown brought pursuant to s. 753(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]. This provision permits the making of a dangerous offender designation in respect of an accused who has been convicted of a serious personal injury offence and who has shown, by his conduct in any sexual matter, including the predicate offence, a failure to control his sexual impulses and

the likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses. The application was predicated on the appellant's conviction for sexually assaulting a 17-year-old female acquaintance.

[2] The Crown conceded that the evidence adduced on the application established a reasonable expectation that a lesser measure than an indeterminate period of incarceration would adequately protect the public against commission by the appellant of a future serious personal injury offence. The sentencing judge agreed. After giving the appellant credit for time spent in pre-sentence custody, the judge imposed a sentence of 50 months' imprisonment followed by a ten-year period of long-term supervision. The judge also made a number of ancillary sentencing orders that are not at issue on this appeal.

[3] The appellant appeals from the dangerous offender designation on grounds that the sentencing judge erred in law by: (1) holding that the threshold for such a designation is "fairly low"; and (2) failing to consider his treatment prospects at the designation stage. The appellant seeks an order setting aside the dangerous offender finding. In oral argument, counsel for the appellant conceded that the appellant was shown to meet the criteria for designation as a long-term offender set out in s. 753.1 of the *Code*. He invited this Court to substitute for the dangerous offender designation a finding that the appellant was a long-term offender.

[4] Whether or not the dangerous offender designation is set aside, the appellant appeals from the determinate sentence and invites consideration of the fitness of that sentence on the well-established standard of review most recently addressed in *R. v. Lacasse*, 2015 SCC 64. He maintains that the sentencing judge erred in principle by: (1) artificially inflating the sentence to permit correctional authorities adequate time to deliver treatment programs in custody; (2) failing to give him appropriate credit for pre-sentence custody; and (3) failing to apply the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2 of the *Code*. In the event that error in principle is not established, the appellant says the determinate sentence is demonstrably unfit. He argues it is "completely out of proportion to the

gravity of the offence", fails to reflect his personal circumstances and moral culpability, and constitutes a marked departure from sentences imposed on similarly situated offenders for like behaviour. The appellant seeks an order "varying" the determinate sentence to require him to serve an actual sentence of no more than 38 months' imprisonment.

[5] The appeal was argued on October 16, 2017. The Court reserved judgment. On December 21, 2017, while the appeal was under reserve, the Supreme Court of Canada released its decision in *R. v. Boutilier*, 2017 SCC 64. At the invitation of the Court, the parties filed supplementary written submissions addressing the impact of *Boutilier* on the resolution of the issues raised on appeal.

[6] In addition to reasserting his main grounds of appeal, the appellant advances two additional grounds in his supplementary factum. First, he submits that s. 753(1)(b) of the *Code* requires the Crown to demonstrate a "pattern" of offending before a dangerous offender finding can be made and that this requirement was not addressed by the judge in his reasons for sentence. The appellant submits that this proposition finds support in *Boutilier* at para. 38. Second, the appellant advises he is no longer prepared to agree to the substitution of a long-term offender finding unless this Court substantially reduces the determinate sentence. If the Court declines to take this approach, he seeks a new hearing on the issues of whether he should be designated a long-term offender and the length of the determinate sentence that should be imposed. The appellant's position on this point is inconsistent with (1) the concession made on his behalf in the court below that the evidence establishes he meets the criteria for designation as a long-term offender and (2) the position he advanced in oral argument of the appeal.

[7] The Crown seeks to uphold both the dangerous offender finding and the determinate sentence imposed in this case.

[8] Dangerous offender hearings consist of a designation stage and a penalty stage. *Boutilier* establishes that a sentencing judge must take into account an offender's treatment prospects at the designation stage. I am satisfied that did not

occur in this case. In my view, failure to do so, standing alone, constitutes reversible error. I am also satisfied that the judge erred in principle by concluding that the threshold for a dangerous offender designation is “fairly low”. The dangerous offender designation must therefore be set aside.

[9] I would not direct a new hearing of the dangerous offender application. The Crown conceded in the court below that the appellant’s behaviour was not intractable – that the risk he poses can be reduced through treatment and that a determinate sentence followed by long-term community supervision would adequately protect the public. It would be contrary to the interests of justice to permit the Crown to resile from this position and argue on a new hearing that the appellant’s conduct is intractable – that the risk he poses cannot be reduced to an acceptable level through treatment intervention and long-term community supervision.

[10] Exercising the broad remedial powers given to this Court under s. 759(3) of the *Code*, I would substitute a finding that the appellant is a long-term offender within the meaning of s. 753.1(1) of the *Code*. In my view, the record before us is more than sufficient to justify this conclusion. On the undisputed factual findings of the sentencing judge, the appellant meets the criteria for designation as a long-term offender.

[11] Having set aside the dangerous offender finding and substituted finding that the appellant is a long-term offender, I am of the view that the task of this Court under s. 759(3) of the *Code* is not to review the fitness of the determinate sentence imposed in the trial court, but to impose the sentence it considers appropriate. After weighing the objectives and principles of sentencing applicable to this case, I would impose the same sentence imposed by the sentencing judge. The appellant’s history of violent offending and the substantial risk he poses to the public require this result. The appellant will, therefore, remain subject to a sentence of 50 months’ imprisonment, followed by a ten-year period of long-term supervision.

II. Background and Procedural History

[12] I will address only so much of the background and procedural history in this matter as is necessary to dispose of the appeal.

(a) The Predicate Offence

[13] The circumstances of the predicate offence are set out in an agreed statement of facts filed for use on the sentencing hearing. The offence was committed on or about April 19, 2015. The appellant was 24 years of age at the time. The female victim was a 17-year-old acquaintance. The appellant and complainant consumed an excessive amount of alcohol the evening of the offence. At the appellant's suggestion, they went to his father's cabin and continued to drink. The victim, who was fully clothed, eventually blacked out. Sometime later in the evening, she remembers the appellant being on top of her engaging in non-consensual sexual intercourse. The appellant is a relatively large man and the victim was not able to get up. When she became fully conscious in the early morning hours, she was naked from the waist down and experiencing vaginal pain. The appellant was lying on the bed beside her. She left the cabin and went to the emergency department of the Whitehorse General Hospital. On examination, the victim's vagina was red and irritated with some associated swelling. The appellant's DNA was identified from a swab taken of the complainant's vagina. The appellant pleaded guilty to the offence of sexual assault. He admitted to having unprotected vaginal intercourse with the victim who had no capacity to consent to this act.

