COURT OF APPEAL OF YUKON

Citation: *R. v. Smarch*,
2020 YKCA 7

Date: 20200324
Docket: 18-YU833

Between:

Regina

Respondent

And

James William Smarch

Appellant

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Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris
The Honourable Madam Justice Shaner

On appeal from: An order of the Territorial Court of Yukon, dated October 23, 2014 (*R. v. Smarch*, 2014 YKTC 51, Whitehorse Docket 13-00085).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon November 15, 2019
Place and Date of Judgment:	Vancouver, British Columbia March 24, 2020

Written Reasons by:
The Honourable Madam Justice Shaner

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris

Summary:

Appeal from an order designating the appellant a dangerous offender, and Crown application to adduce fresh evidence on appeal. Held: Fresh evidence application dismissed and appeal allowed. The fresh evidence which the Crown applied to adduce was made up of court records of events following the designation, none of which related to sexual misconduct and none of which was material enough that it could reasonably have been expected to affect the result. The sentencing judge erred in principle by not considering the appellant's treatment prospects at the designation stage in accordance with R. v. Boutilier, 2017 SCC 64 and in concluding that the threshold for designating an offender dangerous is "low". The dangerous offender designation is set aside. A new dangerous offender hearing is unnecessary. The sentencing judge determined that the appellant would not be likely to commit another serious personal injury offence upon release from custody, as long as he received treatment. Based on this, the appellant could not properly be designated a dangerous offender.

Reasons for Judgment of the Honourable Madam Justice Shaner:

Introduction

[1] The appellant, James William Smarch, appeals from an order of the Territorial Court of Yukon declaring him a dangerous offender. As part of its position in response, the Crown brings an application to adduce fresh evidence.

[2] Mr. Smarch was declared a dangerous offender on October 23, 2014, with written reasons issued on November 25, 2014: *R. v. Smarch*, 2014 YKTC 51.

[3] In 2017, the Supreme Court of Canada released *R. v. Boutilier,* 2017 SCC 64, [2017] 2 S.C.R. 936. This appeal arises from the *Boutilier* decision. The appellant relies on *Boutilier* to argue that the sentencing judge erred in his decision to designate the appellant a dangerous offender.

[4] Dangerous offender proceedings engage two distinct stages of analysis: the designation stage, where the sentencing judge must determine whether an offender poses such a risk as to be considered "dangerous"; and the penalty stage, where the focus is on the nature of the sentence required to manage that risk. *Boutilier* resolves previous uncertainty in the law about whether evidence of an offender's future treatment prospects is relevant at the designation stage. It specifically directs

courts to consider evidence of treatability at the designation stage, where it is relevant to an assessment of the future risk posed by the offender and the intractability of the offender's conduct. If the offender is designated as dangerous, much of the evidence from the designation stage remains relevant at the penalty stage, but for a different purpose. There, it informs the sentence needed to manage the risk: *Boutilier* at paras. 27, 45.

[5] At the time Mr. Smarch was sentenced, the parties and the court were without the benefit of the analytic framework as clarified in *Boutilier.* Accordingly, the approach taken by counsel, and the sentencing judge's analysis and conclusions, were based on what is now considered an erroneous legal framework. Defence counsel conceded that a finding of dangerousness was the likely result, although he successfully argued for a shorter period of incarceration. Neither Mr. Smarch's prospects for treatment, nor the intractability of his offending behaviour, were considered at the designation stage. They factored in only after the sentencing judge moved on to consider the appropriate penalty.

[6] For the reasons below, I would dismiss the Crown's fresh evidence application, allow the appeal and set aside the dangerous offender designation.

Background and Procedural History

[7] Mr. Smarch was convicted of sexual assault in Territorial Court on December 6, 2013: *R. v. Smarch*, 2013 YKTC 114. The Crown subsequently brought the dangerous offender application under s. 753(1)(b) of the *Code*.

[8] Section 753(1)(b) deals with dangerous offender applications based on sexual offending. It provides:

> 753 (1) On application made under this Part … the court shall find the offender to be a dangerous offender if it is satisfied
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> > (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.

[9] The Crown's application was granted October 23, 2014. Written reasons were filed on November 25, 2014: *R. v. Smarch,* 2014 YKTC 51. Mr. Smarch received a determinate sentence of sixteen months' incarceration and three years' probation. As a result of pre-sentence custody, this left him with four months to serve.

