

CANADA / JUDGMENT

R. v. Tallio

2021 BCCA 314

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 314 R. v. Tallio COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Tallio, 2021 BCCA 314 Date: 20210819 Docket: CA44096 Between: Regina Respondent And Phillip James Tallio Appellant Restriction on Publication: Publication bans have been imposed restricting the publication, broadcasting or transmission in any way of information concerning the names of any juror and any information that could identify a juror who sat on the appellant's trial; the partial or complete numbers identified as DNA profiles of any individual; the finger print section ("FPS") number assigned by Corrections Canada to the appellant; and information that could identify the individuals referred to in this judgment as Person X and Person Y. Corrected Judgment: The text of the judgment was corrected at paragraph 69 on August 20, 2021. Before: The Honourable Mr. Justice Frankel The Honourable Madam Justice Stromberg-Stein The Honourable Mr. Justice Hunter On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 1983 (R. v. Tallio, Prince Rupert Docket 74/83). Counsel for the Appellant: T.M. Arbogast, C.J. Nowlin, R.M. Barsky, K.A. Kirkpatrick Counsel for the Respondent: M.T. Ainslie, Q.C., J.A.M. Dickie, S. Gillespie Place and Date of Hearing: Vancouver, British Columbia January 20-23, October 13-16, 19-21, 23, 26-27, and November 23-27, 2020 Place and Date of Judgment: Vancouver, British Columbia August 19, 2021 Written Reasons of the Court: Summary: In 1983, an infant was sexually assaulted and murdered. The appellant was arrested and gave an inculpatory statement to a police officer. He was charged with first degree murder and remanded for a psychiatric evaluation. He was found fit to stand trial. While on remand, he made an inculpatory statement to a psychiatrist. Partway through a jury trial, the trial judge excluded the statement made to the police officer. The Crown then intended to tender the statement made to the psychiatrist by calling the psychiatrist as a fact witness. Being concerned that the jury would likely find the appellant guilty if that statement were admitted, defence counsel obtained verbal instructions to approach the Crown with an offer to plead guilty to second degree murder. The Crown accepted the offer. Defence counsel then obtained written instructions with respect to a guilty plea to second degree murder. The appellant entered that plea and, in early 1984, was sentenced to life imprisonment without eligibility for parole for 10 years. The appellant has maintained his innocence and never received parole. He now appeals his conviction, seeking to have the guilty plea set aside. He argues he received ineffective assistance from his counsel, he lacked the cognitive capacity to enter an informed guilty plea, DNA evidence exonerates him, the police investigation was inadequate and there were alternate

suspects. Held: Appeal dismissed. Both parties tendered fresh evidence. The rules governing the admissibility of the appellant's evidence are not attenuated because he is Indigenous. He must prove the facts that warrant setting his plea aside on a balance of probabilities. The appellant has not demonstrated his counsel was ineffective. His remand was lawful and there was no common law rule that barred the Crown from calling the psychiatrist as a fact witness. Defence counsel was, therefore, properly concerned about the statement to the psychiatrist and did not err by obtaining instructions to negotiate a guilty plea. The appellant has also not established that his guilty plea was uninformed. The Court accepts defence counsel's evidence that he took care to explain the plea to the appellant, that the appellant understood, and that the appellant gave both verbal and written instructions. The appellant is not credible and his evidence that he did not understand the plea is rejected. Fresh evidence tendered by the appellant does not support his contention that he lacked the capacity to understand the nature and consequences of a guilty plea in 1983. The DNA evidence does not exonerate the appellant. The adequacy of the investigation cannot be assessed because most of the police file has been lost due to the passage of time. However, what records remain cast doubt on the appellant's assertions that the police failed to conduct a proper investigation. The evidence the appellant relies on to implicate alternate suspects is speculative or circumstantial and does not come close to meeting the balance of probabilities threshold. Table of Contents Paragraph Range

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INTRODUCTION

- [1] In 1983, 22-month-old Delavina Lynn Mack was sexually assaulted and murdered in the home of her paternal grandparents, Sam and Gert Mack, on the Nuxalk First Nation reserve in Bella Coola, British Columbia. Phillip James Tallio, a 17-year-old member of the Nuxalk First Nation, was charged with first degree murder and initially pleaded not guilty. Partway through his trial, Mr. Tallio pleaded guilty to second degree murder. The change of plea was the result of a plea bargain. The trial judge sentenced Mr. Tallio to life imprisonment without eligibility for parole for 10 years. Mr. Tallio has maintained his innocence since that time.
- [2] On this appeal, Mr. Tallio seeks to have his guilty plea set aside and an acquittal entered. In the alternative, he seeks to have the plea set aside and a stay of proceedings entered. In broad terms, he contends that:
- (a) his trial counsel, Phillip C. Rankin, was ineffective in failing to appreciate that his potentially inculpatory statement to Dr. Robert Pos, a psychiatrist, which was the impetus for the plea negotiations, was inadmissible;
 - (b) his plea was uninformed because, as a result of a cognitive disability, he neither understood what the term "guilty plea" meant nor appreciated that by pleading guilty he was admitting to sexually assaulting and killing Delavina;
 - (c) recently conducted DNA testing exonerates him; and
 - (d) the police investigation was inadequate and it is likely that someone else sexually assaulted and murdered Delavina. With respect to the cognitive disability ground, it should be noted that Mr. Tallio now accepts that he orally instructed Mr. Rankin to initiate plea bargaining discussions and later gave Mr. Rankin detailed written instructions with respect to entering a guilty plea to second degree murder. Mr. Tallio further accepts that Mr. Rankin had no reason to believe he did not understand and appreciate the instructions that he gave. Prior to closing arguments, Mr. Tallio's position had been that he never gave those instructions.
- [3] In accordance with this Court's Criminal Practice Directive, Ineffective Assistance of Trial Counsel (12 November 2013), both Mr. Tallio and Mr. Rankin filed affidavits. In addition, the parties filed a large number of affidavits containing both fresh and new evidence. Mr. Tallio, Mr. Rankin, and ten other persons were examined before this Court. As discussed below, the Crown disputes the admissibility of some of the evidence on which Mr. Tallio relies.
- [4] For the reasons that follow, this appeal is dismissed.

BACKGROUND

- [5] Many of the events of April 22 and 23, 1983, as well as the subsequent proceedings leading to Mr. Tallio's conviction, are disputed, and many documents that would have clarified events no longer exist. What follows is a brief overview of the undisputed facts in relation to the issues raised in this appeal.
- [6] In April of 1983, Mr. Tallio was living with his uncle and aunt, Cyril and Nina Tallio. A party took place at Cyril and Nina Tallio's house on the evening of April 22, 1983, that went on well into the next day. Delavina's parents, Blair Mack and Marion ("Lotta") Bolton, were at the party. They had left Delavina with Sam and Gert Mack, Delavina's grandparents, who lived nearby. Blair Mack and Lotta Bolton ended up sleeping at Cyril and Nina Tallio's house after the party ended.
- [7] At some point in the early morning hours of April 23, 1983, Mr. Tallio left Cyril and Nina Tallio's house and walked to Sam and Gert Mack's house. The Macks were asleep when Mr. Tallio arrived. After entering the house and finding Delavina, Mr. Tallio ran back to Cyril and Nina Tallio's house. He woke Nina Tallio up and told her Delavina had been raped.
- [8] Mr. Tallio's explanation of these events raises credibility issues that we discuss in the section, "Assessment of Credibility".
- [9] Delavina was taken to the local hospital where she was pronounced dead. That day, Delavina's body was flown to Vancouver where Dr. Glenn P. Taylor performed an autopsy at BC Children's Hospital. Dr. Taylor identified the cause of death as acute asphyxiation, likely by smothering, and concluded Delavina had sustained injuries to her vagina consistent with a sexual assault. During the autopsy, Dr. Taylor removed tissue (i.e., histology) samples from Delavina's body. The significance of those samples is discussed in the section, "The DNA Evidence".
- [10] The police took Mr. Tallio in for questioning. During that questioning, Mr. Tallio made an incriminating statement to Corporal Garry Mydlak of the Royal Canadian Mounted Police (the "Mydlak statement"). On April 24, 1983, Mr. Tallio was charged with first degree murder.
- [11] After the murder charge was laid a justice of the peace in Bella Coola remanded Mr. Tallio in custody to appear in Vancouver. On April 25, 1983, Mr. Tallio appeared in the Provincial Court of British Columbia in Vancouver before Judge Diebolt, who remanded him in custody. The following day, Diebolt P.C.J. remanded Mr. Tallio to the Forensic Psychiatric Institute (the "FPI") for 30 days for observation. Mr. Tallio takes the position that the remand for observation was unlawful, but we have concluded otherwise in the section, "Was Mr. Tallio Lawfully Remanded for Observation?"
- [12] Mr. Tallio was interviewed by Dr. Emlene Murphy, a forensic psychiatrist, who formed the opinion that he was fit to stand trial. Dr. Murphy sought a second opinion from Dr. Pos, who concurred that Mr. Tallio was fit to stand trial. In his reporting letter to Dr. Murphy, Dr. Pos stated Mr. Tallio had made an incriminating statement to him concerning Delavina's death