(b) History of Offending

[14] At the time of the application, the appellant had two previous convictions for sexual assault.

[15] On June 22, 2006, the appellant pleaded guilty before a youth court judge to sexually assaulting his girlfriend on November 20, 2005. The appellant was 15 years old at the time of this offence. The circumstances of the offence are also set out in an agreed statement of facts. On this occasion, the appellant and victim were

"making out" in a vacant cabin. The victim objected to the appellant undoing her pants. He ignored her pleas to stop and engaged in an act of unprotected vaginal intercourse without her consent. The appellant was sentenced to 24 months' probation for this offence.

[16] On May 5, 2011, the appellant pleaded guilty to the May 28, 2010, sexual assault of a four-year-old girl. The circumstances of this offence, which are very disturbing, are also set out in an agreed statement of facts. When the appellant was 22 years old, he surreptitiously entered a residence in Whitehorse between 6:30 a.m. and 7:30 a.m. He got into bed with the victim and her seven-year-old brother. He removed the victim's underwear and touched her genital area for a few minutes. The appellant had no relationship with anyone in the home. The appellant received for this offence a territorial sentence of two years less one day followed by three years' probation.

[17] The appellant has a significant record as a youth and adult for other violent offences.

[18] As a youth, the appellant was convicted on May 17, 2007, of assault with a weapon and on October 15, 2007, of aggravated assault. The appellant was intoxicated when he committed both of these offences.

[19] The first offence involved an altercation between the appellant and another male whom the appellant believed was "hitting on" his girlfriend. From the materials put before the sentencing judge in relation to this offence, it would appear that the appellant stabbed the victim with a hunting knife in the face and torso. The victim also sustained defensive wounds to his right hand when he tried to grab the appellant's knife. For this offence, the appellant was placed on an Intensive Support and Supervision ("ISS") Order and a probation order totaling six months.

[20] The second offence also appears to have involved an altercation over a young woman the appellant considered to be his girlfriend. From the materials before the sentencing judge, it would appear that the appellant repeatedly hit the

victim on the head with a shovel, causing numerous and deep cuts to the victim's face and head that required 50 stitches to close. The appellant was sentenced on this occasion to one year of custody and supervision (consisting of eight months' secure custody and four months' community supervision) to be followed by an eight-month ISS Order.

[21] As an adult, the appellant was convicted on November 27, 2014, of assault causing bodily harm. On this occasion, the appellant appears to have repeatedly punched the victim in the face, causing him to lose a tooth and sustain facial lacerations and bruising. The appellant told Dr. Lohrasbe, who was assigned to prepare the assessment report contemplated by s. 752.1 of the *Code*, that he struck the victim with such force that he fractured his own right hand.

[22] The appellant also has a lengthy record as a youth and adult for property-related offences and offences against the administration of justice, including failing to comply with past recognizances and probation orders. He was on probation when the predicate offence was committed.

[23] Dr. Lohrasbe asked the appellant about his history of not complying with court orders. He summarized the appellant's response this way:

> As best I could understand his over-all explanation (he could not recall the circumstances specific to each noncompliance offence) Mr. Skookum described a recurrent pattern. Once he is back in the community, he rapidly starts drinking alcohol and once he is drinking again, it becomes uncontrolled. When intoxicated, he is "*in a different place*", outside the bounds of "*regular society*". His mindset and lifestyle then is at one with his companions, all of whom struggle with substance abuse and drift from day to day with little purpose other than to get intoxicated. Once Mr. Skookum is "*back there doing that*" the expectations and demands of society, including the justice system, fade into the background. He acknowledged that he has been cavalier about meeting demands for compliance partly because he simply did not worry too much about possible consequences. The prospects of returning to jail were not especially intimidating. It is only with current sentencing proceedings that he has become aware of the potential seriousness of his failures to comply.
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> [Italics in original.]

[24] With respect to the sexual assault committed in 2005 and the predicate offence, the appellant told Dr. Lohrasbe that he no longer has any difficulty

accepting that he sexually assaulted the victims. He said he has come to realize that, “I’m just another guy who hurts women … I can’t escape that now. It makes me feel sick”. Dr. Lohrasbe noted that the appellant’s acceptance of responsibility and expression of contrition appeared to be sincere.

[25] The appellant, who testified on the dangerous offender hearing, once again acknowledged that these two offences were wrong and constituted sexual assault. He did not seek to diminish his responsibility for either offence.

[26] Dr. Lohrasbe noted that when he questioned the appellant about his 2011 conviction for sexually assaulting the four-year-old girl in her home, the appellant became quiet and morose. He had no explanation for his conduct and claimed to have no recollection of actually committing the assault. The appellant attributed this to alcoholic blackout. Dr. Lohrasbe concluded that if the appellant was being truthful in this regard, the incident demonstrated the extent to which he can be “out of control” during an alcoholic blackout, including by committing an act the appellant acknowledges to be reprehensible. Dr. Lohrasbe opined that it is possible the appellant, in a drunken state, did not perceptually distinguish between an adult and a child when he committed this offence. Even so, Dr. Lohrasbe emphasized that this hypothesis simply shifts the source of risk from unacknowledged sexual deviance to capacity for gross perceptual error when intoxicated.

[27] In his evidence, the appellant reiterated that he has no recollection of the events surrounding the 2011 sexual assault. He testified that when he heard about what he had done, he felt ashamed.

(c) Circumstances of the Appellant

[28] The appellant was 26 years of age at the time of sentencing. He had been in custody since his arrest on August 28, 2015 – a period of about 14½ months.

