
CANADA / JUDGMENT

R. v. Haley

2016 BCSC 1144

COURT

Supreme Court of British Columbia

DECIDED

27 June 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 1144 R. v. Haley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haley,

2016 BCSC 1144

Date: 20160627

Docket: 26487

Registry: Vancouver

Regina

v.

Paul Haley

Before: The Honourable Mr. Justice Fitch

Reasons for Sentence

Counsel for the Crown:

James H. Cryder

Counsel for the Accused:

Gary Botting

Hearing Dates:

Vancouver, B.C.

November 30, 2015;

December 1-4, 7-11,

15, 17-18, 2015;

May 16-20, 2016

Written Submissions of the Accused:

June 13, 2016

Written Submissions of the Crown:

June 17, 2016

Place and Date of Sentence:

Vancouver, B.C.

June 27, 2016

Contents

A. INTRODUCTION. 4

B. OVERVIEW.. 5

C. THE LEGISLATION. 8

(a) The Relevant Provisions. 8

(b) The Purpose of the Legislation and the Principles Informing its
Application. 11

D. THE TWO PHASES OF THE APPLICATION. 12

E. THE ISSUES ARISING ON THE APPLICATION. 20

F. BACKGROUND. 21

(a) The Predicate Offences - Vancouver, British Columbia (Victim: Warren Prevey) 21

(b) Mr. Haley's Personal Circumstances. 23

(c) Mr. Haley's Criminal Record. 25

(i) Assault - Oshawa, Ontario (December 5, 1991) 27

(ii) Assault and Uttering Threats - North Bay, Ontario (November 10, 1997) Victim: Melanie
Dupuis. 28

(iii) Fail to Comply with Probation Order - North Bay, Ontario
(November 13, 1997) 29

(iv) Fail to Comply with Probation Order - North Bay, Ontario

(May 26, 1998) 29

(v) Attempt to Obstruct Justice and Escape Lawful Custody - North Bay, Ontario (August 17, 1998) 29

(vi) Assault, Uttering Threats, Failing to Attend Court - North Bay, Ontario (June 29, 2000) Victim: Melanie Dupuis. 30

(vii) Assault, Possessing a Controlled Substance, Obstructing a Peace Officer, Theft Under, Fail to Appear, Unlawfully at Large and Failing to Comply with Probation Order - Toronto, Ontario (October 2, 2000) 31

(viii) Assault - Vancouver, British Columbia (September 3, 2002) Victim: Crystal Barker 33

(ix) Manslaughter - Vancouver, British Columbia (December 9, 2003) Victim: Kandace Kemp. 34

(x) Breach of Undertaking, Attempt to Obstruct Justice - Vancouver, British Columbia (January 24, 2012) 35

(xi) Admissions Made by Mr. Haley in Relation to Uncharged Conduct 36

(d) Correctional History. 36

(e) Previous Response to Community Supervision and Control 45

(f) Mr. Haley's Statement to the Court Prior to the Imposition of Sentence. 47

G. THE EXPERT EVIDENCE: RISK, TREATABILITY AND MANAGEMENT IN THE COMMUNITY. 48

(a) Statements Made by Mr. Haley at the Time of the Assessment 48

(b) Diagnostic Formulation. 51

(c) Intelligence Testing. 51

(d) Risk Assessment 52

(e) Dr. Hart's Evidence Regarding the Potential for Cultural Bias in the Application of Actuarial Risk Assessment Tools. 55

(f) Manageability in the Community. 58

H. ANALYSIS OF THE ISSUES. 62

(a) Assessing Dr. Piché's Evidence. 62

(i) Reliability of the Actuarial Risk Assessment Tools Used by Dr. Piché. 63

(ii) Reliability of Dr. Piché's Evidence Generally. 66

(iii) Other Discrete Issues Impacting the Weight to be Given Dr. Piché's Evidence. 69

- (b) The Pattern Analysis. 74
- (c) The Threat Assessment 81
- (d) Whether to Impose an Indeterminate Sentence. 84

I. CONCLUSION AND SENTENCE. 87

A. INTRODUCTION

- [1] The Crown applies to have Mr. Haley designated a dangerous offender and sentenced to an indeterminate period of incarceration in a federal penitentiary.
- [2] In support of its application, the Crown relies on s. 753(1)(a)(i) and (ii) of the Criminal Code, R.S.C. 1985, c. C-46. The Crown says the evidence establishes beyond a reasonable doubt that Mr. Haley meets the criteria set out in one or both of these provisions and that, in accordance with s. 753(1) of the Code, he must be designated a dangerous offender. Further, the Crown submits that, applying s. 753(4.1), the court should not be satisfied by the evidence adduced on the application that there is a reasonable expectation that any sentencing measure less than an indeterminate sentence will adequately protect the public against the commission by Mr. Haley of a serious personal injury offence in the future. As a result, the Crown submits Mr. Haley should be sentenced to an indeterminate period of incarceration.
- [3] Mr. Haley argues, among other things, that: (1) the Crown has not proved beyond a reasonable doubt that the predicate offences form part of the pattern of behaviour contemplated by either s. 753(1)(a)(i) or (ii); (2) the actuarial risk assessment tools relied on by the Crown in support of its application, specifically the PCL-R and VRAG-R, are unreliable as applied to him and should not be used to ground a finding that he poses an ongoing threat to the life, safety or physical or mental well-being of others; (3) the assessor appointed pursuant to s. 752.1 of the Code brought to her assessment pre-conceived notions about him as an offender, applied unreliable actuarial risk assessment tools, and made critical errors respecting background facts that undermine the reliability of her opinion and the weight that should be accorded her evidence; (4) the Crown has not established beyond a reasonable doubt that he meets the criteria for either a dangerous offender or a long-term offender designation and that, as a consequence, a determinate sentence of six years' imprisonment (with time credited for pre-trial custody) should be imposed; and (5) even if he is designated a dangerous offender, the court should be satisfied by the evidence adduced on the application that there is a reasonable expectation a sentencing measure short of an indeterminate sentence will adequately protect the public from the commission by him of a future serious personal injury offence. Mr. Haley reminds me that at this final stage of the analysis, the unique circumstances of aboriginal offenders must be considered before an indeterminate sentence is imposed, particularly on the question of whether available programs, services and treatment interventions available to aboriginal offenders are such that sentencing options less draconian than an indeterminate sentence are sufficient to

reduce the threat he poses to an acceptable level.

B. OVERVIEW

- [4] The predicate offences were committed on May 1, 2013. Mr. Haley stabbed Warren Prevey in the chest inside the Cambie Pub in Vancouver after an altercation outside the pub that involved Mr. Haley, his girlfriend Alexandra Eadie, Mr. Prevey, and a man nicknamed "Little".
- [5] On May 30, 2014, Mr. Haley was convicted by a jury of aggravated assault and assault with a weapon in relation to the stabbing. Mr. Haley testified at trial. The jury rejected his defences of accident and self-defence.
- [6] Mr. Haley has a lengthy criminal record including a number of convictions for violent offences. To establish the patterns contemplated by s. 753(1)(a)(i) and (ii), the Crown relies on Mr. Haley's five previous convictions for assault, two previous convictions for uttering threats to cause death or bodily harm, a manslaughter conviction from 2003, and the predicate offences.
- [7] Mr. Haley was 43 years of age when he committed the predicate offences. He is now 46. His father was a member of the Mi'kmaq, a First Nations people indigenous to Canada's Maritime Provinces. His mother is Caucasian. His father left the family when Mr. Haley was two years old. He was raised primarily by his mother and maternal grandparents in northern Ontario. When Mr. Haley was a youth, he relocated with his mother to the Toronto area. Mr. Haley reconnected with his father for a time when he was about 17 years old. His father died in the mid-1990s. Mr. Haley reports that he has had no contact with his family in 20 years.
- [8] Mr. Haley has self-identified in different ways. On some occasions, he has self-identified as Caucasian, but reported an affiliation with the Mi'kmaq. On other occasions, he has self-identified as aboriginal. He now identifies as aboriginal and considers his roots to be primarily Mi'kmaq and possibly Mohawk. Mr. Haley has recently made efforts to reconnect with his aboriginal heritage. A pre-sentence report, with a Gladue (R. v. Gladue, [1999] 1 S.C.R. 688) component, is before me.
- [9] On November 14, 2014, I granted the Crown's application for a remand order and directed the preparation of an assessment report pursuant to s. 752.1 of the Code.
- [10] The assessment report was prepared by Dr. Lyne Piché, who was called by the Crown to give evidence on the application.

- [11] At the request of the parties, who urged upon me different interpretations of the jury's verdicts, I made findings of fact respecting the circumstances of the predicate offences before the s. 752.1 assessment was undertaken. Those factual findings, detailed in reasons for judgment indexed as 2014 BCSC 2250, should be read in conjunction with these reasons for sentence.
- [12] The consent of the Attorney General of British Columbia to the institution of this application was conveyed on July 15, 2015. The application was filed on September 24, 2015.
- [13] In response to the application, Mr. Haley filed a Notice of Constitutional Question raising three issues:
1. Does s. 753(1) of the Criminal Code, as amended by s. 42 of the Tackling Violent Crime Act, S.C. 2008, c. 6, offend s. 7 of the Canadian Charter of Rights and Freedoms? If so, is it saved by s. 1 of the Charter?
 2. Does s. 753(1) of the Criminal Code, as amended by s. 42 of the Tackling Violent Crime Act, S.C. 2008, c. 6, offend s. 12 of the Canadian Charter of Rights and Freedoms? If so, is it saved by s. 1 of the Charter?
 3. Does s. 753(4.1) of the Criminal Code violate s. 7 or s. 12 of the Charter? If so, is it saved by s. 1 of the Charter?
- [14] In support of these constitutional arguments, Mr. Haley relied on *R. v. Boutilier*, 2014 BCSC 2187. In that case, Voith J. found that, read in the context of the provisions of Part XXIV as a whole, s. 753(1) of the Code is overbroad and violates s. 7 of the Charter because it does not allow for the consideration of future treatment prospects at the designation stage. He rejected arguments that s. 753(1) also violates s. 12 of the Charter. He also rejected arguments that s. 753(4.1) violates s. 7 and/or 12 of the Charter.
- [15] In a subsequent ruling, indexed as 2015 BCSC 901, Voith J. found that the s. 7 infringement in relation to s. 753(1) could not be saved by resort to s. 1. He suspended the declaration of invalidity for one year, until May 28, 2016.
- [16] The Crown appealed the ruling that s. 753(1) violates s. 7. Mr. Boutilier appealed the dismissal of his other constitutional arguments as well as his dangerous offender designation and indeterminate sentence. The suspension of the declaration of invalidity was extended by the Court of Appeal to the date of its judgment.
- [17] The Court of Appeal rendered its judgment in *Boutilier* on June 2, 2016. The reasons are indexed as 2016 BCCA 235 (*Boutilier* (CA)). The Crown appeal was allowed. The court found that s. 753(1) was not overbroad and did not violate s. 7. Mr. Boutilier's appeal was dismissed. The court affirmed Justice Voith's ruling that s. 753(4.1) does not violate s. 7 or 12 of the Charter.

- [18] The Court of Appeal's judgment in Boutilier was given while this matter was on reserve. The parties requested and were given leave to address the impact of Boutilier (CA) on this case by way of further written submissions, which I have considered.
- [19] In Boutilier, the Court of Appeal appears not to have expressly addressed the question of whether s. 753(1) offends s. 12 of the Charter. Mr. Haley's counsel did not address me on this issue in his oral or written submissions. In these circumstances, and following the principle of judicial comity, I have determined to follow the ruling of Justice Voith that s. 753(1) does not violate s. 12 of the Charter.
- [20] With respect to the merits of the application, and for the reasons that follow, I find the Crown has proved beyond a reasonable doubt that Mr. Haley is a dangerous offender as defined in s. 753(1)(a)(i) and (ii) of the Code. As I am not satisfied by the evidence adduced during the hearing that there is a reasonable expectation that any sentencing measure less than an indeterminate period of incarceration will adequately protect the public, I sentence Mr. Haley to detention in a penitentiary for an indeterminate period.

C. THE LEGISLATION

(a) The Relevant Provisions

- [21] The following provisions of Part XXIV of the Code are most relevant to the determination of this application:

PART XXIII - Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

PART XXIV - Dangerous Offenders

Application for finding that an offender is a dangerous offender

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

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

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.

If offender not found to be long-term offender

- (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.

Evidence of character

757. Without prejudice to the right of the offender to tender evidence as to their character and repute, if the court thinks fit, evidence of character and repute may be admitted

- (a) on the question of whether the offender is or is not a dangerous offender or a long-term offender; and
- (b) in connection with a sentence to be imposed or an order to be made under this Part.

(b) The Purpose of the Legislation and the Principles Informing its Application

[22] The purpose of Part XXIV of the Code and the principles informing its application were addressed in *R. v. Smarch*, 2015 YKCA 13 at paras. 46-48:

There is no dispute that the primary purpose of sentencing in the dangerous offender context is the protection of the public: *R. v. Johnson*, 2003 SCC 46 at para. 19. In *Johnson*, the Court confirmed, however, that dangerous offender proceedings, as part of the sentencing process, "must be guided by the fundamental purpose and principles of sentencing contained in ss. 718 to 718.2" of the Criminal Code: *Johnson* at para. 23. The Court further cited *Lyons*, [1987] 2 S.C.R. 309 at 329, for the proposition that preventive detention "simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased": *Johnson* at para 23.

A sentencing judge must also consider "the possibility that a less restrictive sanction would attain the same sentencing objectives that a more restrictive sanction seeks to attain": *Johnson* at para. 28. With respect to the principle of proportionality in dangerous offender sentencing, in *R. v. Armstrong*, 2014 BCCA 174, this Court held, "a proportionate sentence is one that not only balances the nature of the offence and the circumstances of the offender, but also gives considerable weight to the protection of the public": *Armstrong* at para. 72. Similarly, the principles surrounding the sentencing of Aboriginal offenders, set out by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, apply in the context of dangerous offender sentencing, though their application may be more limited: see *R. v. Ominayak*, 2012 ABCA 337 at para. 41; and *R. v. Standingwater*, 2013 SKCA 78 at para. 49; contra *R. v. Shanoss*, 2013 BCSC 2335 at para. 165.

In determining whether there is a reasonable expectation that measure will adequately protect the public, there has to be evidence before the court that the dangerous offender can be safely released into the community. In *R. v. Bitternose*, 2013 ABCA 220 at paras. 30-37, the Court held that the mere hope of the existence of community programs is insufficient to address the reasonable expectation of protection of the public. There must be evidence of the existence of community resources that will provide the requisite level of supervision outside of custody to provide adequate protection of the public.

D. THE TWO PHASES OF THE APPLICATION

[23] Unusually, the evidentiary portion of this application proceeded in two phases.

[24] In the first phase, which took place in December 2015, the Crown tendered documentary evidence addressing Mr. Haley's social history, history of offending, history of substance abuse and mental health challenges, performance while incarcerated, including his amenability to treatment and the gains he realized from participating in past treatment programs, and his responsiveness to community supervision. The documentary evidence put before the court consists of about 4,000 pages.

- [25] In addition, the Crown called seven witnesses: Rachael Catalano (Regional Director of Information Management with the Correctional Service of Canada (CSC)); Jodi Harbour (Manager of Community Programs for the CSC); Ken Johns (Assistant Deputy Warden of North Fraser Pre-Trial Centre); Ramtin Sadafi (a community parole supervisor with the CSC who also acts as a liaison with the police and Community Residential Facilities operated under contract with CSC); Shannon Schaefer (a probation officer with BC Corrections who supervised Mr. Haley from October 2012 to May 2013, and was able to speak to records relating to Mr. Haley kept in CORNET, the information management system used by BC Corrections); Patrick Storey (a long-time employee of the Parole Board of Canada, and former Board Member, who gave evidence about the Board's application of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (CCRA), including the authority of the Board to detain offenders beyond their statutory release dates); and Dr. Piché, who was qualified to give opinion evidence in the area of forensic psychology, including: diagnosis of mental health disorders; identification of the elements of an offender's past violent behaviour and risk factors; approaches to the assessment of risk; and treatment interventions for violent offenders to address and manage their risk while in custody and in the community.
- [26] In assessing Mr. Haley's risk to the community, Dr. Piché relied on what are traditionally understood to be actuarial measures, including the Hare Psychopathy Checklist - Revised (PCL-R) and the Violence Risk Appraisal Guide - Revised (VRAG-R). The PCL-R is not an actuarial measure per se, but a personality inventory that enables the identification of traits associated with psychopathy. Individuals with psychopathic personality disorders are more likely to reoffend, so the results of the PCL-R are used to predict risk, or fed into other actuarial risk assessment tools like the VRAG-R to derive a statistically-based probability assessment of future risk.
- [27] Dr. Piché also relied on the Spousal Risk Assessment Guide (SARA) and the Historical-Clinical-Risk Management-20 (HCR-20) as tools that assisted her in formulating an overall opinion about Mr. Haley's future risk and manageability in the community. The SARA and the HCR-20 are not actuarial instruments. Rather, they reflect an approach to the assessment of an offender's future risk for violence that involves the application of structured clinical judgment. Utilizing all the tools available to her, both actuarial and non-actuarial, Dr. Piché concluded that Mr. Haley presents overall with a high risk to reoffend violently.
- [28] Mr. Haley called no evidence during the initial phase of the dangerous offender application.
- [29] On December 17, 2015, at the end of his closing submissions, counsel for Mr. Haley referenced Mr. Haley's aboriginal roots as a factor to be considered on this application. On the evidentiary record then existing, very little was known of Mr. Haley's connection to the Mi'kmaq or Mohawk people and nothing was known of recent efforts made by him to reconnect with his aboriginal heritage.