(the "Pos statement"). Whether the Crown could call Dr. Pos as a witness to place that statement before the jury forms the basis of one of Mr. Tallio's grounds of appeal. We review that issue in the section, "Could the Crown Call Dr. Pos as a Fact Witness?" and conclude that in 1983 it was open to the Crown to call Dr. Pos.

- [13] After Mr. Tallio was arrested, the police continued their investigation into Delavina's death. Mr. Tallio's criticisms of that investigation form one of his grounds of appeal. On the record before us, we are not prepared to give effect to this ground for the reasons set out in the section, "Inadequate Investigation and Third Party Suspects".
- [14] Mr. Tallio retained Mr. Rankin as his counsel. The preliminary inquiry took place in July of 1983, and Mr. Tallio was committed to stand trial. The trial began in October of 1983, before a Supreme Court judge and jury. The Crown's case against Mr. Tallio was based primarily on the Mydlak statement together with the circumstances of Mr. Tallio's discovery of Delavina. However, following a voir dire, the trial judge ruled the Mydlak statement inadmissible.
- [15] After the Mydlak statement was excluded, Crown counsel advised Mr. Rankin she intended to call Dr. Pos as a witness. Mr. Rankin was concerned that the jury would convict Mr. Tallio of first degree murder if the Pos statement were admitted; that would result in Mr. Tallio being sentenced to life imprisonment with no parole eligibility for 25 years. As a result, Mr. Rankin, after discussing the matter with Mr. Tallio, approached Crown counsel with a plea bargain, namely that Mr. Tallio would plea guilty to second degree murder if the Crown agreed to a sentence of life imprisonment with no parole eligibility for 10 years. Because of uncertainties with respect to the admissibility of Dr. Pos's evidence, Crown counsel accepted the plea bargain. Whether Mr. Tallio instructed Mr. Rankin to enter into the plea negotiations that resulted in his guilty plea and, if he did, whether he was competent to give those instructions, forms one of Mr. Tallio's grounds of appeal. We conclude that Mr. Tallio did give those instructions and are not satisfied he lacked competence to do so, as we explain in the section, "Did Mr. Tallio Lack the Capacity to Enter a Guilty Plea?"
- [16] On November 1, 1983, Mr. Tallio pleaded guilty to second degree murder. On January 26, 1984, he was sentenced to life imprisonment with no parole eligibility for 10 years.
- [17] In a 1988 letter to his Institutional Parole Officer ("IPO"), Mr. Tallio explained the plea bargain in this way, in part: The deal was this. I agree to 2nd degree murder, and they would not use doctor pos' testimony. I felt that parole eligibility sounded better at ten years, rather than at twenty-five years.
- [18] Since being sentenced, Mr. Tallio has asserted his innocence and refused to participate in rehabilitation programs. As a result, he has never been granted parole.
- [19] In 2009, the UBC Innocence Project at the Allard School of Law took on Mr. Tallio's case. It asked the RCMP to locate any tissue samples from Delavina's autopsy that might still be in existence. The histology samples from the autopsy were located at Children's Hospital and subjected to DNA testing. Male DNA was located on some of those samples, but we have

concluded that the results of the DNA tests do not exonerate Mr. Tallio, for reasons set out in the section, "The DNA Evidence". MR. TALLIO'S POSITION AS TO HIS ACTIONS ON APRIL 23, 1983

- [20] Mr. Tallio denies sexually assaulting and murdering Delavina. Although there are inconsistencies in his descriptions of what occurred, the core of his version of events can be summarized as follows: · On the morning of April 23, 1983, he was at the home of Cyril and Nina Tallio, where there was a party. · Delavina's mother, Lotta Bolton, asked him to check on Delavina. · He walked to Sam and Gert Mack's house where he found Delavina in one of the bedrooms. She had been sexually assaulted and was not breathing. · He ran back to Cyril and Nina Tallio's house and tried unsuccessfully to wake up Delavina's father, Blair Mack. · He woke Nina Tallio up and told her Delavina was dead and had been raped. HISTORY OF THE PROCEEDINGS IN THIS COURT
- [21] On November 30, 2016, Mr. Tallio filed a notice of appeal together with an application for an extension of time to appeal. On March 10, 2017, he filed an amended notice of appeal.
- [22] On June 30, 2017, Justice Bennett granted Mr. Tallio's application for an extension of time: 2017 BCCA 259. She did so primarily to permit him to apply for an order for further DNA testing of the histology samples taken during Delavina's autopsy. The RCMP had already submitted some of those samples for DNA testing. After granting the extension, Bennett J.A. undertook case management of the appeal.
- [23] On March 12, 2018, a division of this Court ordered further DNA testing: 2018 BCCA 83.
- [24] On November 14, 2018, a division gave directions to assist the parties in moving the appeal forward: 2018 BCCA 425.
- [25] On September 6, 2019, a division ordered further DNA testing: 2019 BCCA 330.
- [26] Arrangements were made for the appeal to proceed in three phases: (i) the week of January 20, 2020, to deal with objections to the admissibility of evidence; (ii) three weeks beginning March 30, 2020, primarily for cross-examination of affiants, but with some limited direct examination being permitted; and (iii) the week of June 8, 2020, for final submissions.
- [27] During the week of January 20, 2020, the Crown raised various objections to Mr. Tallio's proposed fresh and new evidence. In some cases, the Crown objected to the whole of an affidavit while in others it objected to only certain portions. Some potential objections were deferred, as the affidavits in question had not yet been finalized.
- [28] The Court did not find it necessary to rule on any of the objections at that time. In part, this was because Mr. Tallio, after considering the Crown's objections and comments from the bench, agreed to either revise, correct, or withdraw certain affidavits. In addition, he agreed to limit the extent to which he would seek to rely on opinions expressed by some experts.