[29] The appellant is a member of the Tahltan First Nation. He experienced significant disadvantages in his early childhood. His parents, both of whom struggled with alcohol addiction, separated when he was five or six years old. His father

committed suicide shortly after the separation. The appellant was taken into care on a permanent basis when he was about eight years old because of his mother's abuse of alcohol and unprescribed medications. The appellant recalls, with gratitude, the support he received from his two foster families. The appellant's mother died of cirrhosis of the liver when he was 15 years old. He continues to enjoy the support of his paternal grandmother and an aunt.

[30] The appellant did not fare well in school. His early school years were marked by behavioural problems, truancy, and a lack of interest in education. He was diagnosed with Attention Deficit/Hyperactivity Disorder when he was about nine years old and prescribed Ritalin for the condition when he was ten. He discontinued use of the drug shortly thereafter due to his experience of its side effects.

[31] The appellant began using alcohol and marijuana when he was ten or eleven years old. He began to experiment with ecstasy and cocaine when he was 15 or 16. He stopped using "hard" drugs at the age of 19, but acknowledged that his consumption of alcohol remained "out of control" and that he was abusing alcohol at the time of the predicate offence. I note that the appellant has received treatment for potentially life-threatening alcohol poisoning on more than one occasion.

[32] As a youth, the appellant received sex offender treatment and participated in an intensive program for violent offenders. More recently, the appellant completed the Addictions Awareness Program but was not motivated to abstinence noting that, "I thought I could control it". Despite these interventions, the appellant has, in the past, returned to behavioural patterns that elevate his risk factors.

[33] In 2007, the appellant met the criteria for a "Conduct Disorder" diagnosis. His behaviour reflected marked narcissistic tendencies and established that he is prone to disregard social norms. He was assessed as being at high risk for future violence.

[34] In 2011, when the appellant was 21, he was assessed as being at high risk for future violent and sexual reoffending.

(d) Evidence Respecting the Appellant's Treatment Prospects

[35] The appellant testified about his involvement in institutional programs since his arrest on the predicate offence. It is apparent that he availed himself of the educational programs offered at the Whitehorse Correctional Centre. He testified that an educational program about violence against women "[r]eally got me thinking about my past history and, you know, all the violence that I've caused and potentially the violence that I could cause in the future if I keep drinking". In addition, the appellant sought out personal counselling, including from elders, and attended AA meetings.

[36] Dr. Lohrasbe concluded in his assessment report of August 28, 2016, that the appellant's behaviours reflect a clear-cut Antisocial Personality Disorder marked by repeated lawbreaking, aggression, irritability, recklessness, impulsivity, deceitfulness and irresponsibility. He also meets the diagnostic criteria for Substance Use Disorder. Dr. Lohrasbe concluded that, without effective treatment interventions and risk management, the appellant is at high risk for acts of violence in the future.

[37] Dr. Lohrasbe did consider it significant that the appellant was no longer denying the severity of his substance abuse problems. He testified that if the appellant remains abstinent, the risk he poses would plunge significantly. Dr. Lohrasbe also testified that he considered the appellant's stated desire to change his behaviour to be authentic and not simply motivated by the commencement of dangerous offender proceedings. He testified that a "lightbulb of awareness" appears to have gone off in the appellant's mind.

[38] Although Dr. Lohrasbe acknowledged in his report that treatment interventions have not been effective in the past, he said it could not be assumed that high-intensity programming would also be ineffective:

> Typically, a diverse and established history of violence, ineffective treatment interventions, and persistent non-compliance would indicate the need for high - intensity violence prevention, sex offender, and substance abuse programming. It

> cannot be assumed that such high intensity and prolonged programming will be as ineffective as past programs of lesser intensity. In my view the opposite assumption is more reasonable, that ageing, maturity and the "wake up call" will lead to more sincere and sustained engagement in treatment programs. This is the primary source of hope for reducing Mr. Skookum's risk to the point where he can be managed in the community in an organized and systematic manner.

Dr. Lohrasbe also noted that the appellant has done relatively well when working on "dry sites" away from home and destabilizing peer associations.

[39] In examination-in-chief, Dr. Lohrasbe was asked by Crown counsel whether intensive institutional programming followed by long-term supervision in the community would ground a reasonable expectation that the public would be protected from commission by the appellant of another serious personal injury offence. He said this:

> A. Yeah, I think it is a reasonable expectation that his risk can be reduced to the point where he will be managed in the community in the future.
>
> Q. In the past, that hasn't been the case.
>
> A. Correct.
>
> Q. And we've gone over some of the things that you've seen as maybe potentially being different. A lot of that's based on a certain amount of hope. Is that correct?
>
> A. Yes.
>
> Q. And there's obviously difficulties with predicting future behaviour –
>
> A. Yes.
>
> Q. – to any sort of degree of certainty; correct?
>
> A. Yes.
>
> Q. But what do you think in the long run – what would be different here that you could have or you could say to the court that there is a reasonable expectation?
>
> A. I wouldn't underestimate the power of the wake-up call of this proceeding, at least in the short term … Not just in terms of him being aware of how the system perceives him, but him being aware in his own mind and the jeopardy that he is in. … he's a few years older now. He is more aware that being incarcerated has allowed him to look after himself, body and mind, pursue his education, think about the long-term vocational kind of plan and then, as you pointed out, assuming that he will now be offered and participate in the in-depth programs that are offered. When you put that all together, I don't think it's unreasonable to think that the future may be a bit different than the past has been.

> Q. But without that in-depth treatment, that wouldn't be the case.
>
> A. Correct.
>
> [Emphasis added.]

[40] In cross-examination, Dr. Lohrasbe testified that under the pre-2008 legislative regime, "[a] lot of cases that are in any way comparable with Mr. Skookum would have ended up under the LTO". His opinion that the appellant's risk could be managed safely in the community hinged on completion by the appellant of a high intensity sex offender treatment program.

[41] Dr. Lohrasbe acknowledged the "unavoidable negatives" of federal incarceration and agreed that the treatment programs delivered "closer to home" and in a more natural setting are likely to have a greater impact. Further, he noted that for offenders who come from a First Nations background, a spiritual and cultural component to their rehabilitation is often a key aspect in the development of a positive identity.

