COURT OF APPEAL OF YUKON

Citation: *R. v. Smarch*,
2019 YKCA 5

Date: 20190306
Docket: 18-YU833

Between:

Regina

Respondent

And

James William Smarch

Applicant

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Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler

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

Counsel for the Applicant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Vancouver, British Columbia February 4, 2019
Place and Date of Judgment:	Vancouver, British Columbia March 6, 2019

Written Reasons by:
The Honourable Mr. Justice Fitch

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

Summary:

The applicant seeks an extension of time to appeal a dangerous offender designation that was made in October 2014. The sentencing judge held that s. 753(1)(b) creates a low threshold for designating an individual as a dangerous offender and that the prospect that an individual will be successfully treated has limited application at the designation stage. Subsequently, the Supreme Court of Canada clarified in R. v. Boutilier, 2017 SCC 64, that a dangerous offender designation is reserved for those who pose a high likelihood of harmful recidivism and whose conduct is intractable. The Court also held that treatment prospects are highly relevant at the designation stage. The applicant says he has a reasonably arguable ground of appeal based on the judge's application of pre-Boutilier jurisprudence and that the interests of justice favour granting the extension of time. Held: Extension of time granted. The applicant has a reasonably arguable ground of appeal that the judge, without the benefit of Boutilier, erred in principle in his application of the dangerous offender designation criteria. The interests of justice, the overarching factor in the analysis, favour granting the extension. Following R. v. M.A.G., 2002 BCCA 413, this case is distinguishable from other extension of time applications involving applicants who are out of the judicial system because the appeal is from an aspect of the sentence, not conviction, and because a dangerous offender designation is uniquely capable of inflicting severe consequences on offenders. Gladue principles are also relevant in determining what the interests of justice require as the applicant is an Indigenous person who is significantly disadvantaged. The time to file a notice of appeal is extended to the day that is two weeks from the date upon which this judgment is released.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] The applicant, James William Smarch, applies under s. 678(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*] and Rules 3 and 16 of the *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993* for an extension of time to appeal a decision made by a Yukon Territorial Court judge on October 23, 2014, declaring him to be a dangerous offender. The applicant submits that the interests of justice favour granting the order sought because he was found to be a dangerous offender on an analytical framework inconsistent with *R. v. Boutilier*, 2017 SCC 64. Specifically, he submits that the sentencing judge, who did not have the benefit of *Boutilier*, erred in principle by designating him a dangerous offender without considering his treatment prospects at the designation stage and in the absence of a finding that his behaviour is intractable.

[2] For the reasons that follow, I would grant the order sought. Time for filing a notice of appeal from the decision declaring the applicant to be a dangerous offender is extended to the day that is two weeks from the date upon which this judgment is released.

II. Background

[3] The procedural history of this matter and the background relevant to the determination of this application may be briefly stated.

[4] On December 6, 2013, the applicant was found guilty of sexually assaulting an unconscious female in a public park in Whitehorse. He was intoxicated at the time of the offence. Without diminishing the seriousness of the offence or the gross violation of the victim's bodily and psychological integrity inherent in its commission, the sentencing judge found the applicant's actions to "…have been those of a highly intoxicated individual who likely somewhat spontaneously and opportunistically engaged in sexual contact with the unresponsive [victim]."

[5] The Crown initiated an application for a finding that the applicant be declared a dangerous offender under s. 753(1)(b) of the *Code* on grounds that he had, by his conduct, shown a failure to control his sexual impulses and the likelihood of causing injury or pain to others through a failure to do so in the future.

[6] The applicant was 28 years old at the time of sentencing. He is a member of the Tr'ondek Hwech'in First Nation. As a youth, he was convicted on two occasions of committing a sexual assault in the course of breaking and entering a residence. The victims in both cases were known to the applicant. At the age of 24, he was convicted of sexual exploitation, assault and uttering threats in relation to the same complainant. The offence of sexual exploitation was committed in the context of a nine-month intimate relationship the applicant had with a 15-year-old female.