- [29] Due to the COVID-19 pandemic, it was necessary to reschedule the remaining phases of the appeal. The evidentiary phase proceeded in October of 2020, with several affiants appearing by videoconference.
- [30] The following affiants were examined: · Mr. Tallio; · Mr. Rankin; · Dr. Rick W. Staub, a DNA expert relied on by Mr. Tallio; · Dr. Greg Hampikian, a DNA expert relied on by Mr. Tallio; · Dr. Frederick R. Bieber, a DNA expert relied on by the Crown; · Superintendent David Hall, a member of the RCMP who became involved in the re-examination of Mr. Tallio's case in 2011; · Deidre D. Potheary, Crown counsel at the preliminary inquiry and trial; · Dr. Peggy R. Koopman, a psychologist retained by Mr. Rankin in 1983; · Dr. Julianne L. Conry, a psychologist who participated in a 2015 diagnostic assessment of Mr. Tallio; · James Bruce Hulan, a retired member of the RCMP who was involved in the 1983 investigation of Delavina's death; and · Maureen L. Tallio, who resided in Bella Coola in 1983.
- [31] In addition, both parties examined Dr. Murphy who did not provide an affidavit and appeared in response to a subpoena.
- [32] Final submissions took place during the week of November 23, 2020. They included arguments on the admissibility of some of the evidence on which Mr. Tallio seeks to rely.
- OVERVIEW OF THE RECORD CREATED BY THE PARTIES
- [33] This appeal involves a large volume of fresh and new evidence. Transcripts of the trial, which took place in Prince Rupert, do not exist and cannot now be obtained. There is no transcript of what occurred when the guilty plea was entered. The only transcripts that exist are: (a) an oral ruling dismissing Mr. Tallio's challenge to the jury array; (b) an oral voir dire ruling admitting one of three post-arrest statements made by Mr. Tallio; (c) the testimony of Dr. Anthony M. Marcus, a psychiatrist Mr. Tallio called at the sentencing hearing; and (d) the oral reasons for sentence. The trial exhibits have not been located and likely no longer exist.
- [34] The court clerk's notes from the trial and sentencing are available. In addition, the parties obtained the trial judge's bench book notes for the day on which the guilty plea was entered and the day on which Mr. Tallio was sentenced.
- [35] The 1983 police investigation file has not been found, but limited parts of it have been obtained from other sources. Mr. Rankin's file was destroyed in 1996 as part of his office's normal file retention practices.
- [36] The appeal book prepared by Mr. Tallio contains the information, indictment, preliminary inquiry transcript, court clerk's notes, the two trial rulings, and documents and correspondence from the Supreme Court file.
- [37] Mr. Tallio relies on 57 affidavits, four of which he swore. In his first two affidavits, Mr. Tallio deposed, among other things, that he did not: (a) sexually assault and kill Delavina; (b) confess to killing Delavina or sign any papers for police officers; (c) meet with Dr. Pos; or (d) give Mr. Rankin instructions with respect to a guilty plea. In Mr. Tallio's fourth affidavit, sworn in response to the affidavit in which Mr. Rankin deposed he obtained instructions to

enter the guilty plea, Mr. Tallio says he does not recall giving those instructions, but that it is possible he did so without understanding what he was doing.

[38] A number of the affidavits Mr. Tallio filed are for the sole purpose of placing before the Court documents and records obtained from or relating to: (a) the Provincial Court file; (b) the Crown's trial file; (c) Mr. Tallio's post-arrest remand to the FPI; and (d) the 1983 investigation. A plan of the layout of the streets in the area of Bella Coola where the murder occurred is attached as an exhibit to a number of the affidavits. An enlargement of that plan was marked as an exhibit at the hearing of the appeal, together with a more recent aerial photograph of the area in question.

[39] Aside from Mr. Tallio's own evidence, in general terms the evidence he seeks to have admitted falls into the following categories:

- (a) persons who lived in Bella Coola describing what they did, heard, or saw on the evening of April 22, 1983, and on April 23, 1983;
- (b) persons who lived in Bella Coola stating they were not interviewed by the police in 1983;
- (c) expert opinion with respect Mr. Tallio's cognitive abilities;
- (d) lay opinion with respect to Mr. Tallio's cognitive abilities;
- (e) persons describing two men who lived in Bella Coola in 1983 as sexual predators (i.e., Mr. Tallio's proffered alternate suspects);
- (f) expert opinion concerning DNA testing of the histology samples from Delavina's autopsy and the interpretation of the test results;
- (g) Ms. Potheary's involvement in the case from its inception through to sentencing; and
- (h) expert opinion regarding the cultural characteristics, dynamics, and practices of the Nuxalk Nation, particularly in the context of their involvement with non-Indigenous peoples.

[40] The Crown seeks to have 14 affidavits admitted. A number of these were prepared for the sole purpose of placing before the Court documents and records. In general terms, the Crown's evidence falls into the following categories:

- (a) Delavina's autopsy and the making, handling, and storage of the histology samples;
- (b) expert opinion concerning DNA testing of the histology samples and the interpretation of the test results;
- (c) expert opinion with respect to Mr. Tallio's cognitive abilities;
- (d) the police re-examination of Mr. Tallio's case at the request of the Innocence Project;
- (e) Correctional Service of Canada ("CSC") records relating to Mr. Tallio;

- (f) British Columbia Ministry of Children and Family Development records relating to Mr. Tallio, including juvenile court records and psychological and psychiatric assessments; and
 - (g) FPI records relating to Mr. Tallio. PROCEEDINGS IN COURT THE DAY THE GUILTY PLEA WAS ENTERED
- [41] The appeal book contains the court clerk's handwritten daily notes--on a form entitled "Trial Record - Minute Sheet: Record of Proceedings"--from October 17, 1983 (when Mr. Tallio pleaded not guilty to first degree murder) to January 26, 1984 (when he was sentenced for second degree murder).
- [42] With respect to November 1, 1983 (when Mr. Tallio pleaded guilty to second degree murder), the clerk's notes indicate that court convened at 10:00 a.m. in the absence of the jury, following which Mr. Rankin and Ms. Potheary addressed the trial judge. After a short adjournment, the court reconvened with the jury present. The notes then state [times omitted]: Defence address Court Indictment Read Accused Pleads guilty to the lesser & included offence of 2nd degree murder Crown presents facts Defence confirms facts Court address Jury Court adjourned Jury retires Court reconvened Jury finds prisoner not guilty of first degree murder but guilty of the lesser & included offence of second degree murder Court addressed jury Jury retires Court re-convened Jury returns Foreman - Jury makes no recommendations Court address Jury - Counsel Jury excused Court adjourned Defence address Court The notes go on to indicate that court reconvened later that morning, at which time the trial judge adjourned the case to November 8, 1983, to fix a date for sentencing in Vancouver.
- [43] The trial judge's handwritten bench book notes for November 1, 1983, read as follows: Rankin Advises of client wish to enter a plea of not guilty Sec 670 - 671 Review the procedure Jury called in Rankin Advises on plea change Asked if he has explained the consequences to his client Indictment is read to accused Plea: to included offence of 2nd degree murder confirmed by Mr. Tallio Facts: approved by defence counsel read to the jury by Crown counsel Rankin formally admits those facts on behalf of the accused Direction to the Jury Verdict: Not guilty as charged but guilty of 2nd degree murder Jury Recommendation: none Fix Sentence Vancouver - Tuesday 9:30 am Nov 8/83
- [44] The judge's note "Sec 670 - 671" is a reference to the provisions of the Criminal Code in 1983 dealing with the fact that the minimum punishment for second degree murder was, as it is today, life imprisonment with no eligibility for parole for a minimum of 10 years. However, a jury could recommend that the judge substitute a parole ineligibility period that is more than 10 years but less than 25 years. In Mr. Tallio's case, the jury did not make a recommendation. Those provisions are now ss. 745.2 and 745.4 of the Criminal Code, R.S.C. 1985, c. C-46.

- [45] It should be noted that in 1983, when an accused who had pleaded not guilty to a charge and been placed "in charge" of the jury wished to plead guilty to a lesser and included offence with the Crown's consent, judge-made law required the trial judge to instruct the jury to return a verdict of not guilty as charged but guilty of the lesser and included offence. As a result of *R. v. Rowbotham*; *R. v. Roblin*, [1994] 2 S.C.R. 463 at 476, that is no longer the practice. Today, the trial judge discharges the jury and renders the verdict.