[42] In summary, Dr. Lohrasbe opined in his written report that:

1. There is a high likelihood that the appellant will commit an act of sexual and/or general violence;
2. He has responded poorly to past treatment efforts;
3. If future treatment interventions are to be more effective, they should be intensive and comprehensive;
4. Intensive and comprehensive treatment programs are delivered by the Correctional Service of Canada ("CSC");
5. Ongoing engagement with First Nations spirituality and culture may also assist his rehabilitation;
6. With appropriate treatment interventions there is a realistic possibility that his risk could be reduced and then be safely managed in the community; and
7. At the point the appellant is released into the community, he will require a prolonged period of follow-up to manage his risk.

[43] With the consent of the Crown, we were advised on the hearing of the appeal that in July 2017 the appellant began the intensive sex offender treatment program offered in federal institutions by the CSC. In his supplementary factum, counsel for the appellant advised that the appellant completed that program in December 2017. We were not provided with any information about how the appellant fared in this program.

(e) The Positions of Counsel on the Sentencing Hearing

[44] At the sentencing hearing, Crown counsel submitted that the appellant's treatment prospects were only relevant at the penalty stage of the hearing, not the designation stage. The Crown's position was consistent with a substantial body of pre-*Boutilier* jurisprudence. It is, however, inconsistent with the holding in *Boutilier* that a finding of dangerousness at the designation stage necessarily engages a prospective inquiry into an offender's future treatment prospects.

[45] The Crown conceded that the evidence adduced on the sentencing hearing established a reasonable expectation that a determinate sentence followed by a long-term supervision order would adequately protect the public against the commission by the appellant of another serious personal injury offence. Crown counsel said this:

> [Dr. Lohrasbe] was very clear that the sex offender programming available in the penitentiary met the requirements that he indicated that Mr. Skookum needed appropriate treatment interventions. If they were to be effective, they needed to be comprehensive and intensive.
>
> And it was – it was based on the fact that he had been offered that type of programming before that made him [Dr. Lohrasbe] not only hopeful, but feel that there was a reasonable expectation that his risk level could be dramatically reduced.
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> …
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> So I mean, the crux of Dr. Lohrasbe's evidence is intensive programming with long-term supervision in the community. And based on what he saw in his interview with Mr. Skookum, the fact that there wasn't any mental health diagnosis and what he saw was sincerity in wanting to change, he [Dr. Lohrasbe] felt that he [the appellant] would be successful in that programming.
>
> …

> I would submit that the evidence we heard does show that there is appropriate facilities and supervision both in the lower mainland...as well as in Whitehorse, that that – that proper supervision and public safety can – can be met under a long-term supervision order.
>
> [Emphasis added.]

It is apparent from the foregoing that the Crown conceded in the court below that the evidence went beyond a mere expression of hope that the appellant would derive benefit through participation in treatment programs.

[46] The Crown agreed the appellant should be credited at the rate of 1:1.5 for the time he spent in pre-sentence custody, but sought a determinate sentence of four to six years' imprisonment "on top of that".

[47] The appellant argued that the Crown failed to establish beyond a reasonable doubt the criteria necessary to ground a dangerous offender finding. While the appellant acknowledged that the predicate offence was a serious personal injury offence and that the evidence established a failure to control his sexual impulses in the past, he submitted that the evidence fell short of establishing a likelihood that he would cause injury, pain or other evil to other persons through failure in the future to control his sexual impulses.

[48] The appellant conceded that he met the criteria for designation as a long-term offender. He submitted that a determinate sentence of no more than four years' imprisonment should be imposed, followed by a ten-year period of community supervision. The appellant maintained that he should be credited for 21 months for the 14 months he served in pre-sentence custody. In the result, the appellant submitted that he should be sentenced to a determinate sentence of no more than 27 months' imprisonment.

III. Reasons for Sentence

[49] In addressing the Crown's application to have the appellant designated a dangerous offender, the sentencing judge concluded that the 2008 amendments to Part XXIV of the *Code* established "a fairly low threshold for a dangerous offender

finding". The judge found support for this proposition in *R. v. Smarch*, 2014 YKTC 51 at para. 201. In *Smarch*, the offender was designated a dangerous offender and sentenced to a territorial sentence of less than two years' imprisonment. The Crown appealed to this Court arguing that a sentence of at least two years' imprisonment ought to have been imposed along with a ten-year long-term supervision order. That appeal was dismissed for reasons reported at 2015 YKCA 13. As the propriety of the dangerous offender designation was not in issue on appeal, this Court was not called on to address threshold issues governing a dangerous offender finding.

[50] The judge accepted Dr. Lohrasbe's evidence that without effective treatment intervention and risk management, the appellant is at high risk for acts of violence in the future.

[51] As noted earlier, the judge accepted there was a reasonable expectation that a determinate sentence followed by a period of long-term supervision would adequately protect the public against the commission by the appellant of a serious personal injury offence in the future. He said this:

> 31. … there are First Nations cultural programs that are available and are highly spoken of, in addition to other worthwhile educational and other programming, so that we have a reasonable expectation that something lesser than an indeterminate sentence will adequately protect the public from a further serious personal injury offence. The Crown has fairly taken the aspect of an indeterminate sentence off the table. Dr. Lohrasbe also agrees with this reasonable expectation test. So do I.
>
> 32. At long last, through fear or perhaps maturity, this offender appears to be motivated to change and to fully engage in the program and the programs that will be made available to him.
>
> [Emphasis added.]

[52] The judge nevertheless had "no hesitation whatsoever in finding Mr. Skookum to be a dangerous offender". In coming to this conclusion he cited *R. v. Szostak*, 2014 ONCA 15, leave to appeal ref'd [2014] S.C.C.A. No. 300. In *Szostak*, the court interpreted the 2008 amendments to Part XXIV of the *Code* and concluded that: (1) Parliament intended these amendments to broaden the group of offenders who could properly be declared dangerous offenders from the "very small group of offenders" the 1977 legislation was found to target in *R. v. Lyons*, [1987] 2 S.C.R.