[10] The Crown appealed the sentence in 2015. The appeal was unsuccessful: *R. v. Smarch,* 2015 YKCA 13. Mr. Smarch did not appeal the designation at that time; however, he was granted an extension of time to bring this appeal in 2019: *R. v. Smarch*, 2019 YKCA 5.

[11] As noted, the dangerous offender application proceeded on the basis that Crown and defence counsel agreed the statutory criteria for the designation were met and that the designation was the likely result. Pursuant to this, the Crown's expert witness, Dr. Shabehram Lohrasbe, was told the following before beginning his examination-in-chief:

> Crown: Dr. Lohrasbe, and with the Court's leave and that of my friend, I propose to catch you up as to the status of today's hearing. I understand my friend and you have agreed that on the evidence before the Court a designation of a dangerous offender is likely or justifiable on the evidence and our intention today is to focus on the evidence pertaining to his treatability, manageability in the community and the prospects that he will ultimately – the risk will be attenuated to the requisite degree contemplated by the Code. Does that assist you, doctor?

[12] It is apparent from the hearing transcript that examination and cross-examination were focussed on the nature of the sentence required to manage Mr. Smarch's risk.

[13] The sentencing judge conducted his own analysis respecting whether the designation was warranted, but did so in accordance with pre-*Boutilier* jurisprudence. He considered Mr. Smarch's offending history and the circumstances surrounding both the prior convictions and the predicate offence. This included

previous psychological reports conducted in relation to past offences and the forensic psychiatric evidence provided through Dr. Lohrasbe.

[14] Mr. Smarch has a history of sexual and non-sexual offending, dating back to 2000, when he was a youth. I do not consider his record to be extensive. At the time of the dangerous offender hearing, the last offence on his record before the predicate offence was entered in 2011 for breach of an abstention clause in a probation order.

[15] In outlining the circumstances of these offences, I rely on the descriptions in the sentencing judge's written reasons. Neither the Crown nor Mr. Smarch take issue with the findings the judge made with respect to these.

[16] In 2000, as a youth, Mr. Smarch was convicted of two counts of break and enter with intent to commit an indictable offence and breach of an undertaking. He was sentenced to eighteen months' probation concurrent for the break and enter convictions and five days for the breach of undertaking.

[17] The first of the sexual offences occurred in 2003, when Mr. Smarch was seventeen. He entered the home of the female victim, who was known to him, and sexually assaulted her by touching her breasts and putting his fingers in her vagina. He attempted to have intercourse with her, but she managed to escape. He threatened to harm her if she told anyone. A few hours later, he entered the home and bedroom of a female cousin. He took off his clothes, got into bed with her and touched her in a sexual manner. The victim woke up and told him to leave. Mr. Smarch was sentenced to twenty months' open custody and ten months' community supervision for the former and six months' probation for the latter.

[18] In 2010, when he was a young adult, Mr. Smarch was convicted of sexual interference, assault, uttering a threat and breach of undertaking. Mr. Smarch assaulted the victim by punching her in the back of her head and in her face. The victim was a 15-year-old girl with whom he was in a sexual relationship. This was the foundation of the sexual interference conviction. He later threatened the victim. He

was sentenced to forty-five days' imprisonment and twelve months' probation for the assault; four months' imprisonment and twelve months' probation for the sexual interference conviction; and sixty days' imprisonment and twelve months' probation for the threat. He was sentenced to thirty days' imprisonment and twelve months' probation for the breach of undertaking. All of the prison time was on a "time served" basis.

[19] The sentencing judge found that the circumstances of the 2010 sexual interference conviction fell outside of the pattern of the previous incidents and the predicate offence. Mr. Smarch was in a relationship with the victim and the sexual contact was illegal because of the age of the victim in relation to Mr. Smarch. Accordingly, the sexual activity was not in a meaningful way similar to the other sexual offences or indicative of a failure to control his sexual impulses.

[20] The sentencing judge also reviewed Territorial Court files and determined there were a few offences missing from the criminal record that was before him. None of these were sexual offences. They included a conviction for possession of property obtained by crime in 2000, for which he received a sentence of three months' probation and two convictions sustained in 2011 for breaching the abstention clause in a probation order.