ANALYSIS

- [46] We will first address the large volume of fresh and new evidence sought to be introduced on this appeal. Then, we will address Mr. Tallio's grounds of appeal in order. Those grounds, by way of reminder, relate to: · ineffective assistance of counsel; · the validity of Mr. Tallio's guilty plea; · the results of the DNA testing; and · the adequacy of the police investigation in 1983, including the possibility of alternate suspects. Evidentiary Considerations Should the Rules of Evidence Be "Attenuated" on this Appeal?
- [47] Mr. Tallio's appeal rests on a considerable volume of fresh and new evidence that he seeks to have admitted pursuant to s. 683(1) of the Criminal Code. "Fresh evidence is evidence that existed at the time of trial but, for various reasons, could not be put before the court. New evidence is evidence that only became available subsequent to the trial": *R. v. Wu*, 2020 BCCA 128 at para. 40, 387 C.C.C. (3d) 269, leave to appeal ref'd [2020] S.C.C.A. No. 284. However, the expression "fresh evidence" is often used to describe both.
- [48] There is a well-developed body of law with respect to both the admissibility of hearsay and the admissibility of evidence on appeal. Mr. Tallio's position is that those rules should be "attenuated" in this case, in part because of the time that has passed since he pleaded guilty. For example, he says that because many of the affidavits upon which he relies were obtained by the Innocence Project before he filed his notice of appeal, this Court should exercise "forbearance" and not subject them to the usual level of scrutiny. He also says we should be more inclined to admit hearsay evidence that would otherwise be inadmissible. Based on his being a member of the Nuxalk First Nation, Mr. Tallio relies on the statement by Chief Justice Lamer in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 105, that "the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims."
- [49] In support of his position that the rules of evidence should be attenuated, Mr. Tallio says "there is an important cultural component and context in assessing the issues and evidence in this case", namely, that "[t]he Nuxalk Nation is a remote Indigenous band that had (and it appears, still has) significant communication and trust issues with the non-Indigenous community." In advancing that submission, Mr. Tallio asks us to admit the affidavit of Dr. Bruce Granville Miller, a professor of anthropology at the University of British Columbia. Mr. Tallio presents Dr. Miller as an expert in the ethnography and ethnohistory of the Coast Salish peoples of Washington State and British Columbia, which includes the Nuxalk Nation.

- [50] The theme of Dr. Miller's opinion is that "[t]he idea of privacy and secrecy is deeply woven into the fabric of Coast Salish historic and contemporary culture" and they "have commonly chosen to reveal as little as possible about themselves, including information concerning crimes committed on reserves, to external authorities." While, as Dr. Miller goes on to explain, there are a number of reasons why members of the Nuxalk Nation with information about a crime in their community may not come forward to the police, his opinion is not relevant to the issues we have to decide. This is because, as we will now discuss, the fact that we are dealing with a crime committed in an Indigenous community has no bearing on how evidentiary issues are to be resolved. Accordingly, Dr. Miller's affidavit is not admitted.
- [51] That Mr. Tallio may face difficulties in marshalling evidence in relation to events that occurred nearly four decades ago does not relieve him of the requirement to satisfy the usual rules that govern the admissibility of evidence. Those rules are the same regardless of how long it has taken to bring a matter before an appellate court. Apposite is *Truscott (Re)*, 2007 ONCA 575, 225 C.C.C. (3d) 321, a case in which the validity of a historical conviction was revisited in light of fresh evidence.
- [52] *Truscott* involved a reference to the Court of Appeal for Ontario by the Minister of Justice under s. 696.3(3)(a)(ii) of the Criminal Code. A jury had convicted Mr. Truscott of murder in 1959. In 2004, in light of new information brought to his attention, the Minister directed the Court of Appeal to consider whether a miscarriage of justice had occurred. By virtue of s. 696.3(3)(a)(ii), the Court was required to hear and determine the reference "as if it were an appeal by the convicted person". The hearing took place in 2007. It should be noted that Mr. Truscott's conviction had been upheld on an earlier reference to the Supreme Court of Canada: *Re: Truscott*, [1967] S.C.R. 309.
- [53] Notwithstanding the fact that the case involved events that had occurred nearly 50 years before, the Court of Appeal held that the admissibility of the evidence Mr. Truscott (as the appellant) sought to tender was to be determined on the basis of the usual rules of evidence. In that regard, it stated:
- [70] An appeal is not a wide-ranging investigatory process like a public inquiry or Mr. Kaufman's review [in 2002 of the conviction] on behalf of the Minister. Nor is an appeal a retrial of the allegations against the appellant, much less the kind of open-ended factual inquiry into past events that might be conducted by an historian or journalist. Rather, an appeal is an adversarial judicial process carried out in accordance with the statutory provisions of Part XXI of the Criminal Code. Those provisions define the appeal court's procedural, substantive and remedial powers.
- [72] The unique features of this Reference do not, however, alter the basic appellate nature of the inquiry directed by s. 693.3(3)(a)(ii) of the Criminal Code. For example, under Part XXI, the rules of evidence applicable to criminal trials apply in determining the admissibility of material proffered as fresh evidence on appeal. The evidentiary difficulties encountered by the appellant because of the many years that have passed since the homicide do not permit

this court to deviate from that evidentiary requirement so as to assist the appellant in making his claim that he has suffered a miscarriage of justice. [Emphasis added.] Mr. Tallio is in no different a position than Mr. Truscott.

- [54] The fact that Mr. Tallio is Indigenous has no bearing on the rules that govern the admissibility of the evidence he seeks to tender in a criminal appeal. *Delgamuukw* involved an Aboriginal land title claim. As reflected in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 68, an Aboriginal fishing rights case cited in *Delgamuukw* at para. 105, the "evidentiary difficulties" the Supreme Court of Canada was concerned about arose from the fact that those claiming an Aboriginal right have to establish that the right existed prior to contact with or sovereign occupation by Europeans: *Delgamuukw* at para. 84; *Van der Peet* at para. 60. However, because written records of pre-contact practices, customs, and traditions do not exist, the Court adapted the laws of evidence to provide for the admission of oral histories in such cases: *Delgamuukw* at para. 87; *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 at para. 68, [2005] 2 S.C.R. 220. There is nothing to indicate the Court intended for the admissibility of evidence sought to be tendered by an Indigenous litigant in other legal contexts to be subject to rules different from those applicable to non-Indigenous litigants.
- [55] Accordingly, the admissibility of the evidence Mr. Tallio seeks to tender falls to be determined as it would in any conviction appeal. *Setting Aside a Guilty Plea*
- [56] As Justice Wagner (as he then was), in dissent but not on this point, observed in *R. v. Wong*, 2018 SCC 25 at para. 61, [2018] 1 S.C.R. 696, "[g]uilty pleas are of central importance to the Canadian criminal justice system" and are "one aspect of the plea bargaining process". By pleading guilty, an accused admits all the essential elements of the offence and waives their right to require the Crown to prove those elements. To be valid, a guilty plea must be "voluntary, unequivocal and informed"; "[a] plea will be informed if the accused is aware of the nature of the allegations made against him or her, as well as of the effect and consequences of the plea": *Wong* at para. 63.
- [57] An application to set aside a guilty plea engages an appellate court's authority under s. 686(1)(a)(iii) of the Criminal Code to allow a conviction appeal "on any ground [where] there was a miscarriage of justice". There is no exhaustive list of what constitutes a miscarriage of justice. Rather, the court will accede to an application when there are "valid grounds" to do so: *Adgey v. The Queen*, [1975] 2 S.C.R. 426 at 431. "The inquiry is case-specific and sufficiently flexible to take account of the almost infinite range of circumstances that might be said to have contributed to a miscarriage of justice": *R. v. Alec*, 2016 BCCA 282 at para. 76, 337 C.C.C. (3d) 345.
- [58] A miscarriage of justice can occur even when the requirements for a valid guilty plea were satisfied at the time the plea was entered. That was the case in *R. v. Hanemaayer*, 2008 ONCA 580, 234 C.C.C. (3d) 3. Mr. Hanemaayer was charged with breaking and entering and assault with a weapon. It was alleged he broke into a residence and threatened a 15-year-old girl with a knife. On the second day of the trial, after the girl and her mother had testified, Mr.