[7] The applicant was significantly disadvantaged at an early age. He was exposed to alcohol abuse as a child and began consuming alcohol regularly at the age of 14 or 15. He quit school in Grade 11. He was diagnosed in 2003 with

Attention Deficit Hyperactivity Disorder and a “mild intellectual handicap” with a selective deficit in verbal aptitude indicative of a severe language-based learning disability.

[8] Dr. Lohrasbe prepared the assessment report ordered under s. 752.1 of the *Code*. He concluded it was highly likely that the applicant suffers from Fetal Alcohol Spectrum Disorder (“FASD”). As a result, the applicant lacks the capacity to maintain awareness that his judgment, cognitive skills and interpersonal skills are impaired, and that his sexual and social behaviours are inappropriate. Dr. Lohrasbe diagnosed the applicant as having an Antisocial Personality Disorder but did not consider him to be “especially psychopathic” and declined to diagnose any sexual deviance, noting that his sexual aggression was opportunistic and an extension of his antisocial personality.

[9] Given the permanence of his deficits, Dr. Lohrasbe found that the applicant “remains at high risk regarding the likelihood of sexual offending in the foreseeable future.” He concluded that the prospect of reducing the risk of re-offence through treatment interventions was unknown. Although the applicant would be a challenging candidate for treatment, Dr. Lohrasbe testified that it was premature to be pessimistic about his prospects for change, given that he has not been through intensive risk-related programs. Dr. Lohrasbe opined that the applicant needed a lengthy period of treatment intervention, not a lengthy period of incarceration. He said the applicant’s ability to learn skills can make him manageable in the community but whether he would take advantage of opportunities to learn those skills was unknown.

[10] The Crown invited the sentencing judge to find the applicant to be a dangerous offender but conceded there was a reasonable expectation that a lesser measure than an indeterminate sentence would adequately protect the public. The Crown sought, under s. 753(4)(b) of the *Code*, a determinate sentence in the range of four to five years’ imprisonment followed by a ten-year period of long-term community supervision.

[11] The applicant did not contest the dangerous offender designation, though he suggested the possibility of finding him to be a long-term offender under s. 753(5). He did, however, seek the imposition of a much shorter custodial sentence.

[12] On October 23, 2014, the applicant was found to be a dangerous offender and sentenced to a determinate sentence of 16 months' imprisonment to be followed by three years' probation. Written reasons were delivered on November 25, 2014, and are indexed as 2014 YKTC 51.

[13] The Crown appealed the sentence, arguing that the judge should have imposed a sentence of at least two years' imprisonment followed by a long-term supervision order. The applicant did not appeal the decision declaring him to be a dangerous offender. The propriety of the dangerous offender designation was not, therefore, at issue on appeal. The Crown's appeal was dismissed on July 14, 2015, in reasons for judgment indexed as 2015 YKCA 13.

[14] In an affidavit before us on the extension of time application, the applicant deposes that he is not sure what an appeal is and did not know he could "challenge that I'm dangerous".

[15] As a result of being designated a dangerous offender, the applicant is subject to lifelong consequences. Should he be convicted of a serious personal injury offence in the future, the Crown may make application for the imposition of an indeterminate sentence without re-establishing the criteria for designation. Section 753.01, the operative provision in this context, provides as follows:

> **Application for remand for assessment — later conviction**
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> **753.01 (1)** If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under subsection 753.3(1), on application by the prosecutor, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under subsection (4).
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> …