309 at 323, 339; (2) the behaviour of an offender need not be found to be "intractable" before that offender can be designated a dangerous offender; and (3) treatment prospects are of limited relevance in determining whether a person is a dangerous offender, but highly significant in choosing the appropriate disposition under s. 753(4) of the *Code* - an indeterminate sentence, a determinate sentence followed by a long-term supervision order, or a determinate sentence standing alone. On this latter point, I note that the British Columbia Court of Appeal came to a similar conclusion in *R. v. Boutilier*, 2016 BCCA 235 at para. 62, holding that an offender's amenability to treatment is of limited relevance at the designation stage.

[53] The judge imposed a determinate sentence of 72 months' imprisonment less 22 months' credit for time served in pre-sentence custody, for a total sentence of 50 months' imprisonment. He also imposed a ten-year long-term supervision order.

IV. Analysis

(a) The Legislative Scheme

[54] The following provisions of Part XXIV of the *Code* are relevant to the determination of this appeal:

> **Application for finding that an offender is a dangerous offender**
>
> 753 (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied
>
> …
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.
>
> …
>
> **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.

…

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

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

(a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

(b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

…

Sentence for long-term offender

(3) If the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

…

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

…

Appeal — offender

759 (1) An offender who is found to be a dangerous offender or a long-term offender may appeal to the court of appeal from a decision made under this Part on any ground of law or fact or mixed law and fact.

…

Disposition of appeal

(3) The court of appeal may

(a) allow the appeal and

(i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or

(ii) order a new hearing, with any directions that the court considers appropriate; or

(b) dismiss the appeal.

(b) The Dangerous Offender Designation

[55] In my view, the judge erred in principle in two fundamental ways in declaring the appellant to be a dangerous offender.

[56] First, the judge erred by concluding that Parliament established a "fairly low threshold" for a dangerous offender finding. I suspect that the sentencing judge may have been attempting in this passage to communicate the view expressed in *Szostak* that the 2008 amendments were designed to broaden the pool of offenders who could properly be designated dangerous offenders. Regardless, the proposition cannot be sustained post-*Boutilier*. Writing for the majority, Côté J. affirmed that, like the 1977 regime discussed in *Lyons*, the 2008 amendments target "a small group of persistent criminals with a propensity for committing violent crimes against the person": *Boutilier* at paras. 3, 75. The careful tailoring of the legislation to limit its reach has been held to be fundamental to its constitutionality: *Lyons* at 339; *Boutilier* at paras. 28, 34.

[57] Second, *Boutilier* holds that an offender cannot be designated a dangerous offender unless the sentencing judge concludes that he or she is a future "threat" having conducted a prospective assessment of risk: para. 23. Accordingly, sentencing judges must consider an offender's treatment prospects at the designation stage. Before designating a person a dangerous offender, a sentencing judge must be satisfied on the evidence that the offender "poses a high likelihood of harmful recidivism and that his or her conduct is intractable": *Boutilier* at para. 27. Although the focus of the Court's attention in *Boutilier* was on s. 753(1)(a), not s. 753(1)(b), the language of s. 753(1)(b) and Justice Côté's analysis leaves little room for doubt that the need to consider an offender's treatment prospects also applies on dangerous offender applications premised on s. 753(1)(b): see paras. 16, 36 and 38.

[58] The judge in this case did not have the benefit of the Supreme Court of Canada's decision in *Boutilier* when he delivered reasons for sentence. Consistent with the analytical approach advocated by the Crown in the court below, I am satisfied that he did not consider the appellant's treatment prospects at the designation stage. He erred in principle by failing to do so.

[59] In my view, the errors are so fundamental that the Crown cannot discharge its heavy onus of showing that there is no reasonable possibility the result would have been different had the errors not been made: *R. v. Johnson*, 2003 SCC 46 at paras. 47–51.

[60] In light of the conclusion I have reached in relation to these two grounds of appeal, it is unnecessary to consider the appellant's further contention that the sentencing judge erred by failing to appreciate that s. 753(1)(b) requires the Crown to demonstrate a "pattern" of past conduct before a dangerous offender finding can be made.

[61] The question becomes the remedy that should flow from these errors. Clearly, the finding that the appellant is a dangerous offender must be set aside. While this

Court is empowered under s. 759(3)(a)(ii) of the *Code* to order a new dangerous offender hearing, I would not make that order in this case for two reasons.

[62] In my view, had the sentencing judge considered the appellant's treatment prospects at the designation stage, he would inevitably have concluded on the facts he found that the appellant should not be designated a dangerous offender. On this point, the sentencing judge concluded that the evidence adduced on the hearing established a reasonable expectation that the risk the appellant poses to the community could be reduced through treatment intervention and managed adequately through the imposition of a determinate sentence and a long-term supervision order. The judge's findings amount to acceptance by him that the appellant's conduct was not shown to be intractable; that he is maturing, motivated to change, and, with the benefit of intensive treatment available to him, capable of surmounting in the future the behavioural challenges and personality deficits that have caused him to offend violently in the past. These findings are uncontaminated by error in principle. Applying them to the case at bar, the appellant could not properly be designated a dangerous offender.

[63] Second, I am of the view that ordering a new hearing would be unfair in this case. The Crown conceded in the court below that the appellant should not be sentenced to indeterminate incarceration because the evidence gave rise to a reasonable expectation that a determinate sentence and long-term supervision would adequately protect the public. The Crown did not base its concession on the proposition that the appellant's risk could be safely managed in the community in spite of the intractability of his violent conduct. Rather, the Crown made this concession because it was satisfied on the evidence that the appellant's behaviour was not intractable – that he would benefit from the intensive treatment programs the CSC would make available to him and there was a reasonable expectation that the risk he poses to the public would thereby be dramatically reduced and manageable within the context of a determinate sentence and long-term supervision order. In my view, it would be unfair to the appellant, and contrary to the interests of justice, to permit the Crown to take a contrary position on a new hearing.