[21] The circumstances of the predicate offence are described at paras. 2 and 3 of the written reasons for sentence. Mr. Smarch was discovered lying in a "spooning" position behind the victim, with his pants down to his knees. The victim's pants were lowered below her buttocks. Mr. Smarch was highly intoxicated and the victim was passed out. The judge determined Mr. Smarch had sexual contact with the victim, but he could not conclude there had been intercourse or penetration. He characterized Mr. Smarch's actions as being "… those of a highly intoxicated individual who likely somewhat spontaneously and opportunistically engaged in sexual contact with the unresponsive [victim]".

[22] Dr. Lohrasbe testified that sexual deviance and psychopathy were both absent in Mr. Smarch, but noted problems with intimate relationships, compliance

with court orders and employment. He also noted the presence of Fetal Alcohol Spectrum Disorder, adversely affecting Mr. Smarch's judgment, interpersonal skills and appreciation of consequences. Alcohol abuse was identified as a prominent risk factor.

[23] In assessing treatability, Dr. Lohrasbe stated the following in his report:

> Mr. Smarch is going to be a challenging candidate for treatment, given his broad deficits. However, as he has not been through intensive risk-related programs, it is far too premature to be pessimistic about his prospects for change.
>
> […]
>
> He would benefit from a sex offender program, if only to educate himself about his risk factors and about the impact of sexual violence on women. He would benefit from a spousal/family violence program. He would benefit from an aboriginal-focused violent offender program such as the In Search of Your Warrior program. Ongoing substance abuse programs are going to be necessary for a lengthy period; his learning is likely going to be based on repetition. Vocational training will assist in learning to structure his day, and any skills that can be transferred to work in the community can assist with pro-social living. We discussed these options, and he appeared interested.

[24] Dr. Lohrasbe summarized his conclusions as follows:

> On the basis of a review of Mr. Smarch's history and my clinical evaluation, my opinion is that, in the foreseeable future:
>
> 1) He poses a high risk for acts of sexual offending against females.
> 2) The prospects for reduction of his risk through treatment interventions are unknown.
> 3) Treatment programs may be helpful in preparing him for risk management in the community.
> 4) Risk management should involve strategies focused on structuring his life away from high-risk situations.
> 5) The longest period of parole would assist in managing his risk when he is back in the community.

[25] Dr. Lohrasbe confirmed that Mr. Smarch would benefit from a lengthy period of treatment and that he had expressed a willingness to engage. He was not asked to comment on whether Mr. Smarch could surmount his offending behaviour through treatment.

[26] No additional psychiatric/psychological expert evidence was called, nor was there evidence about specific programs and services. Mr. Smarch gave evidence on his own behalf.

[27] The Crown began submissions by reiterating counsels' agreement that Mr. Smarch met the statutory criteria in s. 753(1)(b). Thereafter, both Crown and defence focussed their submissions on the length and nature of the sentence.

The Parties' Positions on Appeal

[28] Mr. Smarch advances a number of grounds of appeal, two of which are central to the disposition of this appeal. First, Mr. Smarch argues the sentencing judge did not consider future treatment prospects, nor intractability, at the designation stage. Second, Mr. Smarch argues that the sentencing judge erred by holding that s. 753(1)(b) of the *Code* creates a "low threshold."

[29] The Crown argues that even though the sentencing judge did not have the benefit of *Boutilier* at the time he made the designation, he nevertheless conducted an appropriate analysis and reached the correct conclusion. Further, the Crown says that the sentencing judge's comment that there is a "low threshold" was *obiter* and that the whole of the reasons demonstrate a clear recognition that the dangerous offender designation is exceptional. Alternatively, even if the sentencing judge erred in the pattern of his analysis, the evidence establishes that Mr. Smarch's offending behaviour is intractable.

[30] I agree that the sentencing judge erred on these two grounds. Respectfully, neither the sentencing judge's reasons, nor the appeal record support the Crown's arguments.

Analysis

[31] I begin with the appellant's argument that the sentencing judge failed to consider future treatment prospects at the designation stage.

[32] *Boutilier* holds that a sentencing judge cannot designate an offender as a dangerous offender without considering all retrospective and prospective evidence relating to the continuing nature of the offender's risk, which includes the offender's future treatment prospects: at para. 43. While *Boutilier*'s focus was on s. 753(1)(a), not s. 753(1)(b), *R. v. Skookum*, 2018 YKCA 2 clarified that *Boutilier* "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)": *Skookum* at para. 57.