Hanemaayer changed his pleas to guilty. On the basis of a joint submission he was sentenced to imprisonment for two years less one day. One of the reasons why Mr. Hanemaayer pleaded guilty was because his counsel told him he would almost certainly be convicted and sentenced to six years or more. Years later, evidence came to light that established another person had committed the crimes. As a result, the Crown consented to Mr. Hanemaayer being granted an extension of time to appeal his conviction and to the pleas being set aside and acquittals entered. In allowing the appeal, Justice Rosenberg stated (at para. 20): The fresh evidence proves beyond doubt that the appellant did not commit the offences to which he pleaded guilty. One miscarriage of justice would be compounded by another if this court had no power to intervene.

- [59] Then there are what can be described as the "Dr. Smith cases". In the early 1990s, Dr. Charles Smith was a pediatric forensic pathologist with an outstanding reputation; he was considered the leading expert in Ontario. Dr. Smith was regularly called as a Crown witness in cases involving infant victims to give opinion evidence on cause of death, generally the "Shaken Baby Syndrome". Faced with Dr. Smith's evidence, several accused pleaded guilty, sometimes to lesser and included offences on the basis of a joint sentencing submission. It was later determined that Dr. Smith's opinions were flawed and could not be relied upon. His practices led to what is known as the Goudge Inquiry: Report of the Inquiry into Pediatric Forensic Pathology in Ontario (Toronto: Ministry of the Attorney General, 2008) (The Honourable Stephen T. Goudge). Given the existence of fresh evidence refuting Dr. Smith's opinions, the Crown agreed to a number of valid guilty pleas being set aside and, in some cases, to acquittals being entered: see e.g., *R. v. C.M.*, 2010 ONCA 690; *R. v. Kumar*, 2011 ONCA 120, 268 C.C.C. (3d) 369; *R. v. Brant*, 2011 ONCA 362; *R. v. Shepherd*, 2016 ONCA 188.
- [60] *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307 at paras. 85-90, 108-13, is another example of a miscarriage of justice. In that case, an otherwise valid guilty plea was set aside because the Crown had failed to meet its pre-trial disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and a reasonable person armed with that information would not have pleaded guilty. The Burden on Mr. Tallio
- [61] What an appellant must establish to set aside a guilty plea was discussed by Wagner J. in Wong:
- [65] The onus is on a person who appeals a conviction on the ground of an invalid plea to show that the plea was in fact invalid: [*R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (C.A.)], at p. 519. The integrity of the plea bargaining process and the certainty and order which are essential to the criminal process depend on the finality of guilty pleas. The benefits associated with guilty pleas will be lost and the very functioning of the criminal justice system will be threatened if such pleas are set aside lightly. Accordingly, there is a considerable public interest in preserving the finality of guilty pleas, and the burden of showing that a guilty plea was invalid falls to the accused. [Emphasis added.] In that case, Mr. Wong's guilty plea was found to have been uninformed because he established on a balance of probabilities

that he was not aware of legally relevant collateral immigration consequences, i.e., that his conviction and sentence could result in the loss of his permanent residence status and removal from Canada. However, the majority of the Supreme Court of Canada declined to set the plea aside because Mr. Wong failed to establish a reasonable possibility that he would have acted differently had he known of the collateral consequences.

- [62] With respect to the ineffective assistance of counsel ground--i.e., that Mr. Rankin failed to appreciate Mr. Tallio's potentially inculpatory statement to Dr. Pos was inadmissible--Mr. Tallio accepts he must establish that, as a matter of law, the Crown would not have been able to tender that statement as part of its main case in 1983.
- [63] With respect to his other grounds, Mr. Tallio submits the standard he must meet is one of "reasonable possibility". On his uninformed guilty plea ground, Mr. Tallio submits we should set his plea aside if we find there is a reasonable possibility he did not understand or appreciate that he was admitting to having killed Delavina. With respect to his DNA and inadequate investigation grounds, he submits we should set aside his plea if we find that the evidence he relies on could have affected the outcome of a trial had there been one, i.e., that it could have raised a reasonable doubt as to his guilt. For example, with respect to the DNA ground, he says we are not triers of fact and that we only need to decide whether the evidence on which he relies is reasonably capable of belief. As we will explain, we do not agree.
- [64] Mr. Tallio seeks to support his position with cases in which fresh evidence has resulted in successful appeals from convictions entered following a trial. One of these is *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401, leave to appeal ref'd [2017] 1 S.C.R. xvi, which involved a jury conviction for murder. In ordering a new trial, the Court of Appeal granted Mr. Manasseri's application to introduce expert evidence about a cause of death different from that described by the Crown's experts who testified at the trial. The evidence was admitted because it met the criteria for admission set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, one of which is that it "must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result." In other words, if the jury in *Manasseri* had heard the fresh evidence, then it might not have been satisfied that the Crown had proven Mr. Manasseri's guilt beyond a reasonable doubt.
- [65] *R. v. T.S.*, 2012 ONCA 289, 284 C.C.C. (3d) 394, is another case Mr. Tallio cites as support for the reasonable possibility standard. In that case, that standard was applied in assessing whether information the Crown had failed to disclose in accordance with *Stinchcombe* could have created a reasonable doubt in the mind of the trier of fact: at para. 126. However, as set out in *R. v. Dixon*, [1998] 1 S.C.R. 244 at paras. 32-33, to trigger that assessment, T.S. had to establish two things on a balance of probabilities: (i) that the undisclosed information should have been disclosed; and (ii) that his right to make full answer and defence was impaired as a result of the failure to disclose. The reasonable possibility standard applied in determining whether the second burden had been met; i.e., whether "there is a reasonable

possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process": Dixon at para. 34.

- [66] Mr. Tallio also relies on the aspect of Truscott dealing with fresh evidence tendered on the issue of the time of the victim's death, particularly in connection with his ground of appeal based on DNA. Context is important. Time of death was a critical issue at Mr. Truscott's 1959 trial. The Court of Appeal described it as the first of the four "pillars" of the Crown's case: at para. 304. At the trial, the Crown called a pathologist who opined, based on an analysis of the victim's stomach contents, that death occurred between 7:00 p.m. and 7:45 p.m. The Crown relied on this evidence in combination with evidence concerning the movements of Mr. Truscott and the victim to support its position that he had the exclusive opportunity to commit the crime. However, at the 2007 reference, Mr. Truscott tendered evidence based on recent scientific research that satisfied the Court of Appeal that the evidence given at trial by the Crown's pathologist "must be rejected as scientifically unsupportable": at para. 211.
- [67] In a passage from Truscott cited by Mr. Tallio, the Court of Appeal said this:
- [215] In conclusion, the expert evidence pertaining to the time of Lynne Harper's death meets the criteria for the admissibility of fresh evidence. The fresh expert evidence of Drs. Pollanen, Knight and Diamant demonstrates that there is no scientific justification for Dr. Penistan's opinion that Lynne Harper must have died between 7 and 7:45 p.m. on June 9. This evidence also undermines the Supreme Court's conclusion that Dr. Penistan's opinion was sound. We are satisfied that the fresh expert evidence, considered cumulatively and in the context of the other expert evidence heard at trial and on the first Reference, could reasonably be expected to have affected the result of the prior proceedings. [Emphasis added.]
- [68] What is important, and what distinguishes Truscott from the case at bar, is that the "result" being considered in Truscott was a jury verdict. Further, that consideration arose only after Mr. Truscott had established that the forensic evidence placed before the jury by the Crown to support one of the "pillars" of its case was not just questionable, but was "scientifically unsupportable". We note, as well, that in the Dr. Smith cases, it was common ground that Dr. Smith's opinions were erroneous and could not be relied on.
- [69] Because Mr. Tallio pleaded guilty, this appeal is not analogous to cases in which fresh DNA evidence has resulted in a trial verdict being set aside. For example, in *R. v. Rose* (1998), 108 B.C.A.C. 221, a jury convicted Mr. Rose on two counts of murder. One of the victims had blood underneath her fingernails from which the jury could have concluded that she scratched Mr. Rose's face before he killed her; he had scratches around his cheeks and below one eye. However, subsequent DNA testing excluded Mr. Rose as the source of the blood and determined that it likely was the victim's. In addition, post-trial, the police learned that years before another person who had since died had confessed to his wife that he had committed the murders. On appeal, the Crown conceded there were sufficient indicia of reliability to meet the threshold question with respect to the admissibility of that

statement. This Court admitted the DNA evidence and the statement, set aside the convictions, and ordered a new trial.