> **Application for new sentence or order**
>
> **(4)** After the report is filed, the prosecutor may apply for a sentence of detention in a penitentiary for an indeterminate period, or for an order that the offender be subject to a new period of long-term supervision in addition to any other sentence that may be imposed for the offence.
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> **Sentence of indeterminate detention**
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> **(5)** If the application is for a sentence of detention in a penitentiary for an indeterminate period, the court shall impose that sentence unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted — with or without a new period of long-term supervision — will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
>
> **New long-term supervision**
>
> **(6)** If the application is for a new period of long-term supervision, the court shall order that the offender be subject to a new period of long-term supervision in addition to a sentence for the offence for which they have been convicted unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that the sentence alone will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[16] The Supreme Court of Canada released judgment in *Boutilier* on December 21, 2017. To summarize, the Court in *Boutilier* held that the 2008 amendments to the dangerous offender provisions of the *Code* did not broaden the pool of offenders who could properly be designated dangerous. Like the 1977 regime at issue in *R. v. Lyons*, [1987] 2 S.C.R. 309, the 2008 amendments were found to target “a small group of persistent criminals with a propensity for committing violent crimes against the person”: at paras. 3, 75. In addition, *Boutilier* confirms that an offender cannot be designated a dangerous offender unless the sentencing judge concludes that the offender is a future threat having conducted a prospective assessment of risk: at 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”: at para. 27.

[17] Before *Boutilier* resolved these interpretive points, it was the law in some jurisdictions, including Yukon, that: the 2008 amendments were intended to broaden the group of offenders who could be declared dangerous from the very small group of offenders the 1977 legislation was found to target in *Lyons*; a dangerous offender designation did not require a demonstration of intractability; and treatment prospects played a limited role at the designation stage but were highly relevant in choosing the appropriate sentence under s. 753(4). This interpretation was largely based on the reasoning in *R. v. Szostak*, 2014 ONCA 15, leave to appeal ref'd [2014] S.C.C.A. No. 300.

[18] The focus of the Court's attention in *Boutilier* was on s. 753(1)(a), not s. 753(1)(b). In *R. v. Skookum*, 2018 YKCA 2 at para. 57, however, this Court held that the language of s. 753(1)(b) and the analysis undertaken by Côté J. in the reasons for judgment of the majority left little room for doubt that the need to consider an offender's treatment prospects at the designation stage applies equally to dangerous offender applications premised on s. 753(1)(b).

[19] On the day judgment in *Boutilier* was released, counsel for the applicant, who appeared for the Yukon Legal Services Society ("YLSS") as intervener in the Supreme Court of Canada, recommended that YLSS undertake an assessment and review of all dangerous offender designations made after 2008 to assess whether appeals were warranted in any of these cases. The review took place from December 2017 until April 2018. The applicant's case was the only one identified by YLSS as justifying an appeal.

[20] Contact with the applicant was not established until early September 2018. He confirmed his desire to appeal from the dangerous offender designation. The notice of application to extend time to appeal was filed on October 23, 2018.

III. The Test on Extension of Time Applications

[21] Appellants seeking to challenge a conviction or sentence are only allowed to do so while they are "in the system". To be in the system, an appeal or application for leave to appeal must have been initiated within time, or an application to extend

time must have been granted based on the criteria that normally apply in such cases: *R. v. Wigman*, [1987] 1 S.C.R. 246 at 257-58; *R. v. Thomas,* [1990] 1 S.C.R. 713 at 715-16.

[22] The parties agree that the criteria to be applied on an application to extend time were properly set out in *R. v. Smith*, [1990] B.C.J. No. 2933 (C.A.):

> 4 The appellant in order to obtain an extension of time must satisfy certain rules. The governing principle on which this Court acts on applications to extend time for doing an act is that the applicant must establish special circumstances.
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> 5 In considering whether there are special circumstances this Court has always taken into account such factors as whether: (1) the applicant had a bona fide intention to appeal before the expiration date of the appeal date; (2) informed the respondent either expressly or impliedly of his intention; (3) the respondent would not be unduly prejudiced by an extension of time; (4) there is merit in the appeal in the sense that there is a reasonably arguable ground; (5) it is in the interest of justice, that is the interest of the parties, that an extension be granted. How much weight will be given to any of these factors in determining whether there are special circumstances will depend on the circumstances of each case.

Similar criteria were identified in *R. v. Roberge*, 2005 SCC 48 at para. 6, as being applicable to extension of time applications brought in the Supreme Court of Canada.