- [30] When pressed by the court, Mr. Haley's counsel confirmed that he was making application for a Gladue report. The court was informed by Mr. Haley's counsel that he had discussed this matter with the Legal Services Society and was sure funding would be provided for the preparation of a Gladue report.
- [31] Although the timing of the application was troubling, the Crown quite properly did not oppose an order for the preparation of a Gladue report. For reasons indexed at 2015 BCSC 2481, and relying on the representations of Mr. Haley's counsel, I directed the preparation of a Gladue report.
- [32] On the same day the request for a Gladue report was made, counsel for Mr. Haley brought to the court's attention (also for the first time) the decision of Justice Phelan in *Ewert v. Canada (Correctional Service)*, 2015 FC 1093.
- [33] At issue in *Ewert* was whether the CSC's reliance on actuarial risk assessment tools for aboriginal offenders constitutes a breach of its obligations under the CCRA and/or violates s. 7 and/or 15 of the Charter. The actuarial tools at issue in *Ewert* included the PCL-R and VRAG-R, both of which were used by Dr. Piché in assessing Mr. Haley's risk for violent recidivism.
- [34] Mr. Ewert, who is of Métis descent, is a federally incarcerated inmate. The CSC relies on different actuarial tests, including the PCL-R and VRAG, to assess whether an offender meets the criteria for the diagnosis of a personality disorder and to assess the future risk posed by that offender. Mr. Ewert alleged that unreliable actuarial risk assessment tools were being used by the CSC to determine his security classification and institutional placement, and eliminate any hope he had of being given favourable consideration for any form of parole, including escorted temporary absence passes.
- [35] Although Justice Phelan acknowledged that "a thin record" existed upon which to resolve the issue, a finding was made that Mr. Ewert established that the actuarial risk assessment tools used in his case "are susceptible to cultural bias and therefore are unreliable" (para. 75).
- [36] Justice Phelan held that the CSC's reliance on unreliable actuarial risk assessment tools constitutes a breach of its statutory duties under s. 4(g) and 24(1) of the CCRA. Section 4(g) of the CCRA expresses, as one of the CSC's guiding principles, that correctional practices respect cultural differences and be responsive to the special needs of aboriginal peoples. Section 24(1) obliges the CSC to take reasonable steps to ensure that any information about an offender is as accurate as possible.
- [37] Justice Phelan also held that CSC's reliance on the results derived through the application of unreliable actuarial risk assessment tools constituted a breach of Mr. Ewert's s. 7 rights. In the constitutional analysis, reliance was placed on the principles of overbreadth and arbitrariness.

[38] With respect to overbreadth, Justice Phelan concluded at para. 102 that "the continued use of the assessment tools is overbroad of the purpose and objective of the legislation and of CSC's decision making responsibilities."

[39] With respect to arbitrariness, he said, at para. 103:

As held in *Bedford*, arbitrariness arises where there is no connection between the purpose of the impugned state action and the impacts on the individual.

The effect of CSC's unqualified reliance on the risk assessment tools for Aboriginal inmates when there is no evidence of predictive validity is inconsistent with the objective of accurately predicting risk, and/or is unnecessary to achieve that objective.

[40] The s. 7 breach was found not to be justified under s. 1 of the Charter.

[41] The Federal Court enjoined the CSC from using actuarial risk assessment tools, including the PCL-R and VRAG-R, in relation to Mr. Ewert (para. 116).

[42] The Federal Court also announced its intention to issue a final order enjoining the CSC from using actuarial risk assessment tools in respect of all federally incarcerated aboriginal offenders until the CSC has conducted a study confirming the reliability of these tools as applied to adult aboriginal offenders. The Court directed that a remedies hearing be held to determine the fairest way of implementing the final order (para. 113-115). I am advised by counsel that the remedies hearing took place on April 25-27, 2016. The matter is currently under reserve.

[43] The Attorney General of Canada has appealed the initial order made in *Ewert* enjoining the CSC from using actuarial measures in relation to him. The appeal has been set for hearing on June 13, 2016.

[44] Mr. Haley's counsel asked for and was given additional time to consider how he wished to proceed in light of the decision in *Ewert*.

[45] A further pre-hearing conference was held on January 22, 2016. Counsel for Mr. Haley then advised that, due to funding constraints, the Legal Services Society (LSS) was not in a position to fund the preparation of a full Gladue report in Mr. Haley's case. The LSS advised that consideration would be given to funding a Gladue report that focused on discrete issues considered to be of importance to the resolution of the application if those issues were not adequately addressed in the context of a pre-sentence report. With the agreement of counsel, the court then made an order directing the preparation of a pre-sentence report with a Gladue component. Mr. Haley was given leave to renew his application for a Gladue report following receipt of the pre-sentence report. The pre-sentence report was filed on March 30, 2016. The application for a Gladue report was not renewed thereafter. Indeed, Mr. Haley's counsel advised the court on the second phase of the hearing that he was content to proceed on the basis of the information contained in the pre-sentence report.

- [46] On February 5, 2016 Mr. Haley made application to re-open the evidentiary phase of the hearing to: (1) lead evidence regarding recent efforts made by him to reconnect with his aboriginal heritage; and (2) adduce evidence relating to the reliability of actuarial risk assessment tools as applied to aboriginal offenders.
- [47] The Crown did not oppose Mr. Haley's application to re-open provided that leave was also granted to it to adduce further evidence on the issues identified. Mr. Haley did not oppose the Crown's application. In the result, the application was re-opened to permit both parties to adduce additional evidence on these two issues.
- [48] Neither counsel suggested that this Court consider following the ruling in Ewert that actuarial risk assessment tools as applied to aboriginal offenders are unreliable. Rather, both counsel sought the opportunity to create an independent evidentiary record upon which the issue could be adjudicated in the context of this application.
- [49] The second phase of the evidentiary hearing commenced on May 16, 2016. The Crown recalled Dr. Piché primarily on three issues: (1) the possibility that cultural bias is embedded in the structure of actuarial risk assessment tools, and that these tools may yield unreliable results when applied to aboriginal offenders; (2) whether her opinion regarding Mr. Haley's risk for violent recidivism is impacted by reliability concerns respecting actuarial risk assessment tools as applied to aboriginal offenders; and (3) whether her opinion regarding the extent to which Mr. Haley's risk can be reduced to an acceptable level is impacted by new evidence concerning his aboriginal heritage and the availability of custodial and community-based programming specific to aboriginal offenders with a history of violence.
- [50] On the issue of programming for aboriginal offenders with a history of violence, the Crown called Robert Harrison, Regional Administrator of Aboriginal Initiatives, in CSC's Pacific Region. Mr. Harrison is responsible for implementing aboriginal initiatives and gave detailed evidence regarding aboriginal programs, services and culturally appropriate interventions that are available to Mr. Haley both in custody and out of custody while subject to a community supervision order, including a long-term supervision order.
- [51] I was most impressed with Mr. Harrison's evidence and obvious commitment to his work. Mr. Harrison described CSC's Strategic Plan for aboriginal offenders, the Aboriginal Corrections Continuum of Care model, and the work currently being done at Healing Lodges. He noted that aboriginal inmates may apply to serve the balance of a custodial sentence at one of the Lodges run by CSC or operated by an aboriginal community in partnership with CSC: s. 81 CCRA. Mr. Harrison also noted that an inmate who wants to be released into an aboriginal community may engage the assistance of that community, and an aboriginal community liaison officer, in preparing a release plan: s. 84 CCRA.

- [52] Mr. Harrison also described Pathways Healing Units and the benefit aboriginal offenders appear to derive from participation in them. He said that aboriginal offenders are encouraged to participate in Aboriginal Integrated Correctional Programs and access elder services.
- [53] Mr. Harrison also highlighted the substance abuse program and trauma-based interventions that are available at Tsow-Tun-Le Lum Society in Lantzville, B.C. and other residential facilities like it in the Lower Mainland and elsewhere. These aboriginal-specific programs are also summarized in the Gladue component of the pre-sentence report.
- [54] While in federal custody, Mr. Haley would be eligible to participate in the high intensity Integrated Correctional Program Model (ICPM) for aboriginal offenders. The program consists of 104 sessions with each being approximately 2 ½ hours. Mr. Harrison testified that Mr. Haley would be eligible for this program even if he is a non-status Indian within the meaning of the Indian Act, R.S.C. 1985, c. I-5.
- [55] Mr. Haley called two witnesses in the second phase of the hearing: Tony Niles, an elder who has worked with Mr. Haley for the past 18 months while Mr. Haley has been incarcerated at the North Fraser Pretrial Centre awaiting disposition, and Dr. Stephen Hart, a clinical psychologist, researcher and professor in the Department of Psychology at Simon Fraser University.
- [56] Mr. Niles is an elder who provides spiritual support to inmates who express an interest in learning more about their culture and effecting change in their lives. His teaching is based on the Medicine Wheel and involves self-reflection, reconnection with the community, effecting personal change and incorporating the wisdom of elders. He said Mr. Haley has displayed a keen interest in learning more about his culture because it gives him hope. He described Mr. Haley as a respectful person. He also noted that Mr. Haley works as a cleaner - a position of trust that an inmate must earn.
- [57] Dr. Hart, who also testified in the Ewert proceeding, was qualified to give opinion evidence in the areas of forensic psychology, approaches to risk assessment and the reliability of tools used to predict risk. Dr. Hart described various approaches to risk assessment, including both actuarial measures and those that engage structured professional judgment. He testified that actuarial tools rely on statistical profiles based on a data pool and are used to generate a probability estimate of the risk of re-offence. Structured professional judgment tools use evidence-based guidelines but are not designed to be quantitative tests. Both approaches are to the same end - the prediction of risk.
- [58] While Dr. Hart counsels against the use of scores derived from actuarial risk assessment tools as applied to aboriginal offenders in predicting risk, he agrees that information obtained from actuarial measures may assist in the identification of personality traits relevant to both diagnosis and risk assessment. While Dr. Hart has strong concerns about the rigidity of actuarial tools and reliance upon actuarial scores, particularly when applied to aboriginal offenders, he advocates a holistic approach that draws on the diagnostic and

risk assessment insights that may be derived from the proper use of both actuarial and non-actuarial measures in coming to an overall assessment about future risk. Having reviewed Dr. Piché's assessment report, he acknowledged that she appears to have adopted that approach in this case.

[59] Dr. Hart did not assess Mr. Haley and was not asked to provide direct evidence relating to Mr. Haley's diagnosis, the threat he poses to the community, or the extent to which his risk could be managed in the context of a long-term offender disposition or determinate sentence.

[60] I will review the evidence adduced on the application, including the evidence of Dr. Piché and Dr. Hart, in greater detail in the context of addressing the discrete legal issues that arise in this case.

E. THE ISSUES ARISING ON THE APPLICATION

[61] It will streamline identification of the issues arising on this application to state briefly what is not in issue.

[62] First, there is no suggestion that the procedural requirements for the institution of this application have not been met.

[63] Second, it is common ground that the predicate offences are "serious personal injury offences" within the meaning of s. 752 of the Code.

[64] Third, the presumption set out in s. 753(1.1) of the Code is not applicable to this case. Even though Mr. Haley has been convicted of a primary designated offence on more than two occasions, he received for those offences a sentence of more than two years on only one occasion.

[65] Fourth, given the result in Boutilier (CA), Mr. Haley accepts that, for the purposes of these reasons, he is subject to the current legislative regime.

[66] With these issues out of the way, the remaining issues that arise on this application can be framed as follows:

1. Whether actuarial risk assessment tools known as the PCL-R and VRAG-R, when applied to aboriginal offenders, reflect cultural bias or give rise to unreliable estimates of risk such that no weight can properly be given to this evidence on the issues that arise on this application, including on whether the Crown has proved beyond a reasonable doubt that Mr. Haley constitutes a threat to life, safety or physical or mental well-being of other persons;
2. Whether the evidence of Dr. Piché on the central issues of risk, treatability, and the future management of Mr. Haley in the community should be given any weight by the court in light of her reliance on: (a) the PCL-R and VRAG-R; and (b) other information said by Mr. Haley to be inaccurate in material ways;

3. Whether Dr. Piché approached the s. 752.1 assessment with pre-conceived notions about Mr. Haley reflecting a bias against him that manifested itself in her report and her evidence;
4. Whether the Crown has established beyond a reasonable doubt that Mr. Haley meets either (or both) of the threshold criteria set out in s. 753(1)(a)(i) or (ii) of the Code, including that the predicate offences form part of the contemplated patterns of behaviour [the "pattern analysis"];
5. If so, whether the Crown has established beyond a reasonable doubt that Mr. Haley constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of the evidence establishing the past pattern(s) of behaviour: s. 753(1)(a) [the "threat assessment"]: R. v. Neve, 1999 ABCA 206 at paras. 102-105; R. v. Pike, 2010 BCCA 401 at paras. 74-85; and
6. If the aforementioned statutory criteria are met and Mr. Haley must, as a consequence, be designated a dangerous offender pursuant to s. 753(1), whether the court is satisfied by the evidence adduced on the hearing of the application that there is a reasonable expectation that some measure less than an indeterminate sentence will adequately protect the public against the commission by Mr. Haley of murder or a serious personal injury offence: s. 753(4.1). In this regard, particular attention must be paid to Mr. Haley's aboriginal heritage and the services and programs available to him to manage to an acceptable level the risk he poses to the community.

F. BACKGROUND

(a) The Predicate Offences - Vancouver, British Columbia (Victim: Warren Prevey)

- [67] The offences occurred on May 1, 2013. At the time, Mr. Haley was subject to a conditional sentence order requiring him to keep the peace and be of good behaviour and not possess weapons. He was also subject to an order made March 18, 2013 under s. 810(1) of the Code requiring him to keep the peace and be of good behaviour.
- [68] Briefly, Mr. Haley was arguing with Alexandra Eadie as they walked past the Cambie Pub. "Little", who had been drinking in the pub with Mr. Prevey, intervened in the dispute and engaged Mr. Haley in a physical altercation on the street. Mr. Prevey, who was very intoxicated, also involved himself in the fray. A scuffle involving Mr. Haley, Ms. Eadie, "Little" and Mr. Prevey ensued. After the altercation on the street came to an end, "Little" and Mr. Prevey retreated to the pub.
- [69] Enraged by the altercation outside the pub and by his perception that the fight had been unfair, Mr. Haley retrieved a folding knife from his knapsack and pursued "Little" and Mr. Prevey back into the bar to exact revenge. He was overheard to say, "You think you can jump me and get away with it - two on one"?

- [70] Portions of the street altercation, as well as the events inside the bar leading up to the stabbing, were captured on video surveillance cameras. The video depicts "Little", Mr. Prevey and then Mr. Haley rushing into the bar shortly after the altercation on the street came to an end. Mr. Haley looked directly at Mr. Prevey and pursued him to the point of attack. Mr. Prevey, who was unarmed, saw Mr. Haley coming at him from behind. He swung his right arm back towards Mr. Haley as Mr. Haley caught up with him. Mr. Prevey did this at the same time Mr. Haley extended his right arm towards Mr. Prevey in a reaching motion. The two men locked up and engaged in a tussle. In the course of the tussle, Mr. Haley intentionally stabbed Mr. Prevey on the left side of his chest.
- [71] Paramedics who attended the scene noted that Mr. Prevey suffered a 15 centimetre laceration to the left side of his chest. The wound penetrated Mr. Prevey's chest cavity and lacerated his heart. Mr. Prevey was transported to the Emergency Department of the Vancouver General Hospital. Surgery was performed to release blood from the pericardial sac and suture a laceration of the left ventricle. Had Mr. Prevey not received prompt medical care, it is likely that the wound inflicted by Mr. Haley would have caused his death. Mr. Prevey spent five days recuperating at Vancouver General Hospital before being discharged. Fortunately, he has made a full recovery.
- [72] Mr. Haley and Ms. Eadie left the scene immediately after the attack.
- [73] The knife used by Mr. Haley is about 10 inches in length. The blade of the knife is hooked and 4 to 5 inches long. Mr. Haley deposited the knife in a nearby dumpster shortly after committing the offences.
- [74] Mr. Haley testified at trial that he was not using drugs at the time of these offences, a position he re-asserted in the interview with Dr. Piché.
- [75] About his decision to stab the victim, Mr. Haley said, "I just reacted". He told Dr. Piché that after the stabbing he left the bar but said to Ms. Eadie he wanted to go back in again to find a cell phone he believed to have been taken from him by "Little" or Mr. Prevey, and to confront them a second time. He said Ms. Eadie encouraged him not to pursue the altercation further and they left.
- (b) Mr. Haley's Personal Circumstances
- [76] Mr. Haley appears to have been significantly disadvantaged by a chaotic upbringing. The information that follows is sourced in CSC documents that are based largely on Mr. Haley's self-reports.
- [77] File information suggests Mr. Haley's father struggled with alcoholism and drug abuse. Mr. Haley told Dr. Piché his father was controlling and violent.
- [78] After his parents' divorce, Mr. Haley was raised by his mother and maternal grandparents in Madawaska, Ontario. He had no contact with his five half-siblings or biological father until later in his teenage years. Based on CSC documentation, the extent to which Mr. Haley

reconnected with his father later in life is unclear. Following his parents' divorce, Mr. Haley had no contact with the Mi'kmaq or Mohawk people and, given his impoverished circumstances, likely had no support or practical ability to reconnect with his aboriginal heritage as a younger man.

- [79] Mr. Haley's mother relocated to Toronto when he was a young boy. He was raised by his mother in a poor neighbourhood on the east side of Toronto. He reports being physically and emotionally abused by her. He said, "She kicked me out when I got too big to beat on". He remembers staying up at night to ensure his personal safety.
- [80] Mr. Haley says he started using drugs at the age of 11. He was placed in a group home at the age of 14 and spent some time in a juvenile facility. About his placement in a group home, Mr. Haley told correctional officials his mother was having difficulty controlling his increasingly violent and antisocial behaviour. He acknowledged stealing from her to acquire drugs. He claims to have been physically abused by his foster care parents. He dropped out of school after grade 8 or 9. Before he was 15, he was living on the streets of Toronto, working at a gas station, and surviving on handouts from shelters and soup kitchens. He involved himself in the drug trade to feed his own habit. He said he associated with "bikers and prostitutes" and became accustomed to seeing women being abused and numb to their despair. Mr. Haley was reportedly committed to the Whitby Psychiatric Hospital at the age of 15 for uncontrollable behaviour.
- [81] In addressing his formative years, Mr. Haley told Dr. Piché, "I wanted control I wanted power, respect one way or the other I stole, lied, manipulated, cheated; everything negative to get what I wanted for me". Dr. Piché testified that she did not understand Mr. Haley to be bragging about his past behaviour, but simply relating to her how he coped as an isolated young man in a dysfunctional environment with an emerging and serious drug habit.
- [82] Mr. Haley has struggled throughout his life with drug addiction. He told the author of the pre-sentence report that he began using cocaine at the age of 17 and methamphetamines later in life.
- [83] At various times, while in and out of custody, Mr. Haley sought treatment for his addiction and for a variety of mental health issues. Mr. Haley has also reported experiencing bouts of depression, anxiety and, on occasion, paranoid thought disorder. He claims to suffer from post-traumatic stress disorder (PTSD) and takes issue with the mental health diagnoses he has received in the past for behaviour and thought processes he now attributes to either drug abuse or withdrawal from drugs.
- [84] Mr. Haley has had a number of fairly long-term relationships. Most of them have been characterized by violence. He claims to have fathered five children with four different women. It would seem that Mr. Haley has no ongoing contact with any of his children. He told the probation officer who prepared the pre-sentence report that he owes approximately \$100,000 in child support payments.