- [70] *R. v. Vanezis* (2002), 156 O.A.C. 143, is another example. A jury convicted Mr. Vanezis of murder. The Crown's case was circumstantial and identity was the central issue at the trial. DNA testing was unable to identify the source of blood stains found on the female victim's clothing. Mr. Vanezis, who testified in his own defence, advanced the victim's boyfriend as an alternate suspect. Following the trial, the blood stains were tested using more advanced technology that revealed a mixed DNA profile. The dominant profile matched the victim and the subordinate profile came from at least one male. Mr. Vanezis was excluded as a potential source of the male profile and the Crown conceded that the victim's boyfriend was the likely source of that profile. The Court of Appeal admitted the DNA results and ordered a new trial on the basis that those results could reasonably have affected the jury's verdict.
- [71] Different considerations apply when an appellant has, by entering a guilty plea, admitted all the essential elements of the offence and waived their right to require the Crown to prove those elements. In our view, for Mr. Tallio to succeed on any of his other grounds, he must prove the factual foundation on which those grounds rest on a balance of probabilities. This is because his plea is presumed valid and he bears the burden of rebutting that presumption by showing that allowing it to stand would perpetuate a miscarriage of justice.
- [72] We begin with Mr. Tallio's uninformed guilty plea ground. The test for determining whether an appellant had the mental capacity to enter a valid guilty plea is the same as that used to determine fitness to stand trial; it is referred to as the "limited cognitive capacity" test. "That standard requires only that the court be satisfied an accused understands the process, can communicate with counsel and can make an active or conscious choice. Whether the accused's choice is wise, rational or in the accused's best interest forms no part of the limited cognitive capacity standard": *R. v. M.A.W.*, 2008 ONCA 555 at para. 25, 237 C.C.C. (3d) 560. See also: *R. v. Yukich*, 2017 BCCA 77 at paras. 29-30.
- [73] It is well established that an appellant who seeks to set aside a guilty plea on the basis that they did not have the cognitive capacity necessary to enter it must establish that fact on a balance of probabilities: *M.A.W.* at paras. 23, 36, 61; *Yukich* at para. 35; *R. v. Singh*, 2014 BCCA 373 at paras. 33, 37, 316 C.C.C. (3d) 490. See also: *R. v. Williams*, 2012 BCCA 314 at paras. 47, 56, 324 B.C.A.C. 166 (an appellant who seeks to set aside a guilty plea on the basis they acted solely out of frustration, without intending to admit responsibility for their actions, must prove that fact on a balance of probabilities).
- [74] Should Mr. Tallio fail to establish that he lacked the capacity to enter a guilty plea that was voluntary, unequivocal, and informed, then the question becomes whether there is a basis on which we can conclude that allowing his valid plea to stand would give rise to a miscarriage of justice. We are not persuaded that a "reasonable possibility" is the appropriate standard of proof. As a matter of logic and consistency, the balance of probabilities standard should apply. It would be illogical to place a lower burden on an

appellant who seeks to set aside a valid guilty plea than on an appellant who challenges the validity of the plea itself.

- [75] Although Mr. Tallio no longer asserts his plea should be set aside on the basis that he did not give Mr. Rankin instructions to negotiate a plea to second degree murder, had Mr. Tallio pursued that ground, he would have had to prove that he did not give those instructions on a balance of probabilities, in the same way that an appellant convicted following a trial has to prove their trial counsel failed to follow instructions: *R. v. Ballantyne*, 2012 BCCA 372 at para. 90, 328 B.C.A.C. 68, leave to appeal ref'd [2013] 2 S.C.R. vi. See also: *R. v. Cherrington*, 2018 ONCA 653 at para. 45 (an appellant who alleges their trial counsel pressured them into pleading guilty must establish that fact); *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69 at 80-81 (Que. C.A.) (an appellant who alleges their trial counsel was in a conflict of interest must establish an actual conflict of interest arising out of joint representation).
- [76] *R. v. Phillion*, 2009 ONCA 202, 241 C.C.C. (3d) 193, is also pertinent. Like *Truscott*, it was a reference by the Minister of Justice; this is the same matter discussed below in dealing with statements to psychiatrists. A jury had convicted Mr. Phillion of murder in 1972. On the reference, he asserted the prosecution was a miscarriage of justice because the Crown had proceeded against him in the face of an alibi the police had verified. The Crown agreed that if this were so, then the conviction should be set aside and an acquittal entered: at para. 70. The Court of Appeal held that the burden was on Mr. Phillion to prove on a balance of probabilities not only that the alibi existed but also that it had not been discredited: at paras. 71, 76. As Mr. Phillion could not meet this burden, this ground failed. Two judges could not determine "one way or the other" whether the alibi had been discredited: at para. 104. A third judge was satisfied the alibi had been discredited: at para. 263.
- [77] In conclusion, and putting to one side the admissibility of the Pos statement, we are of the view that to succeed on having his guilty plea set aside on the ground of a miscarriage of justice, Mr. Tallio must prove at least one of the following on a balance of probabilities:
- (a) he did not have the cognitive capacity to enter a valid plea;
 - (b) the DNA evidence excludes him as the perpetrator of the sexual assault on Delavina; or
 - (c) someone else sexually assaulted and murdered Delavina. Admitting Evidence on Appeal
- [78] The authority of an appellate court to admit evidence is set out in s. 683(1) of the Criminal Code, which reads, in part: For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interest of justice, ...
- (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness; In *Truscott*, the Court of Appeal for Ontario stated:
- [81] The "interests of justice" control the admission of all evidence offered on appeal. That phrase signals a broad discretion to admit evidence following a context-sensitive inquiry into the totality of the circumstances.

- [79] As mentioned above in discussing the factual burden Mr. Tallio must meet, the criteria for the admission of fresh evidence on an appeal brought from a trial verdict are set out in the Supreme Court of Canada's judgment in *Palmer*, wherein Justice McIntyre stated (at 775):
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [[1964] S.C.R. 484].
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. In *Truscott*, the Court said these criteria encompass three components (at para. 92):
 - Is the evidence admissible under the operative rules of evidence?
 - Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
 - What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?
- [80] The second component has a believability requirement. Under *Palmer*, an appellate court does not have to believe the fresh evidence; it need only decide that it is capable of belief. The evidence will be admitted on appeal if it is believable and could have affected the result at trial. "Whether it is actually believed is up to the trier of fact": *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 52.
- [81] In the majority of post-trial conviction appeals in which fresh evidence is admitted, it is admitted because the evidence is capable of raising a reasonable doubt with respect to the appellant's guilt. This is why new trials were ordered in cases such as *Manasseri*, *T.S.*, *Rose*, and *Vanezis*. However, if ordering a new trial would constitute an abuse of process, then a stay of proceedings will be entered: *R. v. Dhillon*, 2014 BCCA 480 at paras. 52-54, 16 C.R. (7th) 8. Last, in those cases in which the fresh evidence exonerates the appellant, or the court concludes that no reasonable jury could convict, an acquittal will be entered: *R. v. Morin* (1995), 37 C.R. (4th) 395 (Ont. C.A.); *Dhillon* at paras. 28-31.
- [82] However, the *Palmer* criteria do not strictly apply when fresh evidence is not directed at an issue determined at trial but at issues raised for the first time on appeal. For example, in *Barbeau*, Ms. Comtois Barbeau and her husband were convicted following a trial at which they were represented by the same counsel. On appeal, one of her grounds was that trial counsel was in a position of conflict of interest and, as a result, was unable to represent her effectively. In support of this ground, she tendered fresh evidence. The Crown objected to that evidence on the basis that it did not meet the *Palmer* criteria. In dismissing that objection, Justice Rothman stated (at 78): But, with respect, the criteria required in *Palmer* for the admission of new evidence on appeal relate to new evidence that is tendered to