[64] The next question is whether this Court should exercise its power under s. 759(3)(a)(i) to substitute for the dangerous offender designation a long-term offender designation. As noted earlier, the appellant now says he is prepared to consent to being designated a long-term offender provided this Court substantially reduces the length of his determinate sentence. In the alternative, he seeks a new hearing limited to the issues of whether he should be designated a long-term offender and the determinate sentence that should be imposed.

[65] I am not prepared to entertain the appellant's principal submission. The appellant is in no position to bargain away consideration by this Court of the appropriate disposition.

[66] The appellant's alternative position rests on the proposition that s. 759(3)(a)(ii) of the *Code* empowers this Court to direct a new hearing limited to the specific issues of whether the appellant should be designated as a long-term offender and the appropriate length of the determinate sentence. Under the pre-2008 legislative regime, this Court held that s. 759 did not empower the court of appeal to order a new trial on the limited question of whether the offender is a long-term rather than a dangerous offender: *R. v. Johnson*, 2001 BCCA 456 at para. 113, aff'd 2003 SCC 46. However, in 2008, the *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 51, amended s. 759 to provide that the court of appeal may "order a new hearing, with any directions that the court considers appropriate" (emphasis added). The emphasized words were absent from the pre-2008 version of s. 759. The parties did not address the effect of this amendment on the question of whether an appellate court may order a new hearing limited to the discrete issue of whether the offender is a long-term offender.

[67] Fortunately, we need not resolve the question on this appeal. Assuming, without deciding, that this Court has the power to order a new hearing of the kind contemplated by the appellant, it is my view that such an order is neither necessary nor appropriate in this case.

[68] It is beyond dispute that the language of s. 759(3)(a)(i) empowers this Court to set aside a dangerous offender designation and substitute a finding that the offender is a long-term offender. In my view, that is the appropriate remedy in this case. On the factual findings made by the judge, there can be no doubt that the appellant meets the criteria for designation as a long-term offender under s. 753.1. These factual findings are untainted by the errors in principle that relate to the dangerous offender designation. Counsel who acted for the appellant on the sentencing hearing conceded that the appellant met the criteria for a long-term offender designation. In the result, I would find the appellant to be a long-term offender pursuant to s. 753.1 of the *Code.*

[69] Having set aside the dangerous offender designation and substituted a finding that the appellant is a long-term offender, I turn to consider the appropriate sentence. The appellant takes no issue with the ten-year period of long-term supervision. However, he challenges the determinate sentence imposed by the court below.

[70] Counsel made no submissions on the nature of this Court's task when it substitutes a long-term offender designation for a dangerous offender designation and turns to consider the determinate sentence portion of the disposition. Counsel for the appellant appears to have proceeded on the assumption that, in these circumstances, the Court should engage in a review of the fitness of the determinate sentence imposed in the trial court. In other words, the appellant appears to accept that absent error in principle shown to have had an impact on the sentence, this Court ought not to interfere with the determinate sentence imposed by the sentencing judge under s. 753(4)(b) unless it is shown to be demonstrably unfit: *R. v. Lacasse* at para. 41.

[71] I do not accept that this is the correct analytical approach. Having set aside the dangerous offender designation and substituted a finding that the appellant is a long-term offender, the task of the Court is not to review the fitness of the determinate sentence imposed below on the deferential standard of review set out in

Lacasse. Instead, the Court is obliged to impose a fit determinate sentence in the context of a long-term offender designation. In doing so, this Court must respect the factual findings made in the court below, unless shown to be the product of palpable and overriding error. The appellant has not challenged the sentencing judge's factual findings on appeal. In my view, the language of ss. 759(3)(a)(i) and (6) supports the view that this Court is obliged in these circumstances to impose upon the appellant a fit determinate sentence.

[72] Although the point has seemingly attracted little judicial consideration, two cases are particularly instructive – *Szostak* and *R. v. M.*, 2009 NSCA 1. In *Szostak*, the sentencing judge refused to make a dangerous offender designation and imposed a conventional sentence of six years' imprisonment. The Crown appealed, seeking an order designating Mr. Szostak a dangerous offender and a five-year term of imprisonment followed by a ten-year community supervision order. The Court was satisfied that, but for errors in law committed by the sentencing judge, Mr. Szostak would have been designated a dangerous offender. The appeal was allowed and, pursuant to s. 759(3)(a)(i), the offender was found to be a dangerous offender.

[73] Writing for the Court, Rosenberg J.A. noted at para. 64 that, "[t]he question of further disposition poses some difficulty". As the evidence strongly supported the need for a long-term supervision order to protect the public, the Court concluded that a conventional sentence, standing alone, would be insufficient. In the result, the conventional sentence imposed by the sentencing judge was set aside and the Court sentenced Mr. Szostak to a total sentence of five years' imprisonment followed by a ten-year supervision order. It is interesting to note that, having allowed the appeal and substituted a dangerous offender designation, the Court did not conceive of its task as reviewing the fitness of the determinate sentence imposed by the sentencing judge on the standard of review set out in *Lacasse*. Rather, the Court proceeded to impose what it considered to be a fit sentence under s. 753(4). I take from *Szostak* the proposition that an appellate court should impose the sentence it considers appropriate after exercising its power to make or substitute a designation

under s. 759(3), rather than reviewing the sentenced imposed below in accordance with the standard of review generally applicable to sentence appeals.

[74] The same approach was taken in *M*. In that case, the Crown's application for a dangerous offender designation or, in the alternative, a long-term offender designation was dismissed. The sentencing judge imposed an effective sentence of six years' imprisonment. The Crown appealed on grounds that the judge erred in law by failing to make a long-term offender designation. The appeal court agreed and designated the offender a long-term offender. In addressing the determinate sentence, the Court said this:

> [44] In summary, while I would allow the appeal, I would impose the same custodial sentence as that ordered by the sentencing judge - a period of six years, reduced by remand time to a sentence of one year and seven months.
>
> [Emphasis added.]

Although the Court imposed the same custodial sentence as the sentencing judge, it proceeded on the basis that it was imposing sentence, not reviewing the sentence imposed in the trial court.