[85] Mr. Haley's aboriginal heritage became an important issue on the second phase of the application. Much has been made about when Mr. Haley began to identify as aboriginal and whether his decision to do so was purely opportunistic and tied to the commencement of this application.

[86] I do not propose dwelling on the extent to which Mr. Haley has consistently identified as being aboriginal, the recency with which he has determined to explore his aboriginal roots, or the extent of his acculturation on this application. The fairest course, and one I believe it to be consistent with the principles expressed in Gladue (at paras. 89-92), is to treat Mr. Haley as an aboriginal offender, who was dislocated from his aboriginal heritage by an impoverished and abusive background, and to consider this as a factor in applying the legislative scheme and determining the reliability of the actuarial risk assessment tools used in his case.

(c) Mr. Haley's Criminal Record

[87] Mr. Haley's adult criminal record is reproduced below:

1989-01-31

OSHAWA ONT

POSS OF PROPERTY OBTAINED

BY CRIME UNDER \$1000

SECTION 312(1)(B) CC

SUSP SENT &

PROBATION 18 MOS

1991-01-28

OSHAWA ONT

POSS OF NARCOTIC

SEC 3(1) NC ACT

\$200 I-D 15 DAYS

1991-12-05

OSHAWA ONT

(1) FAIL TO APPEAR

SEC 145(5) CC

(2) ASSAULT SEC 266 CC

(1) SUSP SENT &

PROBATION 12 MOS

(2) \$300 I-D 30 DAYS

1993-05-12

OSHAWA ONT

FAIL TO COMPLY WITH

PROBATION ORDER

SECTION 740 CC

\$500 I-D 30 DAYS

1997-11-10

NORTH BAY ONT

(1) ASSAULT SEC 266 CC

(2) UTTERING THREATS

SEC 264.1(1)(A) CC

(1-2) 45 DAYS INTERMITTENT

& PROBATION 2 YRS

ON EACH CHG CONC

1997-11-13

NORTH BAY ONT

FAIL TO COMPLY WITH

PROBATION ORDER

SEC 733.1 CC

60 DAYS CONSEC TO SENT

SERVING

1998-05-26

NORTH BAY ONT

FAIL TO COMPLY WITH

PROBATION ORDER

SEC 733.1 CC

20 DAYS

(11 DAYS PRE-SENTENCE CUSTODY)

1998-08-17

NORTH BAY ONT

ESCAPE LAWFUL CUSTODY

SEC 145(1)(A) CC

90 DAYS

2000-01-08

OSHAWA ONT

(1) THEFT OF CREDIT CARD

SEC 342(1)(A) CC

(2) USE OF CREDIT CARD

SEC 342(1)(C) CC

(1-2) 45 DAYS ON EACH CHG CONC

(2 DAYS PRE-SENTENCE

CUSTODY)

& PROBATION 12 MOS ON

EACH CHG CONC

2000-04-27

OSHAWA ONT

(1) OBSTRUCT PEACE OFFICER

SEC 129(A) CC

(2) TRESPASSING AT NIGHT

SEC 177 CC

(1) 1 DAY

(4 DAYS PRE-SENTENCE

CUSTODY)

& PROBATION 12 MOS

(2) 10 DAYS CONSEC

& PROBATION 12 MOS CONC

2000-06-29

NORTH BAY ONT

(1) ASSAULT SEC 266 CC

(2) UTTERING THREATS

SECTION 264.1(1)(A) CC

(3) FAIL TO ATTEND COURT

SEC 145(2)(B) CC

(1-3) 60 DAYS INTERMITTENT &

PROBATION 1 YR

ON EACH CHG CONC

2000-10-02

TORONTO ONT

(1) ASSAULT SEC 266 CC

(2) POSS OF SCHEDULE II

SUBSTANCE

SEC 4(1) CDS ACT

(3) OBSTRUCT PEACE

OFFICER

(4) THEFT UNDER \$5000

SEC 334(B) CC

(5) FAIL TO APPEAR

SEC 145(5) CC

(6) UNLAWFULLY AT LARGE

SEC 145(1)(B) CC

(7) FAIL TO COMPLY WITH

PROBATION OFFICER

SEC 733.1(1) CC

(1) 2 MOS & PROBATION 2 YRS

(TIME SERVED 2 MOS)

(2-3) 2 MOS ON EACH CHG CONC

& CONC

MANDATORY PROHIBITION

ORDER SEC 109 CC

(4-7) 2 MOS &

PROBATION 2 YRS ON EACH

CHG CONC & CONC

(2 MOS PRE-SENTENCE

CUSTODY)

2001-12-13

VANCOUVER BC

MISCHIEF UNDER \$5000

SEC 430(4) CC

1 DAY

2002-09-03

VANCOUVER BC

(1) ASSAULT SEC 266 CC

(2) THEFT UNDER \$5000

SEC 334(B) CC

(1) 3 MOS CONDITIONAL

SENTENCE ORDER &

PROBATION 12 MOS

(2) 1 DAY

2003-03-25

VANCOUVER BC

POSS OF PROPERTY OBTAINED BY CRIME UNDER \$5000

SEC 355(B) CC

SUSP SENT &

PROBATION 18 MOS

2003-12-09

VANCOUVER BC

MANSLAUGHTER

SEC 236(B) CC

6 YRS & MANDATORY

PROHIBITION ORDER SEC 109 CC

2012-01-24

VANCOUVER BC

(1) BREACH UTA/

RECOGNIZANCE

SEC 145(3) CC

(2) ATTEMPT TO OBSTRUCT

JUSTICE

SEC 139(2) CC

(1-2) CONDITIONAL SENTENCE

ORDER 18 MONTHS

PROBATION ORDER 2 YEARS

[88] Reliable information documenting the particulars of most of the above-noted offences is before me on this application. This information, none of which is disputed by Mr. Haley, is summarized below. The disposition dates are noted.

- [89] Additional information about some of the offences was supplied by Mr. Haley to Dr. Piché in the interview conducted during the assessment remand. Mr. Haley has not contested the accuracy of any of the information he gave Dr. Piché. On occasion, I will refer to some of the additional information about past offences supplied to Dr. Piché by Mr. Haley during the assessment remand. Indeed, some of this information is relied on by Mr. Haley to demonstrate his capacity for behavioural restraint.
- [90] Some of this additional information, particularly that supplied by Mr. Haley in relation to the manslaughter conviction, does, however, reflect wildly divergent and irreconcilable accounts of the circumstances underlying that offence. The Crown says the additional and conflicting information supplied by Mr. Haley in relation to this offence is unreliable, but nonetheless significant because it demonstrates Mr. Haley's capacity for deception and self-aggrandizing behaviour - issues potentially relevant to his manageability in the community. I agree with the Crown on this point. For the purposes of determining whether Mr. Haley meets the criteria for designation as a dangerous offender, I have proceeded on the basis that the offence is as described by the sentencing judge in his reasons for sentence.
- (i) Assault - Oshawa, Ontario (December 5, 1991)
- [91] Mr. Haley was about 22 years of age when this offence was committed. He told Dr. Piché that he hit the victim when the victim assaulted Mr. Haley's cousin. Mr. Haley said he was using crack cocaine and LSD in these years, but it is unclear whether drug abuse played a role in the commission of this offence. I know very little about the context in which this offence occurred, or its particulars, other than what Mr. Haley told Dr. Piché.
- (ii) Assault and Uttering Threats - North Bay, Ontario (November 10, 1997) Victim: Melanie Dupuis
- [92] Melanie Dupuis was Mr. Haley's common-law partner. The offences occurred during an altercation in which both Ms. Dupuis and Mr. Haley displayed verbal and physical aggression towards one another. The altercation played out in front of Ms. Dupuis's 2-year-old child. After Ms. Dupuis pushed Mr. Haley, he threw her to the floor. Ms. Dupuis fought back by scratching and kicking at Mr. Haley. He told her, "You should never mess with me". Ms. Dupuis then struck Mr. Haley with a toddler's chair. In response, he said to her, "Tell me you're sorry or I'll hurt you, I'll kill you". Mr. Haley was cursing and swearing at Ms. Dupuis. She ran to the bedroom. Mr. Haley followed her and pinned her to the bed in the presence of the child. He then twisted her head, and screamed at her, "I told you not to mess with me, I'm the devil". He lifted her off the bed and dropped her on the floor. He said, "Don't call the cops or I'll kill you".
- [93] Ms. Dupuis sustained a large bruise and swelling in the area of her left cheek bone as a consequence of the assault.
- [94] Mr. Haley pleaded guilty to both offences. At the time of sentencing, he was 28 years old. He was noted to have three dependents and was employed.

[95] In addressing the circumstances of the offence at the sentencing hearing, Mr. Haley said, "I do now realize that I may have taken this a little bit too far".

[96] A sentence of 45 days' imprisonment, to be served intermittently, was imposed (concurrent on each count) to enable Mr. Haley to keep his job. In addition, a two-year period of probation was imposed on terms requiring him not to communicate with Melanie Dupuis and take such anger management counselling as may be directed by his probation officer.

[97] Mr. Haley later told an Institutional Parole Officer (IPO) that Ms. Dupuis lied about the offence and that he never touched or threatened her.

(iii) Fail to Comply with Probation Order - North Bay, Ontario (November 13, 1997)

[98] Mr. Haley breached the no contact term of his probation order by contacting Melanie Dupuis three days after the order was imposed. He immediately pleaded guilty and was sentenced to 60 days' imprisonment, consecutive to the sentence he was then serving.

(iv) Fail to Comply with Probation Order - North Bay, Ontario

(May 26, 1998)

[99] Mr. Haley again breached the no contact term of his probation order by contacting Ms. Dupuis. The offence was committed on May 15, 1998. Mr. Haley pleaded guilty after serving 11 days in pre-trial custody. He was sentenced to a further 20 day custodial term.

[100] It is apparent from the circumstances read in on the guilty plea that Ms. Dupuis and Mr. Haley had reconciled since the probation order was imposed. The sentencing judge noted that this was, "not a situation where you were forcing your presence upon her contrary to a court order". In addressing the circumstances of the offences that led to the imposition of the probation order (see paras. 91-92), Mr. Haley told the sentencing judge:

I just restrained her from assaulting me and that resulted in the assault charge And the threatening junk I was guilty of because I held her down and I told her to stop hitting me.

(v) Attempt to Obstruct Justice and Escape Lawful Custody - North Bay, Ontario (August 17, 1998)

[101] These offences occurred on March 3 and May 6, 1998, respectively. They pre-date the commission of the previous offence, but were disposed of subsequently.

[102] On March 3, 1998, the police received information that Mr. Haley was residing with Ms. Dupuis in breach of the no contact term of his probation order. When they attended at Ms. Dupuis's residence that day, Mr. Haley identified himself as Rick Green. The police re-attended Ms. Dupuis's residence on May 6, 1998 armed with information that the person who identified himself as Rick Green was, in fact, Mr. Haley. Mr. Haley was arrested as he walked towards Ms. Dupuis's residence. He resisted being handcuffed and fled.

- [103] After the commission of these offences, but before the disposition date, Mr. Haley and Ms. Dupuis made preliminary inquiries about having the probation order varied to eliminate the no contact term. Mr. Haley's probation officer at the time did not support deletion of the no contact term, because Mr. Haley had not pursued the substance abuse treatment and anger management counselling that was recommended to him.
- [104] Mr. Haley pleaded guilty to both offences after serving about two months in pre-trial custody. At the time of sentencing, he had been steadily employed in North Bay for the past two years. Mr. Haley advised the sentencing judge he was battling an 11-year addiction to cocaine. He also advised the sentencing judge he was attending an anger management program as part of his probation order.
- [105] Mr. Haley was sentenced to 90 days' imprisonment, concurrent on each count.
- (vi) Assault, Uttering Threats, Failing to Attend Court - North Bay, Ontario (June 29, 2000) Victim: Melanie Dupuis
- [106] On December 23, 1998, Mr. Haley again assaulted Melanie Dupuis. On this occasion, he picked her up by her throat and jacket and threw her onto the stairs repeatedly. He told her she could not leave, and placed his hand over her mouth, impairing her ability to breath. She received a "fat lip" in the assault.
- [107] On December 30, 1998, Ms. Dupuis told Mr. Haley she did not want to be with him anymore and that she was going to a crisis center. Mr. Haley yelled obscenities at her and said, "Get upstairs you lying little cocksucker or I'll fucking drag you up there". He then approached Ms. Dupuis, who was pregnant at the time, and repeatedly said to her, "If you want to get an abortion, you fucking bitch, I'll kick your fucking stomach until the baby dies". Mr. Haley admitted making these threatening remarks.
- [108] Mr. Haley was arrested and released on bail on these charges but subsequently failed to appear in court.
- [109] Mr. Haley pleaded guilty to all three charges. On the sentencing hearing, it was reported that Mr. Haley had been receiving counselling for anger management and substance abuse since the beginning of 1999. Mr. Haley advised the Court that his attendance at an anger management program was as a result of his probation order, but that he was going for substance abuse counselling on his own motion. Mr. Haley said he had been addicted to cocaine for 15 years and that all of his past offences were attributable to substance abuse.
- [110] Noting that Mr. Haley seemed to be in the process of turning things around, the sentencing judge imposed a 60-day intermittent sentence, concurrent on all three counts, to enable him to continue working. A one-year probation order was also imposed on terms requiring Mr. Haley to participate in substance abuse counselling and abstain from communicating with Ms. Dupuis.

[111] Mr. Haley subsequently told a parole officer the incidents of violence with Ms. Dupuis did not occur. He said Ms. Dupuis was a liar and that he never touched her. He said he pleaded guilty to assault and uttering threats to get out of jail.

(vii) Assault, Possessing a Controlled Substance, Obstructing a Peace Officer, Theft Under, Fail to Appear, Unlawfully at Large and Failing to Comply with Probation Order - Toronto, Ontario (October 2, 2000)

[112] Mr. Haley pleaded guilty to all these offences. The circumstances of these offences are only briefly summarized in the materials before me on this application. It is apparent that the two victims of Mr. Haley's assaultive behaviour on this occasion were not domestic partners. Based on the little I know about this incident, the lead offence is properly characterized as a low-level assault. It occurred in the context of Mr. Haley delivering furniture to the victims. A disagreement arose over what Mr. Haley was owed for his services. When a deal could not be reached, Mr. Haley and his co-worker started to leave with the victims' furniture in their truck. It is Mr. Haley's position that one of the victims jumped into the truck and removed the keys from the ignition. When that happened, Mr. Haley and his co-worker pushed the victim out of the truck and left the scene.

[113] When apprehended in relation to this matter, Mr. Haley gave a false name.

[114] File information suggests that upon further investigation, the police discovered a quantity of marihuana kept by Mr. Haley in a storage locker at a bus terminal. Mr. Haley's recollection of the circumstances is somewhat different. He says it relates to possession by him of a small quantity of cocaine. Nothing turns on this issue.

[115] The conviction for failing to comply with the terms of his probation order relates to the conduct underlying the other charges and a term of probation requiring Mr. Haley to keep the peace and be of good behaviour.

[116] The conviction for being unlawfully at large stems from Mr. Haley's failure to surrender himself into custody on July 21, 2000, to serve a portion of the intermittent sentence imposed June 29, 2000, for the assault on Melanie Dupuis.

[117] Mr. Haley, who had served two months in pre-trial custody, was sentenced to a further two months' imprisonment, concurrent on all counts, to be followed by two years' probation.

[118] In April 2001, Mr. Haley relocated from Ontario to the Vancouver area. His probation files were transferred from Ontario to British Columbia.

(viii) Assault - Vancouver, British Columbia (September 3, 2002) Victim: Crystal Barker

[119] On January 3, 2002, Mr. Haley assaulted another girlfriend, Crystal Barker. When the offence was committed, Mr. Haley was bound by the probation order imposed in October 2000.

[120] Mr. Haley pleaded guilty to this offence on September 3, 2002.

- [121] On this occasion, Mr. Haley threatened to kill Ms. Barker's pet turtle in the course of a domestic argument. He then held Ms. Barker's neck in a choke hold and punched her in the face. When the police attended, Ms. Barker was bleeding from her nose and there were bloods splatters on the wall behind where she had been standing when she was punched.
- [122] Mr. Haley was referred for pre-sentence psychiatric assessment to the Forensic Psychiatric Services Commission (FPSC). On intake, he admitted abusing his girlfriend and acknowledged having problems with violence. He was noted to be engaged with the treatment team about how to deal with his anger. Mr. Haley told the psychiatrist assigned to conduct the assessment that he was feeling paranoid at the time of the offence and had been hearing condemning voices calling him names and saying bad things about his girlfriend. He was treated with Risperidone, an antipsychotic drug. Mr. Haley reported that his auditory hallucinations improved after taking this drug. The treating psychiatrist noted Mr. Haley appeared to suffer from intermittent psychosis which was in remission. The extent to which Mr. Haley's intermittent psychotic episodes were related to long-standing drug abuse was said to be unclear.
- [123] At the sentencing hearing, defence counsel advised that Mr. Haley was living with a new girlfriend, Kandace [Kemp] who was five months pregnant.
- [124] Mr. Haley received for this offence a three-month conditional sentence order to be followed by one-year probation on terms requiring him to take drug and alcohol counselling and anger management counselling as directed by his conditional sentence supervisor.
- [125] Mr. Haley subsequently told a parole officer that he remembers voices telling him to hit Ms. Barker, but that he blacked out and cannot recall what happened on this occasion.
- [126] The theft under conviction relates to an offence that occurred July 13, 2002. It involved the attempted theft of a bicycle and is of no consequence to this application.
- (ix) Manslaughter - Vancouver, British Columbia (December 9, 2003) Victim: Kandace Kemp
- [127] Mr. Haley and Ms. Kemp met in February 2002. On May 20, 2003, they were in a common-law relationship and living in a hotel on the downtown eastside of Vancouver. Ms. Kemp had just turned 19 years of age. Mr. Haley was 34 and on probation. Both were addicted to methamphetamine and were using drugs heavily that day.
- [128] The sentencing judge summarized the tragic circumstances of the offence in his reasons for sentence:

There was a verbal confrontation between the two of them in their hotel room overnight and neighbours heard that there was also a physical struggle. During these incidents, Ms. Kemp died, and significant injuries were discovered. It's clear that there's a problem relating what injuries can be related to the struggle and what injuries she might have suffered elsewhere on other occasions earlier. Nevertheless, it's clear that Ms. Kemp died from manual strangulation, and it's also clear that it was Mr. Haley who did that, and that was clearly an intentional, voluntary act

committed by him. It's also clear that it was during a physical altercation in which they were both involved, and because of the significant part that drugs played in this and the effect on each of the two participants, the finding of guilt for manslaughter as opposed to anything else such as murder is clearly appropriate here.

after the incident occurred, Mr. Haley remained. He himself called Emergency Services. Stayed and spoke to the police. He's been in custody since [approximately 6 months].