[33] It is clear from the reasons that the sentencing judge did not consider future treatment prospects, nor intractability, at any point in the designation stage. Treatability was considered only at the penalty stage, in relation to managing the offender's risk. Given *Boutilier* and the subsequent decisions issued by this Court in *Skookum* and *R. v. Lange,* 2019 YKCA 2, this is a reversible error.

[34] Turning to the second ground, in my view the sentencing judge also erred in characterizing the threshold for a dangerous offender designation as "low". Both *Boutilier* and *Skookum* make it clear that the threshold is a high one. Dangerous offender legislation is aimed at "a small group of persistent criminals with a propensity for committing violent crimes against the person". *Boutilier,* at para. 3 (see also para. 75); *Skookum* at para. 56.

[35] Considered in the overall context, it cannot be said that the sentencing judge's comments on this point are *obiter*. His opinion that the threshold is low was central to his analysis and his conclusion, and constitutes an error in principle. In a key, concluding paragraph on whether the appellant met the criteria for an s. 753(1)(b) designation, the judge found that "s. 753(1)(b) creates a low threshold for declaring an individual to be a dangerous offender" and went on to conclude, in light of his factual findings and "the wording of s. 753(1)(b)" that he had "no choice … but to declare Mr. Smarch to be a dangerous offender": para. 201. The judge made this determination after having found that the circumstances of the majority of the sexual offences for which Mr. Smarch was convicted were at the "lower end";

that his criminal history was otherwise “not particularly significant”; that there was an absence of sexual deviance and psychopathy; and that there was an absence of a number of risk factors for sexually offending.

[36] While it is true that the judge used the word “exceptional” at various points to describe a dangerous offender designation, he stated that “exceptional” in this context simply meant that a dangerous offender proceeding goes “somewhat outside of the normal purpose, objectives, and principles of sentencing, not that the designation of a dangerous offender under s. 753(1)(b) will be rare or unusual”: para. 200. It was in the sentence immediately following this definition of “exceptional” that the judge went on to find that s. 753(1)(b) creates a low threshold. In this context, the judge’s use of the word “exceptional” is no response to his articulation and application of a “low threshold.”

Remedy

[37] With respect to remedy, Mr. Smarch asks this Court to find that he is not a dangerous offender, but does not ask this Court to interfere with the sentence imposed below. Alternatively, he requests that a new hearing be ordered, limited to the issue of whether Mr. Smarch should be designated a dangerous offender.

[38] The Crown requests, in the event that this Court finds the sentencing judge erred in law, as it has, that this Court maintain the dangerous offender designation despite the underlying error. As I understand the Crown’s application to adduce fresh evidence, it seeks to use fresh evidence for the purpose of showing that the dangerous offender designation ought to be maintained. In effect, the Crown says, even if the sentencing judge erred, and even if the error was not harmless on the record before the judge at the time of the hearing, fresh evidence shows that a dangerous offender designation would be made if the correct legal test were applied to the record as amplified by the fresh evidence.

[39] For the reasons that follow, I agree with the appellant that this Court should exercise its remedial power to set aside the dangerous offender designation and decline to order a new hearing. On the findings of fact made by the sentencing

judge, a correct application of the law results in a finding that the appellant is not a dangerous offender. The Crown is not entitled to adduce fresh evidence in support of its argument on the curative power, and, in any event, the fresh evidence proffered by the Crown cannot be reasonably expected to affect the result.

[40] The Court's remedial powers on an appeal from a dangerous offender designation are set out at s. 759 of the *Code*. Those provisions read:

> Appeal — offender
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> 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.
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> …
>
> 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
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> (ii) order a new hearing, with any directions that the court considers appropriate; or
>
> (b) dismiss the appeal.

[41] The Court will only exercise its curative power to maintain a dangerous offender designation when the Crown has shown that there is no reasonable possibility that the result would have been different had the proper legal framework been applied: *R v. Johnson,* 2003 SCC 46 at para. 49; *R. v. Sipos*, 2014 SCC 47 at para. 35; *Boutilier* at para. 82.