[75] It would seem that a different approach was taken in *R. v. Knife*, 2015 SKCA 82. In that case, the sentencing judge dismissed the Crown's dangerous offender application, found the offender to be a long-term offender, and sentenced the offender to an effective term of eight years' imprisonment. The Crown successfully appealed the dismissal of its dangerous offender application. The Crown did not, however, seek the imposition of an indeterminate sentence or an increase in the eight-year determinate sentence. The offender cross-appealed the determinate sentence on grounds that it was unfit. Although the sentencing context had changed, the Court dismissed the cross-appeal applying the standard of review applicable to appeals from sentence. The Court concluded that the sentencing judge did not err in principle and that the sentence imposed below was fit. In this admittedly unusual context, the Court did not wrestle with whether it was obliged to impose sentence rather than review the fitness of the sentence imposed in the trial court.

[76] I would adopt as correct the approach taken in *Szostak and M.* Where, as in this case, an appellate court makes or substitutes a designation under s. 759(3)(a)(i) of the *Code*, it must proceed to impose a sentence fit and appropriate in that context.

[77] Despite this conclusion, I am prepared to address the determinate sentence component of the disposition both on the basis that this Court's role is to review the sentence, as suggested by the appellant, and on the basis that the role of this Court is, as I have found, to impose a fit sentence. In my view, whether this Court conceptualizes its task as a review of the fitness of the determinate sentence imposed below or the imposition of a determinate sentence on the appellant as a long-term offender, the result is the same. On the factual findings made below, the sentence could not be less than the one imposed by the sentencing judge.

[78] As the appellant's counsel argued this case on the footing that, whether or not the dangerous offender designation is set aside, this Court's task is to review the fitness of the determinate sentence imposed, I will begin by addressing the determinate sentence through application of the usual principles of appellate review.

[79] I see no merit in the appellant's contention that the sentencing judge erred in principle by: inflating the sentence to permit correctional authorities adequate time to deliver treatment programs in custody; failing to give him appropriate credit for pre-sentence custody; or failing to apply the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2 of the *Code*.

[80] With respect to the first alleged error in principle, the judge said in his reasons for judgment:

> [28] Even though we are dealing with a different framework under s. 753, it would be wrong to inflate a penitentiary term just to make sure that the Pacific Region of Correctional Services of Canada ("CSC") can fit Mr. Skookum into their program. Through the witnesses in this hearing, we are familiar with the parole process and also the procedures at the Regional Reception Centre in Abbotsford, British Columbia. We are also familiar with much of the established and fine programming for First Nations men in the Pacific Region. …
>
> …
>
> [30] I am not going to inflate a sentence merely to accommodate any *unnecessary inefficiencies* nor am I going to naively or somewhat arrogantly expect

> the man that I sentence to receive undue preferential treatment. Nonetheless, I do have a realistic anticipation that the reception and intensive sex offender programming can and should be completed within a period of 18 months. We know that the waiting lists get reviewed and re-assessed regularly.
>
> [Italics in original; underlining emphasis added.]

Against this background, it cannot successfully be contended that the sentencing judge erred by artificially inflating the sentence to allow for the appellant's participation in and completion of necessary treatment programs.

[81] The appellant's submission that he was not given credit for pre-sentence custody is equally without merit. The judge gave the appellant 22 months' credit for the 14 ½ months he served in pre-sentence custody. The appellant's submission that the judge "covertly held that the appellant required four years in order to receive federal programming … and then simply added on 2 years to account for remand credit" is worse than speculative; it is unsupported by the record and unfair to the sentencing judge.

[82] Finally, I cannot give effect to the appellant's contention that the judge erred by failing to give effect to the principles of sentencing enshrined in ss. 718 to 718.2 of the *Code*. In *Boutilier* at para. 53, the Supreme Court of Canada confirmed that dangerous offender proceedings are sentencing proceedings to which the principles set out in Part XXIII of the *Code* apply. It is obvious the sentencing judge considered the appellant's rehabilitative prospects and the principle set out in s. 718.2(d) that offenders should not be deprived of liberty if less restrictive sanctions may be appropriate. Indeed, the application of this principle explains, in large measure, why the appellant was not sentenced to an indeterminate period of incarceration.

[83] While not well developed in his factum, the appellant suggested in oral argument that the judge also erred by failing to give appropriate consideration to s. 718.2(e) and the principles set out in *R. v. Gladue*, [1999] 1 S.C.R. 688. Again, I do not agree. The judge acknowledged at para. 21 that "there are clearly *Gladue* factors in this case, as seen on pages 4 and 5 of Dr. Lohrasbe's reports [sic] and in the numerous other reports in the voluminous file". He was alive to the appellant's

disadvantaged circumstances and relied on the existence of First Nations programs as a factor in concluding that there was a reasonable expectation that something less than an indeterminate sentence would adequately protect the public.

[84] For these reasons, I see no merit in the appellant's complaint that the judge failed to consider the generally applicable principles of sentencing.

[85] In support of the submission that the sentence is demonstrably unfit, the appellant referred to a number of cases which he says illustrate that much lower sentences have been imposed on similarly situated offenders for similar conduct. He relies, in particular, on: *R. v. Akhiatak*, 2016 NWTSC 34; *R. v. J.G.D.*, 2004 YKSC 13; *R. v. F.R.L.*, [1999] Y.J. No. 94 (Y. Terr. Ct.); and *R. v. W. (G.J.)*, 2012 YKTC 54. I do not see that these cases serve to advance the appellant's position that the determinate sentence is demonstrably unfit.

[86] In *Akhiatak*, a 69-year-old First Nations offender with a more extensive record for sexual assault than the appellant and found to be at high risk to reoffend received a sentence of seven years' imprisonment for sexually assaulting a 15-year-old female. Notably, the offender had been diagnosed with an inoperable brain tumor and would likely spend the rest of his life incarcerated. But for this consideration, the sentence may well have been higher.

[87] In *J.G.D.*, a First Nations offender with a similar record to that of the appellant received an effective sentence of 3 ½ years' imprisonment. I note that the sentence imposed was the product of a joint submission. In addition, the sentencing judge in *J.G.D.* did not have before him the extensive risk assessment evidence that required the judge in this case to emphasize the objectives of specific deterrence and the protection of the public.