[129] The sentencing judge found Mr. Haley to be genuinely remorseful but also took into account his history of assaultive behaviour. He concluded that a sentence of seven years' imprisonment was appropriate. Allowing Mr. Haley one year for the six months spent in pre-trial custody, a sentence of six years' imprisonment was imposed. This was the first occasion on which Mr. Haley was sentenced to a federal term of imprisonment.

(x) Breach of Undertaking, Attempt to Obstruct Justice - Vancouver, British Columbia (January 24, 2012)

[130] Mr. Haley pleaded guilty to both of these counts. On the date of the offences, Mr. Haley was in custody charged with assaulting his girlfriend, Alexandra Eadie. Mr. Haley and Ms. Eadie began a common-law relationship in approximately 2009 when Ms. Eadie was 19 years of age.

[131] While subject to an order that he not contact Ms. Eadie, Mr. Haley spoke to her on the telephone from his detention facility in violation of the no contact term. During the call, he counselled her to write and deliver a statement to Crown counsel saying there was no assault and that, at the time of the alleged offence, Mr. Haley was pulling on the back of her dress to prevent her from being hit by a vehicle. The call was intercepted. Mr. Haley essentially dictated to Ms. Eadie what to write in the statement.

[132] The plea of guilty to attempting to obstruct justice was accepted on the basis that Mr. Haley had committed a low-level assault on Ms. Eadie and counselled her to deny this in the statement.

[133] In a pre-sentence report prepared for use on this sentencing hearing, Mr. Haley said he was aware of his triggers and able to recognize his "boiling point" and when he needed a "timeout".

[134] In addressing the Court before sentence was imposed, Mr. Haley acknowledged being physically and emotionally abusive to most of the women with whom he has had intimate relationships.

[135] Mr. Haley received an 18-month conditional sentence to be followed by two years' probation for these offences. The conditional sentence order required him to keep the peace and be of good behaviour and not possess any weapons.

(xi) Admissions Made by Mr. Haley in Relation to Uncharged Conduct

- [136] Between 1992 and 1997, Mr. Haley was involved in a common-law relationship with Tracy Haley (nee Maro). In the course of a Psychological Assessment Report prepared by the CSC at RRAC following Mr. Haley's sentencing for manslaughter, he admitted using crack cocaine during his relationship with Tracy and assaulting her twice a year over the last two or three years of their relationship. Mr. Haley told his IPO in 2004 that "voices" told him to hit Tracy. At the time of the s. 752.1 assessment, he told Dr. Piché he hit Tracy during their relationship and did so to obtain money from her to feed his drug addiction. Mr. Haley was not convicted of any offence arising out of this admitted conduct.
- [137] The Crown does not rely on Mr. Haley's admission to uncharged violent behaviour as part of the pattern analysis or threat assessment. As I understand the Crown's position on this point, use by the court of this information should be confined to assessment of Mr. Haley's character and extent to which his resort to violence is an entrenched behavioural characteristic unlikely to be amenable to treatment intervention at this stage of his life. I have not had regard to this evidence in determining whether Mr. Haley meets the criteria for designation as a dangerous offender. In the context of the evidence as a whole, the admissions regarding Tracy Haley inform in a very modest way the issues that need to be resolved on this application. Factoring out the information with respect to Tracy Haley in its entirety would not lead me to a different result.
- (d) Correctional History
- [138] On admission to RRAC following sentencing on the manslaughter, Mr. Haley was noted to have mental health issues (complicated by a long-standing substance abuse problem) that needed to be explored. He told his IPO that he suffered from periodic depression for which he had been prescribed medication.
- [139] Mr. Haley was assessed on intake to be a high risk of doing violence towards a future intimate partner, but a low risk of generalized violence. Behaviours which could indicate relapse into an offence cycle were thought to include: drug use; claims that he no longer needs help from others; unrealistic planning; problems controlling his temper; paranoid thinking; complete withdrawal into himself; marked overreacting; lack of motivation to take programs; and showing signs of wanting to enter into an intimate relationship prior to dealing with factors that have contributed to past spousal assaults.
- [140] Mr. Haley's intellectual functioning was found to be in the average range and inconsistent with the presence of cognitive deficits.
- [141] The administration of actuarial tests, including the PCL-R (1st ed.), VRAG and HCR-20 all suggested Mr. Haley was at moderate risk of offending violently in the future.
- [142] Mr. Haley's Case Management Plan identified him as being in need of the High Intensity Family Violence Program (HIFVP), High Intensity Substance Abuse Program (HISAP) and Cognitive Skills - Reasoning and Rehabilitation Program (CS). He was classified for placement in a medium security facility and housed at Mountain Institution.

- [143] Shortly after intake, Mr. Haley was transferred from RRAC to the Regional Treatment Centre (RTC) after complaining about auditory hallucinations and reporting he was feeling depressed and anxious. He remained at RTC for approximately 8 ½ months.
- [144] Mr. Haley successfully completed the CS Program while at Mountain. In a Final Performance Report prepared by the program facilitator, it was noted that Mr. Haley was able to demonstrate at the end of the program some improvement in his ability to apply the concepts he learned to problematic situations. The program facilitator suggested that despite these gains, Mr. Haley continued to struggle in the areas of self-regulation and impulse control.
- [145] During the CS program, Mr. Haley is reported to have made inappropriate racial comments and sketches suggesting he sympathizes with neo-Nazi sentiments.
- [146] On a subsequent occasion, when Mr. Haley was served with Notification to Provide a Urine Sample, he acknowledged receipt of the form by placing a swastika on the document. Mr. Haley later explained it was necessary for him to demonstrate affiliation with a white supremacist group in order to survive in the penitentiary environment. He told Dr. Piché, "I used to be racist".
- [147] Mr. Haley is also reported to have commented during the CS program that, "I am 35 and I am not changing". In addition, he is reported to have said that he watches people to determine their weaknesses and then "preys" on them. He is reported to have said that he uses knowledge he acquired as a result of having sisters to get females to do what he wants.
- [148] Finally, Mr. Haley reported during the program that he was better able to control his emotions. He cited as an example of this that he did not become violent when interacting with sex offenders as he had in the past while in provincial adult custody in Ontario.
- [149] The CS program ended January 5, 2005.
- [150] On May 30, 2005, Mr. Haley was transferred to the mental health unit of RTC for assessment. File information reflects that he was threatening to attack a sex offender at Mountain Institution or harm himself unless the transfer was made. Mr. Haley's placement at RTC thwarted his early involvement in the HIFVP.
- [151] Mr. Haley told Dr. Piché that he made these threats to get transferred out of Mountain and into RTC, which was the only institution at the time that was not double bunking inmates.
- [152] While in federal custody, Mr. Haley completed the HISAP. In a report prepared by the program facilitator, it was noted that for most of the program Mr. Haley denied he had a substance abuse problem and said he did not belong in a room with inmates who did. Mr. Haley sometimes denied that the manslaughter was related to his substance abuse problem. The program facilitator said Mr. Haley exhibited low motivation to address his substance abuse issue, and that it was unlikely he would use the majority of the skills taught in the program. Mr. Haley is reported to have said so himself. When he was told that his

conduct in the program could result in a less positive evaluation, he said he did not care. Mr. Haley did not complete all of the course assignments. Although the Program Performance Final Report reflects that Mr. Haley achieved a "successful completion" grade in relation to this program, the body of the evaluation says he was given a lower "attended all sessions" grade. The grade given to Mr. Haley upon completion of this course matters less than the program facilitator's assessment of the benefit he derived from it. This is a summary of her conclusions:

It is the opinion of this writer that Mr. Haley did not reduce his risk by attending the [HISAP]. His motivation to address his substance use was low and he tends to deny that a problem exists.

He threw away the binder containing the majority of his work

Mr. Haley reported that he will not take any more CSC programming therefore it may be difficult to motivate him to do so in the future.

The program facilitator also reported that attempts to motivate Mr. Haley to complete the program satisfactorily were made, including an extension to complete his relapse plan, but Mr. Haley declined this offer.

[153] In August 2005, Mr. Haley was, at his request, transferred to Collins Bay Institution in Kingston, Ontario.

[154] In terms of educational upgrading, Mr. Haley performed very well at Collins Bay. He was noted by one instructor to have a fine creative mind and to be one of the best students in the class.

[155] Mr. Haley was also consistently commended for his work ethic and performance while incarcerated.

[156] As Mr. Haley approached his statutory release date, his Case Management Team (CMT) recommended that he be detained until warrant expiry. He had not completed the HIFVP and had not performed well in the HISAP. With respect to the availability of community supervision programs that would adequately protect the public from a future violent offence, a community parole supervisor expressed the view that no available supervision strategy could adequately mitigate the risk of Mr. Haley committing a similar offence.

[157] In August 2007, a hearing was convened before the Parole Board of Canada to determine whether Mr. Haley should be detained until his warrant expiry date. Under s. 130(3) of the CCRA, the Parole Board of Canada has the authority to detain a federally incarcerated offender until warrant expiry if it is satisfied the offender is likely to commit an offence causing death or serious harm to another person while on statutory release.

[158] Mr. Haley sought to waive his right to a detention review and expressed a desire to stay at Collins Bay until his warrant expiry. In a handwritten note to his IPO, Mr. Haley made it clear he did not want to stay in custody because he feared he would do serious harm to another person. Further, he contested the notion there was a demonstrated likelihood he

would cause death or serious injury to another person if granted statutory release. With respect to programming, Mr. Haley said he did not have the attention span for CSC programs and that participation in them programs would contribute to his "aggravation" due to his learning disabilities. Further, he said that he would not get the full benefit of these programs because he already realized the consequences of violence as he had taken Ms. Kemp's life. He asked to be left alone and given the opportunity to continue working until released.

- [159] Mr. Haley had the right to appear before the Parole Board on the detention hearing but declined to do so. Instead, he gave specific instructions to his IPO to convey to the Board this message: "Fuck off".
- [160] In ordering Mr. Haley to be held in custody until his warrant expiry date, the Board noted, among other things, that the manslaughter reflected a significant escalation of Mr. Haley's violent behaviour. The Board also noted Mr. Haley did not think he could benefit from the HIFVP, suggesting a lack of motivation on his part to engage in treatment designed to ameliorate his risk factors.
- [161] About 4% of federally incarcerated inmates who are subject to a determinate sentence are detained past their statutory release dates.
- [162] Although Mr. Haley voluntarily participated in the HIFVP after the Board ordered that he be detained until warrant expiry, he did so with trepidation, if not reluctance. He initially sought to obtain a deferral from participating in the program for psychological reasons. Mr. Haley was referred for psychological assessment to assess his suitability for the program. When he was told by his IPO he would be offered the program if he was psychologically able to participate in it, Mr. Haley said that he does not do well in groups and would harm other group members if they said something he did not like.
- [163] Mr. Haley began the HIFVP program but did not complete it as a result of his involuntary placement into segregation on June 2, 2008. Mr. Haley was placed in segregation at that time because he was noted to have a black eye and was thought to be in danger of a targeted attack in the general population. Mr. Haley told Dr. Piché he ended up in segregation because of his involvement in the institutional drug trade. Mr. Haley remained in segregation until his warrant expiry date. When questioned about a transfer out of segregation to the Transition Unit before his warrant expiry date, Mr. Haley reportedly implied that he would assault "protective custody" inmates on that range if such a move was attempted.
- [164] Mr. Haley's time-limited participation in the HIFVP program was noted by the course facilitator to be appropriate. He accepted responsibility for his assaults and did not deny, justify or minimize his offences. As Mr. Haley did not complete the program, the course facilitator noted that "his risk areas remain unaddressed".

- [165] In February 2009, the Board confirmed its order detaining Mr. Haley until his warrant expiry date. At the time of the detention review hearing, the Board had before it the opinion of an institutional psychologist that, "Mr. Haley cannot be seen as having materially decreased his risk for future violence by his aborted participation in the [HIFVP]". In another psychological report available to the Board at the time, it was noted that "Mr. Haley's primary criminogenic risk factor, namely family violence, has yet to be addressed". It was recommended that he successfully complete the HIFVP before being considered for any type of community release. Mr. Haley reported at the time feeling "stifled" in his attempts to take programming.
- [166] The Board also noted that since the original detention order, Mr. Haley incurred three institutional infractions. On one occasion, Mr. Haley tested positive for THC. On two other occasions, he was verbally abusive to correctional staff.
- [167] With respect to the three institutional infractions noted above, they are, standing alone, relatively minor. They also appear to be aberrations. Mr. Haley has spent considerable time in provincial custody while on remand, and in federal custody serving the entirety of his six-year sentence for manslaughter. He is fairly consistently described in provincial and federal correctional records as a polite, compliant and hard-working inmate. Although there have been occasions on which Mr. Haley has been assaulted, and occasions on which Mr. Haley has threatened to assault other inmates (apparently as a means of obtaining a transfer to what he perceives to be a more desirable institutional location, or resisting a transfer to what he perceives to be a less desirable location), there is no evidence Mr. Haley has been assaultive towards correctional staff or his peers. With a couple of exceptions, he is noted to be a quiet inmate and someone who prefers to keep to himself.
- [168] Dr. Piché testified that even though the incidents are relatively minor when viewed in isolation, they reflect an entrenched pattern of "rule breaking" that speaks to Mr. Haley's personality style and the challenges associated with attempting to supervise him in the community. While that may be so, given the infrequency of these rule violations and the context in which they occurred, I have determined to place no weight on this evidence. I will assess the weight I am prepared to give Dr. Piché's evidence with this in mind.
- [169] The Crown brought an application prior to Mr. Haley's release from custody requiring him to enter into a recognizance for one year pursuant to s. 810.2 of the Code.
- [170] In advance of the hearing of that application, Mr. Haley wrote a letter to the prosecutor's office in Vancouver, providing his perspective on the utility of such an order. He said such an order would frustrate his plans to commence a new life far away and cause his victims unnecessary emotional stress by keeping him close by. He also said that the order was an expensive way to ensure he signed a reporting book once a week.

- [171] Mr. Haley ultimately consented to the s. 810.2 order made on December 3, 2009. He was required by the terms of that order to abstain from the possession and consumption of alcohol and drugs, and not associate with drug users.
- [172] Mr. Haley was not charged with breaching any of the terms of the s. 810.2 order. He told Dr. Piché that the conditions helped him to be successful on the street. Despite this, Mr. Haley also told Dr. Piché he used and trafficked drugs throughout this time:

According to Mr. Haley, he broke 20 of the 30, [s.]810 conditions that he agreed to abide by. About this decision, he stated, "What are you supposed to do? I was living on the downtown eastside". He then added, "I have no excuses for dealing drugs except for the allure of the money. I was facilitating people's misery. I kept doing it". About his decision not to follow his 810 conditions, Mr. Haley stated he was very angry at having been placed on conditions after the completion of his federal sentence.

- [173] In July 2010, Mr. Haley successfully completed a 27-week Respectful Relationships and Relationship Violence Program offered through BC Corrections. This two-part program addresses: anger management; relationship issues; communication skills; and the prevention of violence in relationships. The Relapse Prevention and Risk Reduction Plan prepared by Mr. Haley at the conclusion of the course summarized his assessment of the things he should avoid in the future: "General public, prison and jail, alcohol and mouthy individuals". Under "Goals", Mr. Haley wrote, "I'll let you know".
- [174] Despite the oppositional tone that might be read into Mr. Haley's risk reduction plan, it is noteworthy that BC Corrections staff frequently commented on how Mr. Haley's presentation to them was a marked improvement over the negative portrayal of him in reports prepared by CSC staff.
- [175] The Crown did not apply to renew the s. 810.2 order and it expired December 3, 2010.
- [176] On March 18, 2013, Mr. Haley was ordered to enter into a recognizance pursuant to s. 810(1) of the Code. The order obliged him to keep the peace and be of good behaviour. The circumstances surrounding this order are the subject of dispute on this application and have not been proved by the Crown beyond a reasonable doubt. The only conclusions I draw from this order are: (1) the criteria for the making of the order (reasonable grounds to fear Mr. Haley would cause personal injury or damage property) were admitted or made out at the time of the application; and (2) Mr. Haley was subject to this order when the predicate offences were committed.
- [177] While on remand status at North Fraser Pretrial Centre pending the conclusion of court proceedings in relation to the predicate offences, Mr. Haley successfully completed a BC Corrections Workbook entitled Criminal and Addictive Thinking and Socialization.

- [178] In addition, Mr. Haley successfully completed a program called Essential Skills to Success. The program consists of about 20 one to one-and-a-half hour instructional modules addressing employment and living skills, maintenance of healthy relationships and substance abuse education. As part of this program, Mr. Haley completed several modules addressing the impact of family violence and the dangers of substance abuse.
- [179] Following his convictions, but before the commencement of this application, Mr. Haley obtained educational material from the Stratford Career Institute on alcohol and drug counselling and treatment and tested himself on his understanding of concepts and strategies he would need to use to remain sober. Mr. Haley did well on these examinations, which were graded by the Stratford Career Institute and returned to him.
- [180] While on remand, Mr. Haley has worked as a cleaner on his unit. As Mr. Niles noted, this job is entrusted to inmates who have shown they are dependable. As with all of his institutional work placements, Mr. Haley has performed very well in this role. He does not appear to have been in conflict with staff or other inmates. Given the volatility known to exist in provincial correctional settings, Mr. Haley's recent performance is of note and may suggest a maturation that augurs well for his future.