[42] With respect to the relationship between the curative power and fresh evidence on appeal, the Supreme Court of Canada in *Sipos* said:

> [35] In dangerous offender appeals, the appellate court may use its curative power to dismiss an appeal even though there was a legal error at first instance. This power may be used only where the legal error was "harmless" in the sense that there is no reasonable possibility that the result would have been different had the error not been made. It follows that a legal error does not necessarily require reconsideration of the sentence. …

> [36] This exercise is necessarily focused on the record before the sentencing judge because the question concerns what that judge might have done had he or she applied correct legal principles. … [G]enerally speaking, where proposed new evidence has nothing to do with the possible impact of the legal error on the sentencing judge's decision, it should not be considered in relation to the use of the curative power. …
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> …
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> [40] The issue for the appellate court is not, … what the outcome might conceivably be today. Rather, the issue is whether the past decision would have been the same notwithstanding the error …
>
> [Emphasis added.]

[43] The Court went on to explain that fresh evidence has a potentially larger role to play when an offender challenges the reasonableness of his designation, an issue not engaged by this appeal: *Sipos* at para. 44.

[44] The Court in *Sipos* was dealing with a case in which the offender sought to introduce fresh evidence to show that the curative power ought not to be applied — in other words, to show that a new hearing would produce a different result based on the fresh evidence: para. 2. While the context is different, the law articulated in *Sipos* must apply equally in a case like this, where the Crown seeks to introduce fresh evidence in order to show that this Court ought to use its curative power to dismiss the appeal.

[45] It follows that I would dismiss the Crown's fresh evidence application, which consists entirely of court records related to events following the appellant's designation. The proposed fresh evidence is not relevant to the question of whether the Crown can satisfy this Court that there is no reasonable possibility the outcome would have differed had the sentencing judge applied the correct principles. In short, the Crown's attempt to use post-designation records to buttress its argument on the curative power is barred by *Sipos*. In any event, the fresh evidence is not related to any sexual misconduct. While the fresh evidence does involve the appellant's drinking, it is not sufficiently material that it could be "reasonably … expected to have affected the result": *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775.

[46] Turning to the substantive question, I am satisfied that the legal errors did affect the result.

[47] The sentencing judge did not conduct his analysis using the *Boutilier* framework. Further, it is reasonable to infer that Crown and defence counsels' respective strategies, including deciding what evidence to call and their approach to questioning both Dr. Lohrasbe and Mr. Smarch, were shaped, and limited, by the same framework. The process was fundamentally flawed. In the circumstances, it cannot be said that there is no reasonable possibility that the result would have been different had the correct legal test been applied. Indeed, as I explain in the analysis that follows, it is my view that a legally correct analysis would have resulted in a finding that Mr. Smarch is not a dangerous offender.

[48] Given that this is not a case for the Court to exercise its curative powers and maintain the designation, s. 759(3) leaves three dispositions open: finding that the offender is not a dangerous offender; finding that the offender is not a dangerous offender but is a long-term offender (see *Skookum* at para. 68); or, ordering a new hearing.

[49] The Crown has not made any alternative argument asking this Court to substitute a long-term offender designation. Indeed, the sentence imposed on the appellant precludes a finding that he is a long-term offender. Section 753.1(1) says:

> 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
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> (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;
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> (b) there is a substantial risk that the offender will reoffend; and
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> (c) there is a reasonable possibility of eventual control of the risk in the community.

[50] In this case, the sentencing judge found that the appropriate sentence was 16 months' imprisonment. The presumption of indeterminate sentence created by s. 753(4.1) was rebutted: para. 210. The judge also found that the appellant's risk

could be managed without a long term supervision order: para. 247. The judge was satisfied that a 16-month sentence with 3 years' probation, imposed pursuant to s. 753(4)(c), would adequately protect the public against the commission of a further serious personal injury offence. The judge specifically found: "sentencing Mr. Smarch to a penitentiary sentence would be a disproportionate response in the circumstances of this offence and this offender, and that it is not necessary": para. 218. Accordingly, the criterion at 753.1(1)(a) was not met and the appellant could not be designated a long-term offender.

[51] In my view, it is not necessary to order a new hearing. The record and the sentencing judge's reasons permit review and inquiry into whether Mr. Smarch should be designated a dangerous offender. On the facts accepted by the sentencing judge, a proper application of the *Boutilier* framework leads inevitably to a conclusion that the appellant should not be designated a dangerous offender: see *Skookum* at para. 62. I would order that the dangerous offender designation be set aside.

[52] Sexual assault is a serious personal injury offence under s. 752 of the *Code.* The two remaining criteria in s. 753(1)(b) of the *Code,* both of which the Crown must prove beyond a reasonable doubt, are, first, that the offender has demonstrated a failure to control his sexual impulses and second, that there is a likelihood the offender will cause such harm to others in the future by reason of a failure to control those impulses (i.e., the offender's behaviour is intractable).