[88] In *F.R.L.,* as in this case, the offender was convicted of sexually assaulting an intoxicated female who was unconscious and incapable of consenting to the act. He received a sentence of 2 ½ years' imprisonment. The offender had one previous conviction for sexual assault. His criminal record is not otherwise detailed in the brief

oral reasons for sentence and it is therefore difficult to derive much assistance from this case. It does not appear that this offender had a record as extensive as the appellant, and there is no suggestion in the reasons that any risk assessment evidence was before the sentencing judge.

[89] In *W. (G.J.)*, a First Nations offender who had two prior convictions for sexual assault-related offences and was at high risk to reoffend received an equivalent sentence of 32 months' imprisonment. In *W. (G.J.)*, the Crown conceded that a sentence of three years' incarceration would fall within the appropriate range. It is also noteworthy that the sentencing judge referred with approval to *R. v. White*, 2008 YKSC 34, a case in which a range of 5 to 7 years' imprisonment was recognized for repeat sexual offenders with significant criminal records where there were other aggravating circumstances and few considerations that would operate in mitigation of penalty.

[90] I note, as well, that none of these cases involved the sentencing of a designated long-term offender.

[91] Against this background, I am not persuaded that the determinate sentence imposed by the judge below is demonstrably unfit. In my view, it was not unreasonable for the judge to conclude that the appellant's moral culpability for the predicate offence, his history of violent offending and the risk he poses to the public all warranted the imposition of sentence towards the upper end of the applicable range. Applying the deferential standard of review counsel have invited this Court to apply, I would dismiss the appeal.

[92] For the reasons given, the role of an appellate court in these circumstances is not, however, to review the sentence for fitness through the application of a deferential standard of review. Rather, our role is to consider afresh the determinate sentence that should be imposed on the appellant under s. 753.1(3). In doing so, I consider it is necessary and appropriate to act on the factual findings made by the judge below.

[93] There are a number of aggravating features in this case that serve to elevate the appellant's moral culpability and militate in favour of a sentence that strongly emphasizes specific deterrence and the protection of the public. The appellant engaged in non-consensual, unprotected sexual intercourse with a 17-year-old intoxicated female. He forced upon the victim the considerable physical risks and emotional consequences of his behaviour.

[94] The appellant has two previous convictions for sexual assault. When he committed the first assault, the appellant was a youth and his moral culpability for the offence must be regarded as having been attenuated. The same cannot be said of the subsequent sexual assault of the four-year-old who was sleeping in her own home. This incident illustrates the broad range of criminal behaviour the appellant is capable of when he abuses alcohol and the diversity of his potential victim group.

[95] The appellant also has an extremely serious record for non-sexual offences of violence. His record speaks to the appellant's capacity to cause harm in a variety of different contexts.

[96] Although I accept that the appellant's risk can eventually be managed in the community through custodial treatment intervention (some of which has already been delivered) and post-incarceration programs, including programs that seek to engage the appellant with his community, the evidence is clear that, unless those treatment programs provide long-term benefit, the appellant is at high risk to reoffend. The appellant has not derived benefit from treatment in the past and he has not responded well to periods of community supervision. He has, however, matured since the commission of the offence and demonstrated an increased appreciation of his risk factors and the harm he has caused to others. In addition, the appellant has demonstrated a willingness to commit himself to the sort of high intensity treatment program he so obviously needs.

[97] There are also several mitigating factors. Among them is the fact that the appellant pleaded guilty to the offence. In addition, the appellant is still a relatively young man. His behavioural patterns are not intractable; he has been found to be

amenable to treatment. The appellant's evidence on the dangerous offender hearing would suggest that he is beginning to come to terms with the harm he has caused others and what he must do to avoid harming others in the future. In short, rehabilitation is a legitimate and, in my view, attainable sentencing goal in this case. The objectives of denunciation and deterrence must, however, by operation of statute, be given primary consideration in light of the age of the victim: *Code*, s. 718.01.

[98] *Gladue* considerations must also be taken into account in accordance with s. 718.2(e) of the *Code* and given "tangible effect" in crafting an appropriate determinate sentence. This provision recognizes that the devastating intergenerational effects of the collective experience of First Nations peoples may shape the way in which expression is given to the fundamental purposes and principles of sentencing. As Justice Bennett noted in *R. v. J.L.M.*, 2017 BCCA 258:

> [36] The Court in *Ipeelee* [2012 SCC 13] affirmed that in sentencing an Aboriginal offender, the Court must consider "the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts", as these factors "may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (at paras. 72–73).

[99] In determining the sentence to impose on the appellant, it is necessary to pay close attention to the fact that the sentencing context has changed. Where a dangerous offender designation coupled with a determinate sentence is set aside and a long-term offender designation substituted, the circumstances may warrant the imposition of a shorter custodial term. But this will not inevitably be the case.

[100] Weighing the competing considerations as best I can and giving due consideration to the change in sentencing context occasioned by the substitution of a long-term offender designation, I have independently determined that a sentence of six years' imprisonment should be imposed. In all the circumstances, including the seriousness of the offence and the need for denunciation along with specific and general deterrence, I do not believe that any lesser sentence would be appropriate. Giving the appellant credit for 14 ½ months served in pre-sentence custody at a rate of 1:1.5, I, too, would impose a sentence of 50 months' imprisonment. In addition, I

would impose a ten-year period of long-term supervision. I would also make the same ancillary orders as were made in the court below.

V. Disposition

[101] In the result, I would set aside the dangerous offender designation and substitute a finding that the appellant is a long-term offender. I would impose the same sentence imposed by the judge below. By virtue of s. 759(6), that sentence is deemed to have commenced on the date the appellant was sentenced in the court below. I would not disturb any of the ancillary sentencing orders currently in place.

_____
The Honourable Mr. Justice Fitch

I AGREE:

_____
The Honourable Madam Justice MacKenzie

I AGREE:

_____
The Honourable Mr. Justice Harris