[23] The "overarching factor" or "ultimate question" on applications of this kind is whether, in all the circumstances, the interests of justice require that an extension of time be granted. The interests of justice criterion embraces the first four questions but is sufficiently broad to take account of the vast range of considerations, individual and societal, that shape what justice requires in a given case*:* *R. v. M.A.G.,* 2002 BCCA 413 at para. 35 [*M.A.G.*]; *Roberge* at para. 6; *R. v. Tallio*, 2017 BCCA 259 (Chambers) per Bennett J.A. at para. 35.

IV. Application to the Case at Bar

1. *Bona Fide* Intent to Appeal

[24] It is common ground that the applicant did not form an intention to appeal within the 30-day appeal period. This application to extend time was made almost

four years after the appeal period expired. While the absence of an intention to appeal within the applicable time period coupled with a delay of this magnitude will often strongly militate against granting an extension of time, I am not prepared to assign these factors the weight they would ordinarily be given in this case. I say this for two reasons.

[25] First, when sentence was imposed, the governing law did not permit anything more than limited consideration of treatment prospects at the designation stage. The applicant's counsel at the time of the hearing (not counsel on this application) did not contest that the statutory criteria for a dangerous offender designation had been met. The sentencing judge, who was bound by the law as it then existed, concluded that "while [he was] required to find [the applicant] to be a dangerous offender, he certainly is not amongst the most dangerous of offenders": at para. 209.

[26] The applicant was in no position to pursue this appeal on his own. He was completely reliant on legal aid. Given the manner in which the 2008 amendments had been interpreted in Yukon as of November 2014, it seems clear that YLSS would not have issued a legal aid certificate for the purposes of appealing the designation even if the applicant had taken timely steps in pursuit of the appellate remedies available to him under s. 759 of the *Code*.

[27] Second, although the delay is significant, the applicant's disadvantages are such that it is unreasonable to suppose that he could, relying on his own resources, have become aware of the release of the judgment in *Boutilier* and its potential importance to the circumstances of his case.

2. Notice to the Respondent/Crown

[28] The applicant informed the Crown of a possible appeal in this case on December 27, 2017, six days after the decision in *Boutilier*.

3. Prejudice to the Parties

[29] The Crown fairly acknowledges that it would not be unduly prejudiced by an order granting the relief sought. The applicant seeks an extension of time to appeal

one aspect of the sentence imposed upon him – the dangerous offender designation. If the order is granted, he will argue on appeal that the designation should be set aside under s. 759(3)(a)(i). The Crown may argue that the designation should be confirmed or, alternatively, a new hearing ordered under s. 759(3)(b) or s. 759(3)(a)(ii) respectively. In the event that a new hearing is ordered, the case will turn largely on uncontested documentary evidence concerning the applicant's antecedents and expert evidence respecting the risk he poses to the public and whether, with treatment, that risk can be reduced to an acceptable level. The Crown concedes that it will not be prejudiced in remounting the application should that be required.

4. Merits of the Proposed Appeal

[30] The parties joined issue on whether the proposed appeal has been shown to have merit sufficient to warrant granting an extension of time. Indeed, the Crown characterizes the merits component of the test as the "key issue" on this application.

[31] I do not propose analyzing the merits of the proposed appeal with the rigour counsel brought to the task, nor have I attempted in these reasons to reflect the nuances of their respective positions. In my view, the applicant has demonstrated a reasonably arguable ground of appeal premised on the sentencing judge's reliance on pre-*Boutilier* jurisprudence in determining that the applicant should be declared a dangerous offender. He highlights these passages from the Reasons for Sentence:

> [123] The amendments in 2008 to the Dangerous Offender provisions of the *Criminal Code* have significantly altered the landscape with respect to Dangerous Offender applications and designations.
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> …
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> [125] … The issue in regard to the prospects of the offender being controlled in the community has moved from the threshold question of whether the offender is to be designated as a dangerous offender or long-term offender, to the determination of what the appropriate sentence will be.
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> [126] In *R.* v. *Szostak*, 2014 ONCA 15, the Court noted that the current legislative framework is intended to broaden the group of offenders who may be designated as dangerous offenders. The gateway, so to speak, has been widened through these amendments. At para. 54 the Court stated that:

> ... it is apparent that Parliament intended a broader group of offenders be declared dangerous offenders than was envisaged in *Lyons* [*R.* v. *Lyons*, [1987] 2 SCR 309] where the court spoke of "a very small group of offenders". While the legislation is still narrowly targeted to a small group of offenders, that Parliament intended to broaden the group of persons to be labelled as dangerous offenders is apparent... (see also *R.* v. *Paxton* 2013 ABQB 750 at para 25; *R.* v. *Warawa*, 2011 ABCA 294 at para. 6).