(e) Previous Response to Community Supervision and Control

- [181] Mr. Haley's response to community supervision orders and treatment interventions prior to the commission of the manslaughter was poor. There were ongoing problems with missed probation appointments and drug use while subject to probation orders.
- [182] In 1994 and 1998, Mr. Haley was referred for substance abuse treatment but did not follow through with the program. In 1998, Mr. Haley did not complete a program for assaultive males. In late 1999 or early 2000, Mr. Haley attended for one-on-one counselling for family violence. He is reported to have taken no responsibility for his behaviour and missed appointments. This counselling was not completed before the termination of his probation order. In 2001, he was found to be unsuitable for group treatment in a program targeting alternatives to violence because he demonstrated a "deviance profile" limiting the effectiveness of standard group intervention.
- [183] In 2002, Mr. Haley was referred by his family doctor to the Early Psychosis Clinic at the UBC Hospital. He did not attend his appointment. In a pre-sentence psychiatric report prepared for the September 3, 2002, sentencing hearing for the assault committed on Ms. Barker, Dr. Adilman reported seeing Mr. Haley on three occasions while he was on bail. Mr. Haley's file was eventually closed because of missed appointments.
- [184] Mr. Haley has been convicted on four occasions (1993, 1997, 1998 and 2000) for failing to comply with the terms of his probation order. He has failed to appear for court, or for the purposes of the Identification of Criminals Act, R.S.C. 1985, c. I-1, on three occasions (1991 and twice in 2000). He was convicted in 2012 of breaching his recognizance.

[185] Mr. Haley was on probation when he assaulted Crystal Barker.

[186] He was on probation when he committed the manslaughter of Kandace Kemp.

[187] Although Mr. Haley was not charged with breaching any of the terms of the s. 810.2 order that came into effect on his release from federal custody, he told Dr. Piché he repeatedly violated a number of the terms of that order by trafficking in drugs. He also admitted using drugs while subject to the order made under s. 810.2. He told Dr. Piché that when he was confronted by his probation officer with using drugs during this time, "I completely denied it. I almost got busted".

[188] In 2011, Mr. Haley told his probation officer he had been clean and sober since the manslaughter and had no intention of using drugs again as he was fully aware of the repercussions. This was a lie. Mr. Haley told Dr. Piché he was trafficking in and using drugs after being released from the penitentiary and while subject to court imposed conditions.

[189] Mr. Haley was subject to a conditional sentence order (requiring him to keep the peace and be of good behaviour and not possess weapons) and the s. 810(1) order when the predicate offences were committed.

(f) Mr. Haley's Statement to the Court Prior to the Imposition of Sentence

[190] Mr. Haley was given an opportunity to address the court at the conclusion of the second phase of the evidentiary hearing. He took responsibility for the death of Kandace Kemp and expressed remorse for his behaviour and the loss it caused. He said that it was the decision of his counsel at the time to keep information about the offence from the judge. He did not elaborate on what he meant by this. He also said that the various versions of events he has related in relation to the manslaughter reflect his attempt to tell mental health professionals what he thought they wanted to hear.

[191] Mr. Haley takes issue with the treatment he received at Pacific Institution shortly after his incarceration on the manslaughter offence and complains he was unnecessarily treated with antipsychotic drugs when he was suffering from the symptoms of drug withdrawal. He claims that MMPI tests administered to him in the past have unfairly influenced his risk assessment.

[192] With respect to the predicate offences, Mr. Haley said he perceived a threat he now realizes was not there.

[193] He said he was sober and aware of what was happening when Dr. Piché conducted the assessment and fully disclosed to her his history of offending and drug use and how his addiction has affected his life. He believes that Dr. Piché relied on false information to conduct the assessment, including inaccurate MMPI results. He also alleges that Dr. Piché came to the interview with pre-conceived notions about him, based, in part, on inaccurate information provided to her by the CSC.

[194] Finally, Mr. Haley acknowledged that he needed to act more responsibly and said he has been attempting to do this while on remand. For example, he said he refuses to engage other inmates in confrontations or fights and attempts to avoid them through the use of reason. He noted his dedicated work as a cleaner on his unit and expressed optimism about his future. He asked the court not to find him a dangerous offender and impose an indeterminate sentence but, instead, sentence him to a six-year determinate sentence with 1.5:1 credit for pre-trial custody.

G. THE EXPERT EVIDENCE: RISK, TREATABILITY AND MANAGEMENT IN THE COMMUNITY

(a) Statements Made by Mr. Haley at the Time of the Assessment

[195] Dr. Piché met with Mr. Haley on April 27, 2015 at North Fraser Regional Correctional Centre. He was told the purpose and scope of the assessment, that he was under no obligation to participate in it, and that he could terminate the assessment at any time. He was aware that information provided during the assessment could be included in the report to be submitted to the court. Mr. Haley provided his consent to participate in the assessment. The assessment interview lasted nine hours. At the time of the assessment, Dr. Piché was aware that Mr. Haley had aboriginal roots.

[196] Dr. Piché testified that it is her practice to take verbatim notes of comments made by the offender.

[197] In the context of discussing the predicate offences, Mr. Haley told Dr. Piché, "I don't hang around for too long, everybody fears or respects me".

[198] In addressing his personal history, Mr. Haley said, "If I'm not happy and content and at peace with myself, the world and everybody in it, no one else will be". Dr. Piché took these remarks literally. She testified they underscore Mr. Haley's self-focus and lack of consideration for others.

[199] Later, he said:

I have no desire for violence anymore in my life. I do not want to end up [on] a detention order for life, which I know will happen if I am ever violent again.

[200] With respect to his history of violence against female partners, Dr. Piché's report contains these observations:

During the interview, Mr. Haley recognized that in all his relationships he was controlling and dominant. He described himself in relationships as "the worst possible example of what a person could be". Mr. Haley in [the] interview acknowledged being drawn to vulnerable women. He described his use of women as objects to address his needs by stating, "Always having somebody there when I needed it for my own personal use, sex slaves for lack of a better word.

[201] Mr. Haley lived at VisionQuest Recovery Society for a considerable time in 2011 and 2012. He named the Executive Director of VisionQuest as a collateral contact for the purposes of the assessment report. He told Dr. Piché he became a staff member of VisionQuest. The Executive Director was contacted by Dr. Piché. He denied Mr. Haley was ever a staff member at VisionQuest. He said it was difficult to manage Mr. Haley's behaviours and that, "[T]he more freedom he got, the less co-operative he was".

[202] Mr. Haley told Dr. Piché he was enrolled in a drug and alcohol course and planned to work as a drug and alcohol counsellor upon completion of the program. Alternatively, he suggested he could work for building owners who have problems with difficult tenants.

[203] Mr. Haley did not identify any community support at the time of the assessment with the exception of Ms. Eadie, who was residing in a rehabilitation facility due to her continuing struggles with substance abuse.

[204] Dr. Piché noted Mr. Haley frequently gave her contradictory information in the interview. She called him on this behaviour. She records the following interaction in her report:

Mr. Haley appeared particularly pleased when obvious untruths were identified throughout the interview process. When these occurred, he would state, "You caught me" and then provide an alternative explanation for his behaviours. Throughout the interview, Mr. Haley reiterated that he would provide false information to psychologists in past assessments.

[205] Dr. Piché testified that Mr. Haley's tendency to provide different versions of events is significant in terms of identifying at least one element of his personality structure - the tendency to lie and manipulate. This tendency was most obvious in the numerous and wildly divergent accounts Mr. Haley has provided with respect to the manslaughter offence.

[206] While he has fairly consistently expressed sadness and remorse about taking Ms. Kemp's life, Mr. Haley has also provided various accounts about the offence ranging from accepting responsibility for having "beaten the ever-loving tar" out of Ms. Kemp and another man to distancing himself entirely from the homicide, claiming he, "walked into [the] room and found her there on the floor in blood." Mr. Haley has also provided inconsistent accounts of his drug use at the time, first saying that the offence was fuelled by drugs and persistent voices, but later saying that he told the court he was high at the time of the offence to receive a lesser penalty. He told Dr. Piché that he blamed the offence on drugs and auditory hallucinations but then added, while laughing, "[t]here were no voices, man." He later told Dr. Piché, "I've never heard voices".

[207] I wish to emphasize that in conducting the pattern analysis and threat assessment required by s. 753(1), I have proceeded on the basis that the facts of this offence are as disclosed in the reasons for sentence. The Crown says Mr. Haley's various and divergent accounts of this offence are unreliable. I agree. Accordingly, I have not placed any reliance on Mr. Haley's many conflicting statements about this offence for their truth or their contents. But that does not mean these statements are entirely irrelevant. As Dr. Piché explained, the fact that

Mr. Haley has given so many different versions of events in relation to this offence demonstrates his commitment to deception and raises issues complicating his treatment prospects.

- [208] With respect to his criminal behaviour, Mr. Haley told Dr. Piché he reacts in the moment. He has attempted to use two strategies to delay his reactions to volatile situations - an inner dialogue and a presence of mind regarding consequences. He told her that, "In fast situations I lose my inner dialogue. I lose awareness of my surroundings".

(b) Diagnostic Formulation

- [209] Applying the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), Dr. Piché concluded Mr. Haley meets the criteria for the following diagnoses: Antisocial Personality Disorder and Stimulant Use Disorder (in sustained remission in a controlled environment).
- [210] The DSM-V defines Antisocial Personality Disorder by reference to the presence or absence of seven behavioural traits: failure to conform to social norms; deceitfulness; impulsivity; a long-standing pattern of aggressive behaviour; conduct that demonstrates a reckless disregard for the safety of others; irresponsibility; and absence of remorse for harmful behaviour. In addition, mental health professionals look to see whether the individual developed a conduct disorder before the age of fifteen.
- [211] Dr. Piché testified that at least three of these behavioural traits must be present to diagnose someone with an Antisocial Personality Disorder. She concluded Mr. Haley met all seven criteria.
- [212] Individuals with personality disorders tend to have an entrenched and repetitive way of interacting with others. The disorder, and the behaviour associated with it, is difficult to change through treatment intervention.
- [213] Dr. Piché testified that the MMPI-2 can also be used to assess personality disorders, but she does not use this instrument.

(c) Intelligence Testing

- [214] Using the Kaufman Brief Intelligence Test (KBIT-2) Mr. Haley's verbal skill was assessed as being in the average category. His non-verbal proficiency placed him at the high end of the below average category. Based on these tests, Dr. Piché concluded Mr. Haley is possessed of adequate cognitive skills to successfully complete correctional programming.

(d) Risk Assessment

- [215] As noted earlier, Dr. Piché used both actuarial measures (the PCL-R and the VRAG-R) and structured professional judgment approaches (the HCR-20 and the SARA) in assessing Mr. Haley's risk to the community.
- [216] Dr. Piché testified that actuarial instruments are moderately accurate.

- [217] The VRAG-R assesses risk for violent recidivism, which is defined as an arrest for a violent act involving physical contact with a victim. Based on this actuarial tool, Mr. Haley placed at the 87th percentile. The probability estimates associated with this score suggest a 58% probability of violent reoffending within five years, and a 78% probability of violent reoffending within 12 years.
- [218] Mr. Haley's risk of engaging in violent acts in the future was also assessed using the PCL-R, 2nd edition. The PCL-R explores two distinct clusters of factors. Factor 1 explores interpersonal and affective facets. It measures the extent to which an offender exhibits the interpersonal and affective traits typically associated with psychopathy including: callousness; grandiosity; and remorselessness. Factor 2 includes lifestyle and antisocial facets and reflects the degree to which an offender has led a chronically unstable, antisocial and socially deviant lifestyle.
- [219] Mr. Haley scored in the high range on Factor 1 (98.6th percentile) and in the moderate range (67.9th percentile) on Factor 2. Mr. Haley's total PCL-R score falls at the 91st percentile in comparison with the male prison population. The scores suggest Mr. Haley shares personality characteristics with those who are most chronically involved in criminal activities. Generally, inmates who score in this range are considered to be at high risk for general and violent reoffending.
- [220] Through oversight on the part of counsel, Dr. Piché did not have my factual findings respecting the circumstances of the predicate offences when she prepared her report. She was given an opportunity to review those factual findings in the course of her testimony. Having done so, she testified that taking account of those findings could only have elevated Mr. Haley's Factor 2 score and might have placed him in the moderate-high (as opposed to moderate) range on Factor 2. She said that the factual findings do not otherwise change her overall opinion.
- [221] Using the HCR-20, an approach to the assessment of risk that involves the application of structured professional judgment to historical, clinical and risk factors, Dr. Piché concluded Mr. Haley presents with many risk factors related to an elevated risk for violence. She noted that Mr. Haley has been convicted of extremely violent offences on several occasions. She cited and relied on the maxim that nothing predicts future behaviour as accurately as past behaviour. She noted that Mr. Haley's use of violence has escalated as he has aged, and become increasingly disproportionate to the events that have provoked it. She also noted that the predicate offences occurred in a public place in full view of many witnesses. She said this simply underscores Mr. Haley's inability to exercise behavioural restraint when angered.
- [222] Using SARA, Dr. Piché concluded Mr. Haley presents a high risk for spousal violence.

[223] Overall, Dr. Piché concluded Mr. Haley presents with a high risk for violent reoffending. She noted that all the risk assessment approaches used in Mr. Haley's case yielded this consistent result - he represents an elevated risk for future violence.

[224] In the second phase of the hearing, Dr. Piché testified that she is very familiar with aboriginal programs for federally incarcerated offenders. Her evidence on the second phase of the application can be briefly summarized:

- the availability of various types of treatment, interventions and programming specific to aboriginal offenders does not change her assessment of Mr. Haley's risk factors, the challenges that will be experienced in attempting to affect meaningful change in his behaviour, or her overall assessment that he presents with a high risk to reoffend violently. She testified that federal programming previously provided to aboriginal offenders (called "In Search of Your Inner Warrior") had no impact on recidivism rates. She further noted that there has been no research conducted on whether participation in the ICPM reduces recidivism rates for violent offenders;
- she is aware of no research suggesting that programs tailored to meet the needs of aboriginal offenders have a better chance of addressing the challenges of those diagnosed with an antisocial personality disorder;
- Mr. Haley's endorsement in the past of racist attitudes may hinder his ability to participate in the aboriginal stream of the ICPM. I pause to note here that Mr. Haley's 18-month involvement with Mr. Niles suggests that this issue may not be the impediment Dr. Piché feared. Further, Dr. Piché noted that participation with elders, in conjunction with mental health professionals, might assist Mr. Haley in becoming ready to meaningfully engage in programming;
- Mr. Haley's participation in programming for violent aboriginal offenders would not affect her opinion that his tendency to engage in risky behaviours and the speed with which he responds to perceived provocation would limit the effectiveness of any community supervision strategy;
- she is aware of the ongoing dialogue and debate in the academic community about the potential for cultural bias to be embedded in actuarial risk assessment tools. Those concerns do not extend to structured professional judgment approaches like the HCR-20 and SARA;
- she understood the concern in Ewert to arise as a consequence of comparing an aboriginal offender to statistical norms derived from a non-aboriginal group of offenders. She said the issue does not arise in this case because Mr. Haley self-identified as Caucasian and was compared to a non-aboriginal group of offenders;
- she testified that a study in 2013, and a preliminary study from 2016, both suggest that, with slight differences, the PCL-R is moderately predictive of violent and general recidivism when applied to both aboriginal and non-aboriginal offenders. On the basis of the research to date, she has no significant concerns that the PCL-R would grossly overestimate risk of violent recidivism when applied aboriginal offenders and she feels justified moving forward in continuing to use the PCL-R for both groups;

- in formulating her opinion, she relied on actuarial tools as only one way of predicting risk. She looked at the question of risk from a number of different angles to ensure a balanced approach. She looked at Mr. Haley's criminal history and the way his offences have occurred, along with his historical manageability. She also factored in her clinical interview and the results of structured professional judgment approaches to risk assessment; specifically, the HCR-20 and SARA. Like actuarial tools, structured professional judgment approaches have also been found to be predictive of risk in a moderately reliable way. In short, her opinion on Mr. Haley's future risk to reoffend violently was based on a number of different approaches; it was not dependent on the use of actuarial measures; and
- her opinion with respect to Mr. Haley's future risk to reoffend violently would not change even if she factored out any and all reliance on the actuarial tools used in the assessment.

(e) Dr. Hart's Evidence Regarding the Potential for Cultural Bias in the Application of Actuarial Risk Assessment Tools

[225] Dr. Hart's concern centers on the possibility that actuarial risk assessment tools as applied to aboriginal offenders are susceptible to cultural bias; in other words, that the test works differently across cultural groups. His concern does not relate to other evaluative procedures, including structured professional judgment approaches that do not involve statistically based probability estimates of future risk, and are not used in the same "determinative" or "absolutist" way. Dr. Hart's concerns are confined to the use of the PCL-R and VRAG-R, and other actuarial instruments not used in Mr. Haley's case.

[226] Dr. Hart's evidence can be briefly summarized:

- research to date supports the view that the PCL-R is moderately predictive of violence and general recidivism when applied to aboriginal and non-aboriginal offenders;
- the evidence suggests, however, that the PCL-R may be less reliable in terms of predicting risk when applied to aboriginal offenders. In other words, there are more reasons to distrust the reliability of actuarial tools when applied to aboriginal, as opposed to non-aboriginal, offenders. Dr. Hart emphasized that results derived from the application of actuarial risk assessment tools can be [moderately] predictive in two separate cultural groups, but not equivalently predictive as between those two groups;
- all risk assessment tools (both actuarial and non-actuarial) should be taken with a "grain of salt". That grain of salt may be somewhat larger when actuarial risk assessment tools are applied to aboriginal offenders;
- Dr. Hart does not use actuarial risk assessment tools in his own practice, but relies on structured professional judgment. He acknowledges that other professionals do rely on actuarial risk assessment tools and take the position that it is safe to apply these tools in doing risk assessments for aboriginal offenders. He acknowledged that the issue is a contentious one;

- actuarial tools as applied to aboriginal offenders may result in an overestimation of risk, but this has not been demonstrated by clear and convincing evidence;
- currently, there is no reliable evidence that actuarial measures predict risk in an equivalent way as between aboriginal and non-aboriginal offenders. The most current data suggests some significant differences between aboriginal and non-aboriginal groups in terms of the predictive accuracy of the PCL-R;
- there is no evidence to confirm or dispel the concern that the structure of actuarial risk assessment tools like the PCL-R and VRAG-R is such that they are susceptible to cultural bias when applied to aboriginal offenders; and
- there is, however, cause for concern that these tools may give rise to a cultural bias when they are used in relation to aboriginal offenders.

[227] Based on this evidence, Dr. Hart opined that it would be better to avoid using scores derived from the application of actuarial measures in cases involving aboriginal offenders when formulating risk assessments. He advocates this approach until such time as the research dispels the potential for cultural bias to be reflected in the application of actuarial tools. In the interim, he does not suggest that actuarial risk assessment measures not be used at all for aboriginal offenders. With respect to the PCL-R, he acknowledges that valuable information may be gleaned about an individual's personality structure that is relevant to diagnosis and, I infer from that, both future risk and treatability. Rather, his concern relates to using (and overemphasizing) scores derived from rigid actuarial tools to assess risk in relation to aboriginal offenders. In this regard, Dr. Hart referred to the potential for anchoring bias - a cognitive bias describing the human tendency to weigh too heavily a single piece of information, like a test number, in coming to a decision. He suggests that the best approach to the assessment of risk for aboriginal offenders is to use a structured professional judgment approach but consider information derived from the actuarial tests as part of the totality of what can be known about an offender. He described this as a holistic approach to risk assessment for aboriginal offenders.