[53] The first criterion is met. The sentencing judge determined that Mr. Smarch failed to control his sexual impulses. The record supports this, although I note, as the sentencing judge did, that this is demonstrated through relatively few incidents, and there is a significant ten-year gap between the last conviction and the predicate offence.

[54] The question of dangerousness thus turns on whether Mr. Smarch's offending behaviour is intractable. The record shows that it is not.

[55] Dr. Lohrasbe opined that Mr. Smarch was at high risk to offend against females in the future, but not having had specific treatment in the past, his treatment prospects were “unknown”. As the judge observed, the appellant “is not in a position to state that actions he has taken since the commission of the offence, such as involvement in counselling and programming, have reduced his risk of re-offending from that of high risk to that of a lesser risk”: para. 201. In short, retrospective evidence of treatability was unhelpful. However, it is apparent from the judge’s reasons that both Dr. Lohrasbe and the judge were optimistic in terms of a prospective outlook on the appellant’s treatability going forward.

[56] Dr. Lohrasbe determined there was an absence of both psychopathy and sexual deviance. This was “good news” with respect to the appellant’s future treatment prospects: para. 104. The judge characterized this as a “significant” finding, because treatment is more difficult for offenders who have diagnoses of psychopathy or sexual deviance: para. 219. Dr. Lohrasbe identified several types of treatment programs from which Mr. Smarch would benefit, including a sex offender program, a spousal/family violence program, an indigenous-focused violent offender program, vocational training, and ongoing substance abuse programs. Dr. Lohrasbe suggested substance abuse programs would be required for a lengthy period. This is not surprising, given that alcohol abuse was identified as a primary risk factor in Mr. Smarch’s offending. Notably, Dr. Lohrasbe was of the view that Mr. Smarch would benefit from a long period of services, rather than a long period of incarceration. The sentencing judge accepted this.

[57] Indeed, the sentencing judge said, in his concluding paragraph on designation:

> [209] When I look at the relatively lower-end sexually offending behaviour of Mr. Smarch, excluding the one 2003 offence where there was a forcible attempt to have intercourse, the circumstances of his subsequent criminal offending in 2010 and 2013 and the time period between the 2003 offences and these acts, his otherwise not particularly significant criminal history, the assessment of him not being sexually deviant or psychopathic, and the absence of a number of risk factors for sexually offending; while I am required to find him to be a dangerous offender, he certainly is not amongst the most dangerous of offenders.

[58] Separated from the errors which drove the judge to conclude that he was "required to find" the appellant to be a dangerous offender, the judge's findings here and elsewhere strongly support a conclusion that the appellant did not meet the criteria for dangerousness.

[59] That Mr. Smarch could be treated and was not, therefore, unable to surmount his offending conduct, is also supported by the sentence imposed on him. The sentencing judge held that the risk posed by Mr. Smarch could be managed through a short period of incarceration and a probation order which included a direction to take treatment for, among other things, substance abuse, sexual offending and psychological issues.

[60] In evaluating the appropriate sentence, the judge framed the issue as follows:

> [213] … So while it is likely that, if he were to have been released into the community on May 29, 2014, he would commit a serious personal injury offense, the issue is whether it is to be reasonably expected that he will not do so at the time of his release from custody, therefore making it no longer likely that he will commit a serious personal injury offence.

[61] In the analysis that followed, the judge found, in part because "the primary issue that leads to Mr. Smarch's impulsive sexual offending is substance abuse and not sexual deviancy or a psychopathic personality" and because "his sexual offending is towards the lower end of the spectrum" (para. 234), that Mr. Smarch would not be likely to commit another serious personal injury offence upon release from custody, as long as he received treatment, which could be imposed under a standard probation order (paras. 237, 247). It is difficult to reconcile these findings with a conclusion, on an application of the correct legal test, that the appellant's behaviour is intractable.

[62] As I see it, the judge's findings of fact at the designation stage and at the penalty stage make it clear that, had he properly considered future treatment prospects at the designation stage, Mr. Smarch would not have been designated a dangerous offender.

Disposition

[63] I would deny the Crown's fresh evidence application, allow the appeal and set aside the dangerous offender designation.

"The Honourable Madam Justice Shaner"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Harris"