[127] The Court in *Szostak* notes that one impact of the legislative shift in discretion is that the prospect of the offender being successfully treated impacts on the appropriate sentence to be imposed but has limited application on whether the offender is declared to be a dangerous offender or not. (paras. 36, 52, 53).

…

[201] I find that s. 753(1)(b) creates a low threshold for declaring an individual to be a dangerous offender. Mr. Smarch has, in the past and in the predicate offence, shown a failure to control his sexual impulses. He is noted to be at a high risk to re-offend. He 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. If he re-offends sexually his re-offending will undoubtedly cause "injury, pain or other evil to persons". This injury, pain or other evil will be through his failure to control his sexual impulses. In light of my finding in regard to these factors, I have no choice, given the wording of s. 753(1)(b) but to declare Mr. Smarch to be a dangerous offender.

…

[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.

[Emphasis added.]

[32] I emphasize that it is not for us to say whether the applicant's proposed grounds of appeal are strong, let alone likely to prevail. It is sufficient for the applicant to show that the proposed grounds of appeal are reasonably arguable. He has, in my view, met this threshold.

5. The Interests of Justice

[33] The interests of justice take account not only of the applicant's interests but the public interest in the timely resolution of criminal cases. Finality plays an important role in the administration of criminal justice. So does the fair and correct disposal of litigation. Balancing these sometimes conflicting interests requires an acute sensitivity to context.

[34] The context giving rise to this application is very similar to that which gave rise to the British Columbia Court of Appeal's decisions in *M.A.G.* and its companion case, *R. v. R.R.A*., 2002 BCCA 414. In both cases, the offenders sought extensions of time to launch appeals from decisions declaring them to be dangerous offenders and imposing indeterminate sentences. In the lead case of *M.A.G.*, an extension of more than three and a half years was sought. As in this case, both offenders argued they should be permitted back into the system to take advantage of a recent and more favourable judicial interpretation of the dangerous offender provisions of the *Code*. In *R. v. Johnson*, 2001 BCCA 456, aff'd 2003 SCC 46, the Court interpreted the 1997 amendments to Part XXIV of the *Code* and held that if an offender could be controlled in the community within the confines of a long-term offender disposition, a dangerous offender declaration could not properly be made: at para. 104. Prior to *Johnson* and its companion case *R. v. Edgar*, 2001 BCCA 457, the generally accepted view was that the efficacy of a long-term offender designation did not need to be considered before determining whether an offender was a dangerous offender.

[35] Writing for the Court in *M.A.G.*, Esson J.A. noted that in *Thomas* the applicant sought an extension of time to initiate an application for leave to appeal his conviction for second degree murder to the Supreme Court of Canada. The jury had been instructed on a provision later found to be unconstitutional in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. He sought an extension of time to appeal on the ground that he was convicted under a law subsequently declared to be invalid. Applying the criteria applicable to extension of time applications, the Court declined to grant the relief sought, noting that the applicant had not established an intention to appeal within time and had not adequately explained the delay.