[228] In a follow-up report Dr. Hart prepared for the remedies hearing in Ewert, he expressed his opinion on the propriety of using actuarial risk assessment tools in the future given the findings made by Justice Phelan:

it would be consistent with the judgment to administer the identified tests, that is, to use them [to] gather and analyze information relevant to the case at hand, albeit only in the context of a more comprehensive, cautious, and contextual evaluation. This is, in essence, using the identified tests as a list of risk factors to be considered by evaluators, along with other relevant information.

It is my opinion that it would be inconsistent with the judgment [in Ewert] to score or interpret the tests, that is, to use them to transform the information gathered using the test into numbers and decisions. This is true for two reasons. First, by definition, scoring and interpreting the

identified tests involves the use of fixed and explicit algorithms, cutoffs, and reference tables that were determined a priori and have not been validated for use with Aboriginal offenders. Second, a large body of psychological theory and research indicates that evaluators would likely be insensitive to the additional information. Human decision makers tend to be unduly influenced by numbers, such as those generated by the identified tests. Decision makers tend not to revise opinions sufficiently once their thinking has been prejudiced or "contaminated" by a number, even when they know the number may be completely unreliable.

- [229] With respect to Dr. Piché's report, Dr. Hart commented that he would have preferred to have seen additional consideration given to Mr. Haley's aboriginal background. In fairness to Dr. Piché, when the report was prepared there was very little information before her about Mr. Haley's aboriginal roots and no evidence that Mr. Haley had taken recent steps to reconnect with his aboriginal heritage.
- [230] Further, while Dr. Hart did not assess Mr. Haley and was not in a position to challenge Dr. Piché's conclusions, he noted that her scoring of Mr. Haley on the PCL-R was considerably higher than past scores that had been derived using the same actuarial test. He testified that PCL-R scores should not change markedly over time but acknowledged that additional information and new events may explain a somewhat higher score at a later time. He did not, however, see in Dr. Piché's report reference to events that would account for the significantly higher score obtained during her assessment. Further, the magnitude of the historical change in scoring of the PCL-R as applied to Mr. Haley was, in his view, surprising. Finally, while he would have expected PCL-R scores to decrease after Mr. Haley turned 25 years of age, the opposite happened in his case. He testified that he would also have liked to see some analysis in Dr. Piché's report that could conceivably account for fluctuations in the scoring of Mr. Haley on the PCL-R over time.
- [231] Dr. Hart also testified that it was difficult to know from her report how Dr. Piché weighed the results of the actuarial measure in forming her overall opinion that Mr. Haley presents a high risk to reoffend violently. He said that while there is no evidence that Dr. Piché's conclusion on this point is tainted by anchoring bias, it is possible that anchoring bias may have played a role in her conclusions.
- [232] Dr. Hart agreed it was perfectly appropriate for Dr. Piché to attempt to disabuse her mind of the risk assessment results obtained through the use of actuarial tools and consider whether her opinion might have been different had no reliance been placed on this information. Having said that, Dr. Hart testified that the extent to which Dr. Piché (or any other similarly-situated professional) is able to accomplish this cannot be known. As he put it, "You can't un-ring a bell".
- (f) Manageability in the Community

- [233] Dr. Piché concluded that Mr. Haley presents as a poor treatment candidate due to his personality features. His multiple risk factors give rise to significant concerns about managing him in the community.
- [234] In coming to this conclusion, Dr. Piché emphasized a number of considerations.
- [235] First, Mr. Haley presents with personality features that limit his ability to empathize with and consider other people's needs. This is reflected in his behaviour, which shows little regard for others and a tendency to objectify others for his own benefit. It is also reflected in his inability to demonstrate remorse for some of his offences, including the predicate offences. While substance abuse is a contributing factor, Dr. Piché concluded that, "for Mr. Haley, it also appears that inflicting harm and maintaining dominance are the main motivators for his offending behaviours". Mr. Haley's ability to use empathy-based interventions to manage his behaviour in the community is compromised by the grandiose and self-focused nature of his personality. Mr. Haley's personality characteristics also limit the usefulness of many treatment modalities available to him. His personality features involve enduring characteristics that will change slowly, if at all. These features will likely limit his ability to make significant changes to his interpersonal style and behaviour. This is evident in Mr. Haley's criminal history. He acknowledges the inappropriateness of his conduct and has expressed a desire to change, but has been unsuccessful at curbing his behaviours over a substantial time.
- [236] Second, while Mr. Haley has experienced different forms of intervention and participated in different types of treatment programs in the past, these interventions have not curbed his offending behaviour. The predicate offences were committed after Mr. Haley had the benefit of a number of treatment programs. As Dr. Piché observed, it can be concluded from the commission of the predicate offences that the treatment programs Mr. Haley participated in did not change his pattern of violent offending.
- [237] Third, while Mr. Haley has shown some motivation to participate in treatment in the past, he has, on other occasions, expressed disinclination to proceed with treatment, noting he cannot tolerate the demands of group work. On one instance, he said that if he was obliged to participate in group treatment, he might end up assaulting one of the group participants if they said something he did not like. On other occasions, Mr. Haley has expressed doubts that he will obtain any benefit from treatment.
- [238] Fourth, Mr. Haley has a well-documented history of violent reoffending even when subject to supervisory terms in the community.
- [239] Fifth, Mr. Haley has engaged in significant acts of violence towards both male and female victims. As such, there is a relatively large pool of potential victims to monitor based on Mr. Haley's criminal history. In addition, Mr. Haley's criminogenic risk cycle is impulsive and rapid. This creates significant concerns about risk management in the community. As Mr. Haley's offence cycle is rapid, reactive and characterized by impulsive acts of violence, there may be no time for a supervision team to intervene prior to the commission of

another violent offence.

[240] Sixth, Mr. Haley has acknowledged a long history of using lies and manipulation in his interpersonal relationships. Dr. Piché observed that Mr. Haley has provided so many conflicting versions of his history of offending, including in relation to the manslaughter offence (see paras. 204-205), it is difficult to sort out fact from fiction. Mr. Haley admitted to Dr. Piché that he has provided false information to psychologists during past assessments. He said, "I've never heard voices" and explained that when he said he had heard voices, he was "justifying and minimizing and being an asshole at the same time". Dr. Piché said Mr. Haley is likely to continue this behaviour. This will significantly complicate managing the risk he presents to the community. As Dr. Piché observed:

community support would only be effective if Mr. Haley were to be honest about his behaviours, thoughts and future plans with his community supervision team. Mr. Haley's use of lies and omissions suggests that he would likely struggle to engage effectively with a community support team.

[241] Seventh, substance abuse is a significant risk factor for Mr. Haley. This is a life-long problem for Mr. Haley. Substance abuse is a complicating factor because it impairs normal behavioural restraints and facilitates the commission of impulsive acts - the type of acts Mr. Haley is prone to commit.

[242] Eighth, Mr. Haley has continued to ignore his risk factors by involving himself with vulnerable young women who share his substance abuse problem.

[243] Ninth, Mr. Haley's future plans reflect an absence of insight about his risk factors. As Dr. Piché noted, "[I]t appears that Mr. Haley continues to seek positions (drug counsellor/rent collector) where he is in control and can exert power over others". The "disconnect" between the common features underlying Mr. Haley's past behaviour and his future plans demonstrates he has low insight into his risk factors.

[244] Tenth, Mr. Haley's risk factors are multiple and include: use of threats and intimidation to obtain his goals; dishonesty and manipulation; need for power and control; callousness and lack of empathy; substance abuse; self-focused behaviours; unrealistic future plans; poor attitude towards intervention; negative peers; disregarding community supervision requirements; and a utilitarian approach to relationships. Dr. Piché concluded that, "Overall, it appears that these risk factors would present significant concerns in regards to Mr. Haley's ability to be managed in the community".

[245] Finally, Mr. Haley is in mid-life and does not appear to be hampered by any significant physical health concerns. As such, it does not appear that his ability to engage in violent reoffending would be significantly modified by his age, physical mobility limitations, or any physical health concerns in the near future. Further, the predicate offences suggest there has been no change in Mr. Haley's pattern of offending over time.

- [246] In cross-examination, Dr. Piché testified that she did not see how Mr. Haley's risk could be controlled in the community.
- [247] I note that this is not the first occasion such an opinion has been expressed. A similar view was expressed when Mr. Haley was detained until warrant expiry (see para. 155).
- [248] In the second phase of the application, Robert Harrison gave detailed evidence about the availability of custodial and community-based programs for aboriginal offenders subject to a federal sentence. The court heard further evidence on this point from Mr. Niles and also had the benefit of the pre-sentence report. Mr. Harrison testified that, based on his experience, aboriginal offenders reoffend less frequently when they commit to reconnecting with their aboriginal heritage. Although Mr. Harrison said he could not point to any research confirming his experience, I note that the CSC's Strategic Plan for Aboriginal Corrections states that aboriginal offenders who participated in Pathways Units had a significantly lower rate of reoffending after release than aboriginal offenders who did not reside on one of these units. In addition, the Plan states that participation in Healing Lodges has been shown to increase the chance that an aboriginal offender will successfully complete their period of community supervision.
- [249] Dr. Piché testified that while Mr. Haley's work with an elder was a positive development that might make him more amenable to participating in treatment programs, it would not change her conclusion that he is a poor candidate for treatment because: (1) the particular personality features associated with his disorder are well-entrenched and will be difficult to change; and (2) he has a well-established pattern of responding very quickly and in a violent way to perceived provocation that limits the ability of community supervisors to recognize the onset of his crime cycle and intervene before harm is done.

H. ANALYSIS OF THE ISSUES

(a) Assessing Dr. Piché's Evidence

- [250] The first three issues to be determined relate to the weight that should be given to Dr. Piché's evidence that Mr. Haley is a high risk to reoffend violently and a poor candidate for community-based management. Mr. Haley asserts that Dr. Piché's evidence cannot be given any weight, primarily for three reasons.
- [251] First, he submits that Dr. Piché factored into her assessment unreliable information gleaned from the application of actuarial risk assessment tools to him. In support of this submission, Mr. Haley relies heavily on the judgment in Ewert and Dr. Hart's opinion that there currently exists no evidence dispelling the concern that actuarial risk assessment tools may reflect cross-cultural bias when applied to aboriginal offenders.
- [252] Second, Mr. Haley challenges more broadly the reliability of Dr. Piché's evidence, alleging that her opinion rests on inaccurate information supplied to her by CSC.

- [253] Third, he asserts that Dr. Piché approached her task with pre-conceived notions about him as an offender, and that her bias against him manifested itself in her assessment report and her testimony.
- (i) Reliability of the Actuarial Risk Assessment Tools Used by Dr. Piché
- [254] In approaching this issue it is important to keep in mind a number of critical points, some of which serve to distinguish this case from Ewert.
- [255] First, Dr. Piché's opinion was not based exclusively on actuarial risk assessment tools. She also used two structured professional judgment approaches (the HCR-20 and the SARA) to assess the risk that Mr. Haley would reoffend violently. The approach employed by Dr. Piché distinguishes this case from Ewert. In Ewert, it was the CSC's "unqualified reliance" on actuarial risk assessment tools as applied to aboriginal offenders that was found to be objectionable.
- [256] Second, it appears to me that Dr. Piché approached the issue of risk assessment from the holistic perspective suggested by Dr. Hart. I do not read her report, nor do I understand her evidence on the question of Mr. Haley's risk to the public, as resting exclusively on scores derived from the use of actuarial tools. Rather, I consider her evidence on this issue to be the product of a broad-based and comprehensive reflection on all the information before her that might reasonably inform this issue.
- [257] Third, Dr. Piché was clear in her evidence that her overall opinion would not change even if she factored out any reliance on the scores derived from the PCL-R and VRAG-R. I accept her evidence on this point. Mr. Haley's diagnosis, the extent to which his personality characteristics are fixed and unlikely to change, his history of violent offending, past assessments stressing the risk he poses to the community, and the results derived from the HCR-20 and SARA, both of which are non-actuarial tools, all support this conclusion. I do not accept the suggestion that her testimony on this point reflects "anchoring bias".
- [258] Fourth, the record before this Court appears to be different than the record that was before Justice Phelan. Justice Phelan summarized the evidence he understood Dr. Hart to give in Ewert in this way: (1) that actuarial tests, including the PCL-R and VRAG "are more likely than not to be cross culturally variant" (para. 27); and (2) that "actuarial tests are not good predictors of recidivism in Aboriginals" (para. 52). I do not understand Dr. Hart to have given that evidence in this case. First, he emphasized that while the potential for cross-cultural variance in the application of actuarial tools to aboriginal offenders is a concern, there is currently no good evidence confirming or dispelling this concern. Second, I understood Dr. Hart to accept in this proceeding that actuarial risk assessment tools have been shown to be moderately predictive, including when they are applied to aboriginal offenders.

[259] Fifth, the issue comes before me in a different context. This is a dangerous offender proceeding. A sentencing court dealing with such an application should be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety: *R. v. Jones*, [1994] 2 S.C.R. 229 at para. 124. At the same time, I accept that the weighing of the evidence should be fair and, given the substantial liberty interest involved in this case, the information that comes before the court for sentencing purposes should be accurate and reliable: see *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414. Further, as Hill J. observed in *R. v. Campbell*, [2003] O.J. No. 4085 (O.N.S.C.) at para. 31:

concerns about evidentiary reliability are not merely abandoned in a sentencing hearing. The court remains vigilant to act upon reliable evidence. A sentencing court is empowered, at common law, to exclude unreliable evidence, evidence not properly considered creditworthy .

[260] Exercising the vigilance required of a sentencing judge on an application of this kind, I am not satisfied on the evidence before me on this application that actuarial risk assessment tools are unreliable, let alone "junk science" when applied to aboriginal offenders. In fact, Dr. Hart was careful to distance himself from the suggestion that the assessment of Factor 1 traits on the PCL-R as applied to aboriginal offenders can properly be labelled "junk science".

[261] I accept there is cause to be worried about the potential for cross-cultural bias when instruments of this kind are applied to aboriginal offenders. I also accept that there is cause to be worried that actuarial risk assessment tools, when applied to aboriginal offenders, may be somewhat less reliable than when they are applied to non-aboriginal offenders. But these considerations do not undermine the reliability of the evidence in issue.

[262] Although counsel did not approach the issue as a question of admissibility (the evidence already having been admitted when the issue arose), I would not exclude this evidence on reliability grounds even giving due consideration to the fact that reliability concerns must inform application of the admissibility criteria identified in *R. v. Mohan*, [1994] 2 S.C.R. 9.

[263] At most, the evidence called on the second phase of this application raises issues about the weight I am prepared to give the results of the actuarial tests and, because she relied on that evidence, the weight I am prepared to give Dr. Piché's evidence. For the reasons detailed below, I found Dr. Piché's approach to the assessment of Mr. Haley to be inclusive, thoughtful and nuanced, and I accept her evidence on the critical points that arise in this application.

[264] At the end of the day, the expression of concern about the reliability of actuarial risk assessment tools is not new. The best evidence we currently have is that these tools are moderately reliable predictors of risk for both aboriginal and non-aboriginal offenders. It is clear that further research needs to be done to ensure that actuarial instruments do not, in their application, reflect cultural bias when applied to aboriginal offenders. In the interim, they are simply one source of information sentencing judges have available to them in what will always be a holistic and, at the end of the day, judicial assessment of the risk posed by

an offender.

(ii) Reliability of Dr. Piché's Evidence Generally

- [265] Mr. Haley challenges the reliability of Dr. Piché's evidence on grounds broader than the alleged unreliability of actuarial risk assessment tools as applied to aboriginal offenders.
- [266] He suggests that Dr. Piché began the assessment interview with a fixed, sometimes erroneous, and thoroughly negative impression of his past behaviours, future risk and prospects for treatment.
- [267] In support of this submission, Mr. Haley notes that Dr. Piché: (1) entitled her s. 752.1 report a "Psychological Evaluation - Dangerous Offender Assessment", which, he argues, suggests that Dr. Piché came to the assessment with a pre-determined notion that he was a dangerous offender; (2) referred to him as a "drug dealer" as if what he has done in the past to feed his own drug addiction, and the addictions of the women with whom he has been involved, coloured in the entirety of his character; (3) erroneously referred (on two occasions) to the offence in relation to Ms. Kemp as a "murder", when he was convicted of manslaughter; (4) erroneously referred to the assault and theft under convictions disposed of on October 2, 2000 as "extortion"; and (5) scored him higher on actuarial measures and structured professional judgment tools like the HCR-20 than psychologists had in the past, including in 2004, 2009 and 2011.
- [268] I do not accept Mr. Haley's submissions on any of these points.
- [269] Dr. Piché gave her evidence with care and compassion in a difficult case. The results of her assessment have not been contradicted in a direct sense by any other expert evidence. Despite this, I recognize the need to subject her opinions to close scrutiny based on the entirety of the evidence before me on this application, including the evidence of Dr. Hart. Having done so, I accept her evidence as objective and reliable.
- [270] Mr. Haley's first point is without merit. Nothing can properly be inferred from the short form name of the document. As Dr. Piché correctly pointed out in the first paragraph of her assessment report, she received a referral to evaluate Mr. Haley "for consideration in a Dangerous Offender Application under section 753 or 753.1 of the Criminal Code". She stated that her assessment would address "Mr. Haley's risk to the community, provide a mental health diagnosis, as well as review possibilities for treatment or control in the community". This is an accurate and even-handed way of characterizing the task Dr. Piché was given and the issues she was expected to canvass.
- [271] Next, it is obvious that Dr. Piché did not intend to use the term "drug dealer" in a pejorative sense or as a way of compendiously defining Mr. Haley's character. She said so in her testimony. I do not know how she could avoid using the language she did given Mr. Haley's acknowledgement that he has trafficked in drugs for a substantial time.