[36] Esson J.A. distinguished *Thomas* on two bases. First, neither of the applicants in *M.A.G.* sought a new trial. Second, the imposition of a dangerous offender designation and indeterminate sentence entail consequences so harsh that appeals in cases of this kind are *sui generis*:

> [22] The point is that the rule laid down in *Thomas* arose in a particular context which required a firm line to be drawn. In a similar context, that fetter upon the discretion of this Court would have to be applied as was done by this Court in *R. v. Smith* [[1990] B.C.J. No. 2933 (C.A.)] and *R. v. Kivell* [[1990] B.C.J. No. 2430 (C.A. Chambers)]. These applications, however, arise in a very different context. These applicants do not seek a new trial based on a fundamental change in the law flowing from the application of the *Charter*. They ask only to be allowed to appeal against one aspect of the sentence imposed upon them and to be permitted to do so on the ground that recent decisions of this Court have revealed that the failure to consider whether they were long-term offenders was based on an erroneous view of the relevant Code section as it existed at the time of sentencing and as it remains.
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> [23] The circumstances of these cases are significantly different from those in the *Thomas* line of cases. Taken together, they justify the conclusion that the interests of justice require that the extension be granted.
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> [24] The only sense in which there has been a change in the law is that this Court has overruled a series of decisions at first instance holding, or assuming, that the section did not permit consideration of a long-term offender status. This is not a case of seeking to be artificially allowed into the system to take the benefit of a "new" law. Rather, it is an attempt to seek the benefit of the recent correction of a mistaken view of the law.
>
> [25] A second significant circumstance is that the applicants seek an extension to appeal in relation to a dangerous offender designation and the indeterminate sentence based upon it. It is fair to say that our courts have always considered the dangerous offender provisions as something of a special case. There is good reason for that. Dangerous offender provisions, necessary as they are to protect innocent persons from the dangerous propensities of some offenders, have harsh consequences for those offenders, many of whom lack not only the normal capacity to control their violent propensities but who also lack the normal capacity to look after their own interests once they are charged. The unique capacity of these provisions to inflict cruel and unfair consequences on offenders is illustrated by *Steele v. Warden of Mountain Institution* (1990), 60 C.C.C. (3d) 1. In that case, the Supreme Court of Canada upheld the decision of Mr. Justice Paris [(1989), 72 C.R. (3d) 58 (B.C.S.C.)], affirmed by this Court [(1990), 54 C.C.C. (3d) 334 (B.C.C.A.)], to order the release of a man who had been in prison since 1953 under the "criminal sexual psychopath" provisions in effect at that time.

> [26] The circumstances of dangerous offender cases are so radically different from those in the *Thomas* line of cases that it would, in my view, be unrealistic to say that these applicants seek to be "artificially brought in to the system". The question then is whether this application should be granted based on the criteria that normally apply to applications to extend time for appeal.
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> [Emphasis added; citations added.]

[37] The Crown does not take issue with the analysis in *M.A.G.*, including the way in which Esson J.A. distinguished *Thomas* from the extension of time applications before the Court in those cases. I agree with and adopt much of the reasoning in *M.A.G*.

[38] Finality considerations play a role of unquestionable importance in determining what the interests of justice require when extensions of time to initiate appellate proceedings are sought. That is true whether the applicant seeks an extension to appeal conviction, sentence, or both. Finality may, however, play a less important role where an extension of time is sought to appeal only the validity or fitness of a sentence, not the propriety of a conviction. The implications of appellate intervention on an appeal from sentence are generally not as profound as those that can flow from appellate intervention on an appeal from conviction. Where a conviction appeal is allowed and a new trial is ordered, witnesses may be required to testify again. Victims may be re-traumatized in circumstances where they held an objectively reasonable expectation that the litigation part of their ordeal had come to an end. The Crown may be challenged in remounting the prosecution if evidence, or evidence of the same quality, is no longer available. These concerns, which profoundly influence the assessment of what the interests of justice require where an extension of time is sought to appeal conviction, will generally have attenuated significance where an applicant seeks permission to proceed with a late sentence appeal.

[39] Further, I agree with the observations of Esson J.A. that the interests of justice must also take account of the exceptional nature of dangerous offender proceedings and what is at stake in applications of this kind. In the absence of prejudice to the Crown, the importance assigned to the correct determination of a

dangerous offender application may tip the balance away from finality and towards reviewability.