- [272] On two occasions in the assessment report, Dr. Piché erroneously referred to the offence involving Ms. Kemp as a murder (Exhibit 14, Tab 2, Assessment Report dated June 5, 2015, pp. 25 and 39). She acknowledged the error in her testimony. The misstatements are attributable to Dr. Piché's reliance on inaccurate language used in the pre-sentence report prepared in relation to the homicide. Dr. Piché had this pre-sentence report as part of the package of materials she had been given to conduct the assessment. In preparing her report, it is obvious Dr. Piché was tracking inaccurate language used in the pre-sentence report. I am satisfied Dr. Piché knew full well Mr. Haley had been convicted of manslaughter in relation to Ms. Kemp. She properly characterized the offence as manslaughter in her detailed exploration of the different versions of events Mr. Haley has given in relation to this incident (Exhibit 14, Tab 2, Assessment Report Dated June 5, 2015, p. 7). She testified that use of the word "murder" was a misstatement that escaped her attention but did not otherwise influence the content of her report. I am certainly not prepared to infer from this error that Dr. Piché came into the assessment remand interview with pre-conceived notions about the seriousness of Mr. Haley's prior offences, or his future risk, treatability and manageability in the community.
- [273] With respect to her characterization of the October 2, 2000 offences as "extortion", Dr. Piché testified that she understood the conduct to involve an effort on Mr. Haley's part to try to obtain more money for furniture delivery services than had been agreed to by threatening to retain the furniture being moved if the additional amount was not paid. Dr. Piché testified that she was not sure whether the correct legal label for the conduct was "extortion", but acknowledged that she could have used a different word to describe this offence. In referring to the conduct as an "attempt to extort" (Exhibit 14, Tab 2, Assessment Report Dated June 5, 2015, p. 6) it is apparent that Dr. Piché was tracking language used in file material she had been supplied with for the purposes of preparing the assessment report. In a social history report prepared by an IPO following Mr. Haley's admission into federal custody in 2003 (Exhibit 16, p. 8), it is said that Mr. Haley was involved in an "attempt to extort" a customer while working for a moving company. While I do not have before me very much in the way of reliable information about the circumstances underlying these offences, I accept that Mr. Haley was not convicted of extortion in relation to this incident. Further, Mr. Haley has not admitted on this application conduct that could properly be characterized as extortion. I also accept that the Crown has not proved that Mr. Haley's conduct on this occasion warrants characterization as an "attempt to extort". But I cannot accept that Dr. Piché's reliance on the material provided to her, or on descriptive language used in that material, reflects in any way bias or predisposition on her part. I also reject the notion that this mischaracterization of Mr. Haley's conduct either standing alone, or viewed in combination with Mr. Haley's other complaints, undermines the reliability of Dr. Piché's overall opinions on future risk, treatability and the management of his risk in the community.

[274] Finally, I am unable to give effect to Mr. Haley's submission that Dr. Piché's alleged pre-disposition to find him to be a high risk to reoffend may be inferred from the fact that her opinion regarding the likelihood of him committing a future violent offence is gloomier than risk predictions made by other psychologists in the past. While there will always be a subjective component to risk assessment, including those conducted with the aid of actuarial tools, I am satisfied that Dr. Piché's opinion with respect to risk assessment is not the product of any pre-disposition on her part. I am, in short, satisfied that she approached her task with the detached objectivity required of a court-appointed assessor. To the extent Dr. Piché's opinion on future risk is less favourable to Mr. Haley than past psychological assessments, I am satisfied this is explained by: (1) the fact that she had much more information to draw on in assessing the risk posed by Mr. Haley - information that could only raise heightened concerns about the risk of future violent re-offence; (2) the fact that Mr. Haley had committed an additional serious act of violence (reflected in the predicate offences) since the last assessment - an act of violence that would elevate assessment of his future risk, whether measured through an actuarial test or through utilization of structured professional judgment; (3) the fact that the PCL-R has changed and that some caution must be applied in comparing test results derived at different times. I note that Dr. Piché's evidence on this last point was not challenged in cross-examination or contradicted by any evidence elicited from Dr. Hart; and (4) Mr. Haley's admitted tendency to falsify answers in connection with past assessments.

[275] I recognize that Dr. Hart expressed concerns about historical fluctuations in data derived from the application of risk assessment tools, particularly the PCL-R, to Mr. Haley. But this alone does not support Mr. Haley's contention that Dr. Piché approached her task with a jaundiced eye, nor does it undermine the reliability of Dr. Piché's overall opinion. At most, it confirms that actuarial risk assessment tools are not infallible, the results derived therefrom are never purely objective, and they should not be treated as "gospel". As Dr. Piché put it, actuarial measures simply provide another lens through which risk may properly be assessed. Further, I am satisfied that the historical fluctuations that troubled Dr. Hart are, at least to some extent, accounted for by the factors referred to in paragraph 273.

(iii) Other Discrete Issues Impacting the Weight to be Given Dr. Piché's Evidence

[276] The Crown has the obligation to prove beyond a reasonable doubt uncharged past conduct and aggravating circumstances associated with criminal convictions neither found as a fact in judicial proceedings nor admitted by an offender: *R. v. Pike*, 2010 BCCA 401 at paras. 55-58; *R. v. Zeigler*, 2012 BCCA 353 at paras. 7-10; *Neve* at para. 133. Reliance by an expert on unproven foundational facts may well affect the weight that can be given to their opinions: *Pike* at paras. 61-65; *Zeigler* at para. 11.

[277] In a few instances, Dr. Piché referenced in her report uncharged conduct and aggravating circumstances with respect to past offences neither admitted by Mr. Haley nor established by the Crown beyond a reasonable doubt. I will give a few examples:

- With respect to the assault in 1991, Dr. Piché relied on file information that Mr. Haley punched the victim in the face. To the extent this aggravates the offence, I place no reliance on it;
- With respect to the assault of Melanie Dupuis in 1997, Dr. Piché proceeded on the understanding that Mr. Haley choked his victim. Mr. Haley disputed this allegation on sentencing and the Crown did not seek to prove it as an aggravating circumstance. As a result, I place no reliance on it;
- With respect to the offences committed against Melanie Dupuis in 2000, Dr. Piché relied on file information that provided a slightly different, and arguably more aggravated, version of the threats communicated to her by Mr. Haley than that which was agreed to on sentencing. Again, I place no reliance on the version of events set out by Dr. Piché in her report. I rely, instead, on the facts set out in support of the guilty plea;
- As noted earlier, Dr. Piché inaccurately characterized one of Mr. Haley's offences in 2000 as an "attempt to extort";
- Dr. Piché relied on file information respecting one property offence from 2001 that appears to be a theft under allegation. It does not appear on Mr. Haley's record. It is of no consequence but, for clarity, I place no reliance on this unproven information for any purpose;
- Dr. Piché also relies on file information for the facts underlying a mischief offence disposed of in 2001. I place no reliance on this unproven information;
- Dr. Piché references in her report file information suggesting Mr. Haley breached his conditional sentence order on May 19, 2012 by being outside of his VisionQuest residence without permission. There is no evidence before me establishing that Mr. Haley breached his conditional sentence order on this date and I place no reliance on this unproven suggestion; and
- Dr. Piché references in her report file information respecting the circumstances said to form the basis of the s. 810(1) "peace bond" entered into by Mr. Haley on March 18, 2013. Those circumstances, which are in dispute, are not relied on by the Crown on this application and I place no reliance on this information.

[278] In highlighting these points, I intend no criticism of Dr. Piché. As she said in her testimony, an assessor appointed under s. 752.1 is not a fact-finder. She relied, and properly so, on file information supplied to her by Crown counsel, including CSC documents and police reports prepared in relation to criminal allegations and offences involving Mr. Haley.

[279] Regardless of how these issues arose, the court is obliged to consider whether Dr. Piché's reliance on unproven and/or aggravated facts affects the weight I am prepared to give to her opinions.

- [280] On this issue, there is no evidence before me that Dr. Piché's reference to uncharged or unproven criminal acts, or reliance on aggravating circumstances neither admitted by Mr. Haley nor proved by the Crown, influenced in any material way her opinions on the critical issues arising on this application.
- [281] Dr. Piché testified that the fact Mr. Haley did not choke Melanie Dupuis in the 1997 incident would not change her overall assessment. With respect to the uttering threats conviction in relation to Melanie Dupuis in 2000, nothing was made by counsel of the difference between what Mr. Haley admitted and the version relied on by Dr. Piché. This confirms my own view that the difference is insignificant in the context of the evidence as a whole and not a factor that affects the weight to be given Dr. Piché's opinions on risk assessment or treatability. I am also satisfied that characterizing the offence disposed of in 2000 as an "extortion" or "attempted extortion" had no bearing on Dr. Piché's overall conclusions respecting the threat analysis or whether the risk Mr. Haley poses could be reduced to an acceptable level through treatment and community-based supervision. In the scheme of things, the incident is a minor one, and its characterization is inconsequential. I have come to the same conclusion with respect to the other information referenced or relied upon by Dr. Piché. I include in this category Dr. Piché's apparent reliance on institutional infractions committed by Mr. Haley. As noted earlier, I am not prepared to give this evidence any weight. But factoring this evidence out does not change the reality that Mr. Haley has a history of "rule breaking" behaviour. At the end of the day, there is no evidence that any of this information materially influenced Dr. Piché's opinions on the central issues arising on this application. Accordingly, I am not prepared to assign her opinions less weight as a consequence of the failure by the Crown to prove what amounts to inconsequential facts.
- [282] Dr. Piché was, through inadvertence, supplied with a few documents before she conducted her assessment that clearly do not relate to Mr. Haley. In addition, Mr. Haley says that other documents supplied to Dr. Piché for the purposes of preparing the assessment report do not relate to him, even though they bear his name or other identifying information, including his FPS number. He notes that the FPS number assigned to some of those documents has been changed by hand.
- [283] When the assessment remand interview was conducted, Dr. Piché was aware of Mr. Haley's position that at least some of the documents provided to her did not relate to him.
- [284] The documents in issue have been segregated from the voluminous materials provided to Dr. Piché and marked as Exhibit 13 on this application.
- [285] The provision of documents to Dr. Piché that Mr. Haley says do not relate to him gave rise to an allegation that the Crown committed an abuse of process and violated s. 7 of the Charter by failing to take proper care in preparing background materials to be relied on by the court-appointed assessor. Mr. Haley originally sought a stay of proceedings as a consequence of this alleged breach. This constitutional application was abandoned on December 9, 2015. I raise it at this juncture because counsel for Mr. Haley, in his written

submissions in response to the Court of Appeal's judgment in Boutilier, appended the notice of constitutional question in relation to this issue. It is unclear to me why this was done. But even if I considered this application to be extant, it is lacking in merit. The evidence before me falls far short of establishing an abuse of process. Further, the remedy Mr. Haley seeks in connection with this application could not possibly be granted. The remedy would be to exclude those documents that have been shown not to relate to Mr. Haley (a remedy not pressed by his counsel), to consider whether reliance was placed on any of these records by the court-appointed assessor and, if so, the extent to which reliance on those documents undermines the reliability of her opinions on the critical issues that arise on this application.

- [286] Rachael Catalano explained how documents not related to Mr. Haley could have found their way into the materials provided to Dr. Piché for the purposes of completing the assessment report. Ms. Catalano testified that documents created by CSC in relation to an offender are stored in an electronic database called the Offender Management System (OMS). Records relating to an offender can be printed from the OMS but human errors are sometimes made in the storage and/or transmission of requested records. For example, if records relating to more than one offender are being printed, a record unrelated to the offender may be stapled to a record that does relate to that offender and passed along to the requesting party. Alternatively, data entry errors are sometimes made and reports relating to offenders with similar FPS numbers may be misfiled in the electronic database.
- [287] With respect to those records that clearly do not relate to Mr. Haley, I accept Ms. Catalano's explanation for how those documents likely found their way into his OMS file.
- [288] I have read all of the documents in issue. For the most part, they address inconsequential matters and could not possibly have affected Dr. Piché's opinions on risk, treatability or the future management of Mr. Haley in the community.
- [289] Mr. Haley takes particular issue with the results of a Minnesota Multiphasic Personality Inventory (MMPI) that he says does not relate to him. It is likely these reports do relate to Mr. Haley for reasons explained by Dr. Piché. But even accepting that these test results do not relate to Mr. Haley, I am satisfied they could not possibly have affected Dr. Piché's opinions on risk or treatability. On this issue, Dr. Piché testified that the MMPI results in issue were invalid and not considered by her in the formulation of her opinions on risk and treatability. Her evidence on this point was not challenged and I accept it.
- [290] In the result, there is no basis upon which a conclusion could be drawn that Dr. Piché's opinions are based on information that does not relate to Mr. Haley.

(b) The Pattern Analysis

- [291] The Crown must prove beyond a reasonable doubt all the elements necessary to find that Mr. Haley is a dangerous offender: Pike at para. 29.

- [292] The Crown must first establish beyond a reasonable doubt that the predicate offences form part of a pattern of behaviour as defined in s. 753(1)(a)(i) or (ii). As this issue forms a core component of Mr. Haley's response to the Crown's application, I will briefly review the governing principles of law in this area. I should emphasize that these principles are not in issue; what is in issue is the application of them to this case.
- [293] Subsection 753(1)(a)(i) has the following elements, all of which must be proved beyond a reasonable doubt by the Crown:
- a pattern of repetitive behaviour;
 - the predicate offence must form part of the pattern;
 - the pattern must show a failure by Mr. Haley to restrain his behaviour in the past; and
 - the pattern must show a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his behaviour in the future.
- [294] Subsection 753(1)(a)(ii) has the following elements, all of which must be proved beyond a reasonable doubt by the Crown:
- a pattern of persistent aggressive behaviour;
 - the predicate offence must form part of the pattern; and
 - the pattern must show a substantial degree of indifference by Mr. Haley respecting the reasonably foreseeable consequences of his behaviour.
- [295] The word "persistent" as it is used in s. 753(1)(a)(ii) has been equated with the word "repetitive": R. v. J.Y., [1996] S.J. No. 61 at para. 25 (C.A.). One definition of "persistent" taken from the Shorter Oxford Dictionary of English, 6th ed. (Oxford: Oxford University Press, 2007) is "continuing to exist or occur over a prolonged period, enduring". As it would be more favourable to Mr. Haley to do so, I proceed on the footing that the word "persistent" contemplates enduring behaviour or continuity of conduct.
- [296] The "substantial degree of indifference" requirement of s. 753(a)(ii) must be "measured broadly, by examining the attitude of the offender before, during and after the events in question" to the end of identifying the small group of offenders who display a conscious but uncaring, awareness of causing harm to others": R. v. Allan, 2009 BCSC 1245 at para. 218, aff'd 2012 BCCA 388; R. v. George (1998), 109 B.C.A.C. 32 at paras. 23-24.
- [297] The provisions in s. 753(1)(a) are disjunctive. It is common ground that the Crown need only prove one of the threshold "pattern of behaviour" requirements: R. v. Lewis (1984), 12 C.C.C. (3d) 353 (Ont. C.A.); R. v. Dow, 1999 BCCA 177 at para. 13.
- [298] The essence of the threshold pattern requirement was explained in Dow at paras. 23-25 and 27:

So, in any particular case, for the purposes of describing the pattern, each of the three elements may be particularized in a way that gives individuality to the pattern by indicating specific similarities between one incident and another. But it is important that the process of particularization not result in a level of detail which obscures the common characteristics which embody and reveal the three essential elements of the pattern.

In short, the significance and the relevance of common elements of the pattern must be determined by whether they tend to show first, repetitive behaviour, second, that there has been a failure in each case to restrain the behaviour, and third, that there has been injury to other persons arising from that failure. If any of those three elements is missing, then there may be a pattern but it will not be a relevant pattern. But if all three are present then the essential elements of a relevant pattern are revealed.

I think the sentencing judge erred in law when he said that "all of the parts of the [most recent] offence must be of like form, order or arrangement." That constitutes a degree of similarity that is more than is required to represent a relevant pattern. As I have said, the three elements of subpara. (i) of s. 753(a) must be present in the pattern, and should be described at a level of generality which gives individuality to the pattern, but beyond that it is not necessary that all of the parts of the most recent offence must be like all parts of the earlier offences, though further similarities may add vividness to the pattern.

[299] That the predicate offence must be shown to be part of the pattern of past behaviour is an important feature of the legislative regime. As noted in Pike at para. 82:

The predicate offence is not a meaningless, statutory trigger. It is a "last straw", described by Marshall J.A. in *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197 at para. 69 (Nfld. C.A.) as a "one last act of serious personal violence to anchor the offender's pattern of pre-existing unrestrained or uninhibited behaviour". It takes its significance, in part, from the fact that it demonstrates that the relevant pattern of behaviour continues. As Marshall J.A. explains, it serves an important purpose: "[i]t guards against visiting one of the most serious criminal sanctions upon someone who has essentially abandoned a past pattern of intensely serious violence on the basis of a relapse of relatively less grave proportions" (at para. 72). This explains why the pattern and predicate offence must be related. It would be inconsistent and unfair if the ultimate threat determination were to be made on the basis of a perceived threat unrelated to either the predicate offence or the pattern of behaviour it reveals as still persisting.

[300] In *R. v. Hogg*, 2011 ONCA 840 at paras. 39-40 and 43, the Court emphasized that the pattern of repetitive behaviour said to include the predicate offence must contain enough of the same elements of unrestrained dangerous conduct to form the basis of a confident prediction that the offender will offend similarly in the future:

In *R. v. Jones*, [1993] O.J. No. 1321 (C.A.), this court observed that "remarkable similarity" was required in *R. v. Langevin* (1984), 45 O.R. (2d) 705 (C.A.) where the pattern relied on consisted of only two offences, whereas in *Jones*, where there were four offences, fewer exact similarities were needed. In *R. v. Neve*, 1999 ABCA 206, 137 C.C.C. (3d) 97, the Alberta Court of Appeal stated on this issue: "the requirement for similarity in terms of kinds of offences is not crucial when the incidents of serious violence and aggression are more numerous." (para. 113)

To summarize, the pattern of repetitive behaviour that includes the predicate offence has to contain enough of the same elements of unrestrained dangerous conduct to be able to predict that the offender will likely offend in the same way in the future. This will ensure that the level of gravity of the behaviour is the same, so that the concern raised by Marshall J.A. - that the last straw could be a much more minor infraction - could not result in a dangerous offender designation. However, the offences need not be the same in every detail; that would unduly restrict the application of the section.

...

Although the pattern differed in the detail of how the offences were carried out, the predicate and past offences still represented a pattern of repetitive violent behaviour that made it likely that the appellant would continue to commit similar acts of violence in the future.

[301] The parties agree that the law in British Columbia does not appear to require the demonstration of "remarkable similarity" between the previous behaviour and the predicate offence(s). The Crown and defence took no issue on this application with either of these propositions: (1) the fewer the incidents said to constitute the pattern, the more similar they must be: *R. v. Dorfer*, 2013 BCCA 223 at paras. 38-42; *R. v. Jeurissen*, 2014 BCSC 1718 at paras. 388-390; and (2) a lengthy history of resort to serious violence may serve to relax the similarity requirement embedded in the pattern analysis: see *Neve*, at para. 113; *R. v. Szostak*, 2014 ONCA 15 at para. 51.

[302] Importantly, the pattern analysis cannot be reduced solely to the number of offences committed, but must also focus on the "elements of similarity of the offender's behaviour": *Langevin* at para. 29.

[303] The Crown submits that the threshold pattern requirements of s. 753(1)(a)(i) and (ii) have been established. To prove the requisite patterns, the Crown relies on Mr. Haley's five previous convictions for assault, two previous convictions for uttering threats that are bound up with his assaultive behaviour, his conviction for manslaughter, and the predicate offences. The Crown says that what unites Mr. Haley's past behaviour and the predicate offences and reveals the patterns contemplated by s. 753(a)(i) and (ii) is that, in each case, his violent behaviour was reactive, rapid, impulsive (as opposed to instrumental, or planned) and wholly disproportionate to the events triggering his violent response.

- [304] The crux of Mr. Haley's position on this issue is that the predicate offences are distinct from and do not form part of any pattern of behaviour that might otherwise be revealed by Mr. Haley's history of offending. Mr. Haley notes that, unlike the predicate offences, his previous offences were all committed against females, in private, in the context of intimate relationships, and that none of them involved the use of a weapon.
- [305] For the reasons that follow, I find that the Crown has proved the threshold patterns of behaviour contemplated by s. 753(1)(a)(i) and (ii).
- [306] In coming to this conclusion, I have not taken into account Mr. Haley's assault conviction in 1991 (Disposition Date: December 5, 1991) or his assault conviction in 2000 (Disposition Date: October 2, 2000). I have insufficient reliable information before me about the circumstances of either of these offences to conclude that they form part of the discernible pattern of behaviour otherwise reflected in Mr. Haley's criminal history and in the predicate offences.
- [307] For the purposes of the pattern analysis, I rely on: the 1997 assault and uttering threats to Ms. Dupuis; the 2000 assault and uttering threats to Ms. Dupuis; the 2002 assault of Crystal Barker; the 2003 manslaughter Kandace Kemp; and the predicate offences.
- [308] I agree with the Crown that Mr. Haley's past behaviour, including the predicate offences, reflects a pattern of rapid, reactive and impulsive or spontaneous aggression manifesting itself in the domination of his victims.
- [309] Although there are obvious differences between Mr. Haley's past criminal conduct and the predicate offences, I do not ascribe to them the significance Mr. Haley's counsel suggests. In my respectful view, these differences do not detract from the common and unifying elements underlying all these offences. The unifying elements include: what motivates Mr. Haley's conduct (the desire to dominate and harm those who challenge him - see the Assessment Report of Dr. Piché, Exhibit 14, at p. 43); the impulsive nature of his acts; the speed with which he responds to perceived provocation; the disproportionate nature of his response; and the infliction by him of death or serious bodily harm. In coming to this conclusion I am fortified by the analysis in Szostak. In that case, Rosenberg J.A., for the court, rejected the notion that the offences forming part of the alleged pattern must be shown to be "serial offences" (para. 60). In that case, as in the case at bar, the offender had a well-developed history of spontaneous and serious violence - a fact that was found to tell in favour of a pattern in the sense contemplated by s. 753(1)(a)(i) and (ii).
- [310] Mr. Haley's history of violent offending that is relevant to the pattern analysis encompasses five incidents. His resort to reactive and extreme violence when angered is predictable and well-established in his behavioural patterns. It is behaviour that manifests itself at fairly regular intervals and has now endured over portions of three decades. In each of these incidents, Mr. Haley caused bodily harm or death to his victims. To borrow the language of Marshall J.A. in Newman, the predicate offences can properly be regarded as one last act of serious personal violence that anchors Mr. Haley's pattern of pre-existing unrestrained or

uninhibited behaviour. Indeed, had prompt medical intervention not been available to Mr. Prevey, it is likely that Mr. Haley would have taken a second life. Mr. Haley's conduct as reflected in the predicate offences also demonstrates that the pattern is a continuing one. To borrow the language of Feldman J.A. in Hogg, the Crown has shown to the requisite standard of proof that the behaviour underlying the offences I have determined to consider as part of the pattern analysis contains enough of the same elements of unrestrained, dangerous conduct to be able to predict with confidence (in other words, beyond a reasonable doubt) that Mr. Haley will likely act in the same way again.

- [311] Although not an essential part of my analysis of this issue, I note that expert evidence is relevant and admissible on the question of whether particular behaviour may properly be regarded as forming part of an identifiable pattern of past offending. It remains, of course, the responsibility of the sentencing court to determine whether the evidence, in fact, establishes one of the proscribed patterns: Neve at paras. 124, 199. On this point, Dr. Piché testified that Mr. Haley's conduct forms part of an identifiable pattern of rapid, impulsive and violent responses motivated by his desire to maintain dominance and inflict harm. This evidence merely serves to fortify my conclusion that the predicate offences do form part of the patterns contemplated by s. 753(a)(i) and (ii).
- [312] On the basis of the offences I have relied on for the purposes of the pattern analysis, I am satisfied that the Crown has established not only a pattern of repetitive behaviour that includes the predicate offences, but also that the pattern shows a failure on Mr. Haley's part to restrain his behaviour and the likelihood that he will cause death or injury to other persons through failure in the future to restrain his behaviour: s. 753(a)(i). Despite many attempted interventions, including multiple periods of community supervision, Mr. Haley has continued to resort to violence over the years. His behaviour has not been restrained by attempted treatment, supervision, or the passage of time. I cannot credit Mr. Haley's contention that his decision to heed Ms. Eadie's caution not to re-enter the Cambie Pub in search of his property after stabbing Mr. Prevey demonstrates a new-found exercise of behavioural restraint. To the contrary, viewing the predicate offences in context simply reinforces Mr. Haley's pattern of not being able to exercise self-restraint when provoked.
- [313] Likewise, I am satisfied that the Crown has established a pattern of persistent aggressive behaviour by Mr. Haley, of which the predicate offences forms a part, showing a substantial degree of indifference on his part to the reasonably foreseeable consequences to other persons of his behaviour: s. 753(a)(ii). All the offences forming part of the pattern reflect a substantial degree of indifference on Mr. Haley's part to the foreseeable consequences his behaviour would have on others. While Mr. Haley has fairly consistently expressed remorse for causing Ms. Kemp's death, he has, to date, expressed no remorse for his attack on Mr. Prevey - an attack that could well have taken his life.

(c) The Threat Assessment

[314] To have Mr. Haley declared a dangerous offender, the Crown must also prove beyond a reasonable doubt that Mr. Haley constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of the evidence establishing one or both of the patterns contemplated by s. 753(a)(i) and (ii). As explained in Pike, at paras. 25 and 83, it is only when the threshold pattern is established that a sentencing judge can go on to consider whether, in light of that finding, the offender constitutes such a threat. In this respect, the pattern analysis is inextricably linked to the ultimate threat assessment. Having decided that both of the threshold patterns relied on by the Crown have been established beyond a reasonable doubt, I turn next to address the threat assessment component of the dangerous offender test.

[315] Dangerousness is a finding of fact respecting an offender's present condition, as measured by past behaviour and patterns of conduct: *R. v. Allan*, 2009 BCSC 1245 at para. 194, aff'd 2012 BCCA 388. The Crown must prove that the offender represents a threat of harm as defined in s. 753(1)(a), but need not establish that the offender will certainly act in a particular way in the future: *R. v. Lyons*, [1987] 2 S.C.R. 309 at paras. 92-93. The court must, however, be satisfied beyond a reasonable doubt that the offender will likely constitute a threat to society in the future on the basis of evidence establishing that the present condition of that offender is such that he is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person: *Lyons* at paras. 27, 114.

[316] I am satisfied that the Crown has met its burden on this issue and has done so on the patterns established under both s. 753(1)(a)(i) and (ii).

[317] Expert evidence assumes an important, but not determinative, role in connection with this issue. All the evidence bearing on this issue must be considered and weighed.

[318] In my view, the following evidence overwhelmingly supports a conclusion that Mr. Haley constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of the established patterns of behaviour:

- Mr. Haley has a lengthy history of causing harm to others;
- Mr. Haley has limited insight into his criminogenic factors and there is no evidence to support the notion that his rapid, reactive and explosive response to perceived provocation will change. In short, it is evident that Mr. Haley has not been able to restrain his behaviour in the past, and there is no cause for optimism that he will do so in the future;
- After taking one person's life, Mr. Haley very nearly took a second;
- It is remarkable feature of this case that even though Mr. Haley has expressed remorse for killing Ms. Kemp, he committed the predicate offences just 3 ½ years after being released from custody in connection with the manslaughter; offences that would likely have caused Mr. Prevey's death had emergency medical aid not been available;

- Mr. Haley has been diagnosed with an antisocial personality disorder, the characteristics of which include a persistent failure to conform to social norms; impulsivity; a long-standing pattern of aggressive behaviour; conduct that demonstrates a reckless disregard for the safety of others; irresponsibility; and an absence of remorse for harmful behaviour. These personality features are stable and resistant to change. Collectively, these characteristics strongly support a conclusion that Mr. Haley will constitute a threat to society in the future;
- Actuarial and non-actuarial risk assessment measures indicate that Mr. Haley is a high risk to reoffend violently in the future;
- Looking at the issue of risk from an overall or holistic perspective led Dr. Piché to conclude that Mr. Haley represents an elevated risk for future violent reoffending;
- Mr. Haley's use of violence has escalated with age. He is a fairly young man and there is no evidence before me that "burnout" is on the horizon or that the public will be protected by the simple passage of time and the effects of the aging process;
- Mr. Haley's risk-taking behaviour has also increased. The predicate offences occurred in a public place in full view of many witnesses. I agree with Dr. Piché's assessment that this underscores Mr. Haley's inability to exercise behavioural restraint when angered; and
- Mr. Haley's violent conduct has become increasingly disproportionate to the events that have provoked it.

[319] Viewed collectively, I find that this evidence establishes that Mr. Haley constitutes a threat to the life, safety or physical or mental well-being of other persons in the future.

[320] The Court of Appeal noted in Boutilier that determining an offender's future risk requires at least a limited assessment of the treatability of that offender: at paras. 57, 62; see also Szostak at para. 36. There is no evidence before me that Mr. Haley's treatment prospects are such that the Crown has failed to prove to the requisite standard that he constitutes a significant threat to others in the future. Indeed, there is virtually no evidence before me of treatment interventions available to Mr. Haley that would suggest a favourable prognosis in terms of future risk.

[321] I wish to make clear that had I proceeded on the footing that treatment prospects are highly relevant at the designation stage, it would not have changed the result. I would still have found Mr. Haley to be a dangerous offender. Put simply, there is no evidence before me that the threat Mr. Haley poses to society can be reduced to an acceptable level through treatment. Dr. Piché gave a number of compelling reasons why Mr. Haley should be considered a poor candidate for treatment (see paras. 234-244). I accept her evidence on this point. Mr. Haley has never demonstrated a sustained commitment to intensive treatment. When Mr. Haley did attend a treatment program, the evidence before me establishes that he derived very little, if any, benefit from the program. Even if Mr. Haley decides to commit to a treatment program in the future, he suffers from an antisocial personality disorder that is treatment resistant. Mr. Haley's recent effort to engage with Mr.

Niles is a positive development and gives cause for some hope. But the evidence goes no further than that. In addition, while I recognize that aboriginal-specific interventions will be made available to Mr. Haley should he choose to avail himself of them, there is no evidence before me that Mr. Haley will make a serious commitment to these programs or, even if he does, that participation in them will reduce his risk to society to an acceptable level. Accordingly, giving treatment prospects robust consideration at the designation stage would not assist Mr. Haley in this case.

[322] As the criteria for a dangerous offender finding have been proved beyond a reasonable doubt, I am required to declare Mr. Haley a dangerous offender and I do so.

(d) Whether to Impose an Indeterminate Sentence

[323] As noted earlier, s. 753(4.1) requires the imposition of an indeterminate sentence unless I am satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure (a determinate sentence or the sentence contemplated by a long-term offender designation) will adequately protect the public against the commission by Mr. Haley of a further serious personal injury offence.

[324] At least five important principles frame this second-stage inquiry.

[325] First, s. 753(4.1) imposes a higher standard than that which existed under the previous legislation in that an "expectation" speaks to a belief that something will happen and, as opposed to a "reasonable possibility" of eventual control of the risk in the community: *R. v. D.J.S.*, 2015 BCCA 111 at para. 30.

[326] Second, s. 753(4.1) does not impose a burden or onus on the offender but simply requires an evidentiary basis to meet the standard of a "reasonable expectation" triggering the discretion to impose an alternative sentence: *Boutilier (CA)* at para. 79. Equally, while the Crown must prove beyond a reasonable doubt the past conduct of an accused and the criteria required for a dangerous offender designation, "there can be no burden of proof in the classic sense in the assessment of the future": *R. v. Wormell*, 2005 BCCA 328 at paras. 31-34 and 62. The law in this area was recently summarized in *R. v. Bragg*, 2015 BCCA 498 at paras. 27-28:

As to the provisions of s. 753(4.1) of the Criminal Code, the Crown bears no burden in the assessment of future manageability: *R. v. Wormell*, 2005 BCCA 328, at paras. 31-32.

In *Wormell*, Southin J.A. also explained, using the language of the former provision:

[32] The task of the Court from beginning to end is to ask itself, "Am I satisfied that there is a reasonable possibility [now a reasonable expectation] of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender.

There must be evidence that the risk posed could be controlled once a long-term supervision order expires.

- [327] Third, a finding that there exists a reasonable expectation that some measure less than an indeterminate sentence will adequately protect the public must be grounded in the evidence. The mere expression of hope in the absence a supporting evidentiary foundation will not suffice: *R. v. McCallum*, [2005] O.J. No. 1178 (Ont. C.A.) at paras. 47-49; *R. v. G.L.*, 2007 ONCA 548 at para. 42; *R. v. Johnson*, 2008 BCCA 149 at paras. 72-73.
- [328] Fourth, s. 753(4.1) does not require showing that an offender will be "cured" through treatment in order to justify resort to a sentencing measure less than an indeterminate period of incarceration. Rather, what the section requires is the existence of an evidentiary foundation upon which it can be said that there exists a reasonable expectation that an offender's risk can be managed to an acceptable level in the community so as to protect the public: *G.L.* at para. 42.
- [329] Fifth, Mr. Haley's aboriginal roots are particularly relevant at this stage of the application. I am required to consider whether treatment programs and other kinds of interventions specific to aboriginal offenders give rise to a reasonable expectation that a sentencing measure short of an indeterminate sentence will adequately protect the public.
- [330] In approaching this issue, I must have particular regard to s. 718.2 (d) and (e) of the Code. It must be borne in mind that s. 718.2(e) is a remedial provision designed to address the pressing social problem of the over-representation of aboriginal offenders in Canadian prisons: see *Gladue* and *R. v. Ipeelee*, 2012 SCC 13. This core principle is applicable to dangerous offender applications.
- [331] A number of authorities have addressed the application of Gladue principles to dangerous offender hearings, including: *Smarch*; *R. v. Fontaine*, 2014 BCCA 1; *R. v. Standingwater*, 2013 SKCA 78; and *R. v. Peekeekoot*, 2014 SKCA 97.
- [332] In *Standingwater*, at paras. 49-51, the Court confirmed that the availability of alternative, aboriginal-focused treatment interventions designed to ameliorate the risk posed by an aboriginal offender must be considered in deciding whether to impose an indeterminate sentence:

... the sentencing court must have reference to Gladue factors where they serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of reoffending posed by the Aboriginal offender in question. If such means exist, are available and are suitable in the circumstances, then they go to enhance the cogency of the possibility of eventual control of the risk that the Aboriginal offender will reoffend in the community. As such, the existence or non-existence of such means is relevant to any assessment conducted under s. 752.1(1) and the sentencing court must be expected to factor the availability, nature, suitability and efficacy of such means into its determination under s. 753.1(1)(c)

- [333] Thus, Gladue considerations may be highly relevant at the second stage of the inquiry; specifically, on the question of whether an indeterminate sentence should be imposed. The existence of aboriginal-focused treatment programs may give a sentencing judge confidence that a sentence less than an indefinite period of incarceration will adequately protect the public. The application of Gladue principles at this second stage is consistent with the holding in Smarch (at paras. 47-48) that Gladue principles do apply to the sentencing of dangerous offenders, "though their application may be more limited".
- [334] Having applied these principles to the case at bar, I find there is no evidence that Mr. Haley's risk to the community can be reduced to an acceptable level through treatment or other kinds of interventions, including interventions specific to aboriginal offenders. Put differently, there is no evidence upon which a finding could properly be made that there exists a reasonable expectation that a lesser measure than an indeterminate sentence will adequately protect the public. In the result, there is no evidence upon which this Court could properly impose a sentence less than an indeterminate period of incarceration. In support of this conclusion, I rely again on Dr. Piché's evidence summarized herein at paras. 234-244 and 248.
- [335] There will often be cause for hope that an offender will participate in treatment and derive benefit from it sufficient to reduce his or her risk to an acceptable level. There is cause for hope in Mr. Haley's case. The evidence, however, goes no further than that.

I. CONCLUSION AND SENTENCE

- [336] Mr. Haley, would you please stand.
- [337] I find you to be a dangerous offender and sentence you to detention in a penitentiary for an indeterminate period.
- [338] Pursuant to s. 109(1)(a) of the Code, I order that you be prohibited from possessing any firearms or the other items enumerated therein for life.
- [339] You have been convicted of a primary designated offence. I make an order pursuant to s. 487.051(1) authorizing the taking from you of bodily samples reasonably required for forensic DNA analysis.
- [340] Finally, pursuant to s. 760 of the Code, I order the following information be forwarded to the Correctional Service of Canada:
1. A copy of the report prepared by Dr. Piché and a transcript of the evidence given by her on this application;
 2. A copy of the report prepared by Dr. Hart and a transcript of the evidence given by him on this application;
 3. A copy of my reasons for judgment determining the facts of the predicate offences;

4. A copy of these reasons for sentence; and
5. A transcript of Mr. Haley's trial.

"FITCH J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/11/2016BCSC1144.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-haley-2016>

Prepared on 29 October 2026 · Esheria