[40] The Crown does, however, seek to distinguish *M.A.G.* from the case at bar on factual grounds. The Crown says that whereas the offenders in *M.A.G.* were subject to indeterminate sentences when their applications to extend time came forward, the applicant has served the sentence imposed on him for the predicate offence. The Crown submits that the interests of justice play out differently where, as here, the offender is not subject to an ongoing and indefinite deprivation of liberty, but is saddled only with a jeopardy that is contingent in nature and within his power to avoid altogether by not committing a further serious personal injury offence that would trigger the operation of s. 753.01.

[41] While there is some merit in the Crown's position, I am not prepared in this case to distinguish *M.A.G.* on this footing.

[42] Significant downstream consequences attach to a dangerous offender designation even when an indeterminate sentence is not imposed. The offender will carry the stigma associated with being designated "dangerous" for the rest of their life. In addition, pursuant to s. 753.01, the offender is subject for the rest of their life to the threat of indefinite incarceration – the harshest penalty available under the *Code* – should they be convicted of a further "serious personal injury offence". The applicant is subject to this jeopardy despite the fact that it is at least arguable the designation ought not to have been made.

[43] It is also worth noting, in this context, that the definition of "serious personal injury offence" in s. 752 – the gateway to the institution of both a dangerous offender proceeding under s. 753(1) and a direct application for the imposition of an indeterminate sentence or long-term supervision order under s. 753.01 – encompasses a fairly broad range of criminal conduct: *R. v. Steele*, 2014 SCC 61. For example, a future application for the imposition of an indeterminate sentence could be triggered by the applicant's conviction for robbery in circumstances where he uttered threats of violence in the course of stealing something from a drinking

companion. Such an offence would have little to do with the applicant's past pattern of behaviour or with the concern that motivated the initial dangerous offender application – the protection of women from assaultive behaviour. Because of the pre-existing designation, the Crown would, however, be relieved of the obligation of establishing the criteria set out in s. 753(1).

[44] Against this background stands the reality that the applicant, who is still a relatively young man, struggles with impulse control and is cognitively impaired. These impairments are unlikely to change. Both are attributable to FASD. While the judge found that neither an indeterminate sentence nor long-term supervision was necessary in this case to protect the public, it is unreasonable to suppose that the rest of the applicant's life will be conflict-free. Unless the extension of time is granted, it is entirely possible that the applicant will face a future hearing under s. 753.01 to determine whether an indeterminate sentence should be imposed without having had an opportunity to challenge the propriety of the designation that permits that hearing to occur.

[45] The applicant's status as an Indigenous person also warrants consideration in determining what the interests of justice require in this case. As Karakatsanis J. noted in her reasons (dissenting in part) in *Boutilier*, Indigenous persons are greatly overrepresented in Canadian prisons and especially in the dangerous offender population. Citing *R. v. Gladue*, [1999] 1 S.C.R. 688, and other authorities, she noted judicial acceptance of the fact that racism, colonialism and intergenerational trauma inform this disturbing statistic: at para. 108. Karakatsanis J. noted that at the end of the fiscal year 2014-15, Indigenous offenders accounted for 31.5% of the total dangerous offender population, citing Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview*, 2015 Annual Report at 107. I note that at the end of the fiscal year 2016-17, Indigenous offenders accounted for 34.5% of the total dangerous offender population: Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview*, 2017 Annual

Report at 107. Refusal of the order sought in this case would, in my view, only add to this complex and regrettable state of affairs.

[46] At the end of the day, the applicant seeks only the opportunity to argue that the dangerous offender designation to which he is subject is the product of error in principle. He seeks to appeal this aspect of the sentence, not his conviction. The appeal is reasonably arguable. The Crown will not be prejudiced by granting the order sought and I can envision no scenario in which victims will face the trauma associated with testifying again.

[47] Taking all of these considerations into account, I am of the view that the justice of the case requires that the extension of time be granted.

V. Disposition

[48] I would allow the application to extend time to file a notice of appeal from the dangerous offender designation. Time for filing the notice is extended to the day that is two weeks from the date upon which this judgment is released.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Butler"