establish a factual or legal determination made at trial. These criteria do not apply where the purpose of the new evidence is to challenge the very validity of the trial process. The new evidence that appellant seeks to have admitted in this appeal is not evidence that relates to an issue decided at trial. It is new evidence required to establish a ground of appeal which puts in question the trial process itself. [Emphasis added.] Justice Rothman then quoted from *R. v. W. (W.)* (1995), 100 C.C.C. (3d) 225 (Ont. C.A.), another case in which fresh evidence was admitted for the purpose of determining whether trial counsel had a conflict of interest. In that case, Justice Doherty stated (at 232): The Palmer criteria do not, however, apply to all situations where fresh evidence is offered on appeal. Those criteria reflect the balancing of competing considerations relevant to the interests of justice when fresh evidence is offered to attack a determination made at trial. The same criteria cannot necessarily be applied where, as here, the fresh evidence is offered for a different purpose. The material sought to be admitted here is not directed at a finding made at trial, but instead challenges the very validity of the trial process. The nature of this material and the purpose for which it is offered places it outside the Palmer paradigm: [citations omitted]. [Emphasis added.]

- [83] In *Taillefer; Duguay*, the Supreme Court of Canada, in holding that the Palmer criteria do not apply to the admission of fresh evidence in the context of an allegation that the Crown breached its disclosure obligations, endorsed *Barbeau and W. (W.)* as correctly stating the law: at paras. 75-77. See also: *R. v. Budai*, 2001 BCCA 349 at para. 88, 154 C.C.C. (3d) 289, (sub nom. *Gill v. The Queen*) leave to appeal ref'd [2002] 1 S.C.R. vii ("The Palmer principles require modification where the issue on appeal does not involve a determination of an issue of fact relevant to the outcome of the trial.").
- [84] Mr. Tallio bears the burden of proving the factual foundation necessary for him to succeed on his grounds based on evidence that is admissible under the criminal rules of evidence. Our task is to determine whether he has done so. Because we are the trier of fact, the Palmer "reasonably capable of belief" criterion is not pertinent. Matters such as credibility and reliability are within our purview.
- [85] When ineffective assistance of counsel is raised as a ground of appeal, it is well established that the Palmer criteria do not strictly apply: *R. v. Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667 at paras. 33-37, 191 B.C.A.C. 223, leave to appeal ref'd [2004] 3 S.C.R. vii; *R. v. S.G.T.*, 2011 SKCA 4 at paras. 36-40, 265 C.C.C. (3d) 550. In the case at bar, the ineffective assistance claim relates solely to the advice Mr. Rankin gave with respect to entering into a plea bargain; this advice was based on his understanding of the law concerning the admissibility of statements made to a psychiatrist by an accused remanded for psychiatric assessment. The parties agree that the evidence that bears on this ground--the affidavits of Mr. Rankin and Ms. Potheary and their respective cross-examinations--is admissible. Indeed, there is no dispute as to the facts. As discussed later in these reasons, Mr. Tallio's submission on this ground raises questions of law.

- [86] Neither party objects to the admissibility of the evidence tendered by the other on the issue of whether DNA testing exonerates Mr. Tallio. As it is in the interest of justice to determine that issue, we admit all of that evidence for that purpose.
- [87] Mr. Tallio also does not object to the admissibility of the affidavit evidence tendered by the Crown. The Crown, on the other hand, objects to the admissibility of some of the affidavit evidence Mr. Tallio relies on in seeking to establish his lack of cognitive ability, the inadequacy of the investigation, and that someone else sexually assaulted and murdered Delavina. Those objections include: (a) lack of relevancy; (b) hearsay; (c) deceased affiant; and (d) non-expert opinion. For completeness, we note that the Crown's objections do not include lack of due diligence.
- [88] We will address some, but not all, of those objections later in these reasons. So that the record is clear, in an appendix to these reasons we have listed the affidavits we find to be admissible and those we have excluded. It is axiomatic that we have considered only the admissible affidavits in addressing Mr. Tallio's grounds of appeal. Ineffective Assistance of Counsel
- [89] As discussed in more detail later in these reasons, Mr. Rankin raised the subject of a guilty plea to second degree murder with Mr. Tallio because Mr. Rankin was of the opinion that if the Crown was able to call Dr. Pos to testify before the jury with respect to statements made by Mr. Tallio, then it was likely Mr. Tallio would be convicted of first degree murder. Mr. Rankin's view was that Dr. Pos's evidence could be challenged only on the basis that Mr. Tallio's statements were involuntary.
- [90] Mr. Rankin's decision to discuss a guilty plea with Mr. Tallio was prompted by the trial judge's voir dire ruling: *R. v. Tallio*, [1983] B.C.J. No. 258 (S.C.). That ruling dealt with the voluntariness of three statements Mr. Tallio made on April 23, 1983, following his arrest. The first statement was made to Constable Allan O'Halloran at 9:30 a.m.; the second was made to Constable O'Halloran at 7:00 p.m.; and the third was made to Corporal Mydlak at 8:30 p.m. Only the statement to Corporal Mydlak amounted to a confession; it was in writing and signed by Mr. Tallio. The trial judge ruled the first statement to Constable O'Halloran admissible and excluded the others.
- [91] Dr. Pos met with Mr. Tallio at the FPI after a Provincial Court judge had remanded Mr. Tallio there for observation. Dr. Pos's reporting letter with respect to that meeting contains statements made by Mr. Tallio that could be interpreted as an admission by Mr. Tallio that he sexually assaulted Delavina and then smothered her with a pillow.
- [92] Prior to the closing-argument phase of this appeal, Mr. Tallio advanced four arguments in relation to Dr. Pos's letter:

- (i) Dr. Pos concocted the letter as he had never met with Mr. Tallio; (ii) if Dr. Pos did assess Mr. Tallio, then he did so in an unprofessional and unethical manner; (iii) anything Mr. Tallio said to Dr. Pos was inadmissible at trial because the Provincial Court judge who remanded Mr. Tallio for observation had no jurisdiction to do so; and (iv) at trial, the Crown could not call Dr. Pos as a "fact witness" to adduce anything Mr. Tallio said to him.
- [93] In his first affidavit, Mr. Tallio deposed that "I have never been assessed by a 'Dr. Robert Pos.'" In Mr. Tallio's fourth affidavit, sworn in response to an affidavit in which Mr. Rankin explains how Dr. Pos's letter was the impetus for his obtaining instructions to initiate plea negotiations, Mr. Tallio deposed that "I told Mr. Rankin that I did not meet Dr. Pos" and denied giving Mr. Rankin those instructions. In addition, to support an attack on Dr. Pos's veracity, professionalism, and ethics, Mr. Tallio filed affidavits from several psychiatrists and two lawyers.
- [94] During the first phase of the appeal, Mr. Tallio withdrew the affidavit of one of the lawyers. During the closing-argument phase he withdrew the other affidavits--or in some cases, portions of them--that took issue with Dr. Pos's veracity, professionalism, and ethics. Mr. Tallio also abandoned reliance on his own denials of having ever met with Dr. Pos.
- [95] Mr. Tallio now accepts that Mr. Rankin was entitled to assume Mr. Tallio had made the statements attributed to him in Dr. Pos's letter. Accordingly, only the third and fourth arguments listed above need to be considered. Was Mr. Tallio Lawfully Remanded for Observation?
- [96] Mr. Tallio submits the order remanding him to the FPI for observation was made without jurisdiction because the provision under which that order was made--Criminal Code, R.S.C. 1970, c. C-34, s. 465(1)(c)(ii) as it appeared on April 26, 1983--did not apply in the circumstances. Because of this, he says any evidence derived from that order was inadmissible. However, Mr. Tallio does not explain the basis on which those statements would have been excluded.
- [97] We will begin by setting out how Mr. Tallio came to be at the FPI and then review the relevant provisions of the Criminal Code as they stood in 1983. Following that, we will explain why we do not accept Mr. Tallio's argument. As the evolution of a statute can sometimes shed light on its interpretation, we will refer to the evolution of s. 465: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 60, [2017] 2 S.C.R. 795; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 33, [2001] 2 S.C.R. 867. How Mr. Tallio Came To Be at the FPI
- [98] Mr. Tallio was arrested on April 23, 1983. The following morning, on April 24, an information was laid charging him with first degree murder. As required by s. 454(1) of the Criminal Code, the police took Mr. Tallio before a justice of the peace who remanded Mr. Tallio in custody, to appear before a Provincial Court judge in Vancouver.

- [99] On April 25, 1983, Mr. Tallio appeared in the Provincial Court of British Columbia before Judge Diebolt at the courthouse at 222 Main Street in Vancouver. Judge Diebolt remanded him to the "prison" at 312 Main Street--i.e., the City Jail--to appear again at 9:00 a.m. on April 26, 1983. A warrant of remand was issued. After being remanded, Mr. Tallio was seen by Dr. Murphy, who advised Crown counsel that she believed Mr. Tallio may be mentally ill.
- [100] Mr. Tallio appeared before Diebolt P.C.J. on April 26, 1983. Following a hearing at which Dr. Murphy testified, Diebolt P.C.J. was satisfied there was reason to believe Mr. Tallio may be mentally ill and, acting under s. 465(1)(c)(ii), remanded him into the custody of the executive director of the FPI for 30 days for observation. While Mr. Tallio was at the FPI, Dr. Murphy consulted Dr. Pos. In his reporting letter to Dr. Murphy, Dr. Pos set out a portion of a conversation he had with Mr. Tallio in which Mr. Tallio appears to acknowledge he had sexual intercourse with Delavina and placed a pillow on her head. Dr. Pos passed away some years ago. 1983 Provisions of the Criminal Code
- [101] By virtue of the definitions in s. 2 of the Criminal Code, "justice" included both a justice of the peace and a magistrate, and "magistrate" included a judge of the Provincial Court of British Columbia. Accordingly, Diebolt P.C.J. could exercise the powers given to a "justice".
- [102] As Mr. Tallio was charged with first degree murder under s. 218(1) of the Criminal Code--an indictable offence--he was required to be tried in the Supreme Court of British Columbia--a superior court of criminal jurisdiction--and only a judge of that Court had jurisdiction to release him on bail: ss. 426-427, 457(1), 457.7.
- [103] Section 465(1)(c) was in Part XV (Procedure on Preliminary Inquiry) of the Criminal Code, being s. 463 through to and including s. 478. In considering Mr. Tallio's arguments, it is necessary to have regard to the following provisions, as they appeared in 1983, the underlined portions being the most relevant:
- s. 463 Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other charge against that person.
 - s. 465(1) A justice acting under this Part may
 - (a) [Repealed by the Bail Reform Act, R.S.C. 1970, c. 2 (2nd Supp.), s. 6(1).]
 - (b) adjourn the inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits, or for any other sufficient reason, but no such adjournment shall be for more than eight clear days unless
 - (i) the accused, whether or not he is in custody, and the prosecutor consent to the proposed adjournment, or (ii) the accused is remanded for observation under subparagraph (c)(i);
 - (c) by order in writing,

- (i) direct an accused to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or (ii) remand an accused to such custody as the justice directs for observation for a period not exceeding thirty days, where, in his opinion, supported by the evidence, or where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner, there is reason to believe that (iii) the accused may be mentally ill, or (iv) the balance of the mind of the accused may be disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
- (d) except where the accused is authorized pursuant to Part XIV to be at large, remand the accused to custody in a prison by warrant in Form 14;
- (e) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;
- (f) order in writing, in Form 26, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;
- (g) [Repealed by the Bail Reform Act, R.S.C. 1970, c. 2 (2nd Supp.), s. 6(4).]
- (h) grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply upon any evidence that is given on behalf of the accused;
- (i) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;
- (j) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing; and
- (k) regulate the course of the inquiry in any way that appears to him to be desirable and that is not inconsistent with this Act.
- (2) Notwithstanding paragraph (1)(c), a justice acting under this Part may remand an accused in accordance with that paragraph
 - (a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and
 - (b) for a period of more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

- (3) Where, as a result of observations made pursuant to an order issued under paragraph (1)(c), it appears to a justice that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the justice shall direct that an issue be tried whether the accused is then, on account of insanity, unfit to conduct his defence at the preliminary inquiry.
- (4) Where the justice directs the trial of an issue under subsection (3), he shall proceed in accordance with section 543 in so far as that section may be applied. [Emphasis added.]
- Discussion

- [104] Mr. Tallio's position is that in 1983 only a "justice" conducting a preliminary inquiry had authority to remand for observation under s. 465(1)(c). Mr. Tallio submits the opening words of s. 465(1) should be interpreted as if they read "a justice acting under this Part holding a preliminary inquiry proper may" and that, therefore, jurisdiction to remand him for observation did not exist until he appeared before Judge Barnett on July 7, 1983, for a preliminary inquiry. He further says the in-custody remand orders made by the justice of the peace (on April 24, 1983) and by Diebolt P.C.J. (on April 25, 1983) could not have been made under s. 465(1)(d). His position is that those orders could only have been made under s. 457.1, which was in Part XIV (Compelling Appearance of Accused Before a Justice and Interim Release) of the Criminal Code, and read: A justice may, before or at any time during the course of any proceedings under section 457, upon application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in a prison by warrant in Form 14, but no such adjournment shall be for more than three clear days except with the consent of the accused.
- [105] We do not accept Mr. Tallio's arguments. As we will explain, when he appeared before a justice of the peace on April 24, 1983, and before Diebolt P.C.J. on April 25 and 26, 1983, those judicial officers were acting under Part XV of the Criminal Code and had the authority to exercise the powers conferred by s. 465(1) that were applicable in the circumstances.
- [106] Mr. Tallio's argument rests principally on *Vaillancourt v. The Queen*, [1976] 1 S.C.R. 13. He also relies on *Doyle v. The Queen*, [1977] 1 S.C.R. 597, and *R. v. Swain*, [1991] 1 S.C.R. 933. Since we do not consider *Swain*, which deals with the Crown's ability to raise what formerly was referred to as the insanity defence, to have any bearing on the jurisdiction issue that has been raised, we see no need to discuss it.
- [107] As Mr. Tallio correctly points out, *Doyle* stands for the proposition that the powers of a justice acting under the Criminal Code are entirely statutory and must be found to have been conferred either expressly or by necessary implication: at 602. Accordingly, we agree with Mr. Tallio that the validity of the remand for observation turns on whether Diebolt P.C.J. was entitled to exercise the authority conferred by s. 465(1)(c). However, as explained later, the reasoning in *Doyle* undermines Mr. Tallio's argument.

[108] We begin with the fact that the words Mr. Tallio seeks to have read into s. 465(1), or variations of them, were used in previous versions of the Criminal Code in sections setting out the powers and duties of a justice and, indeed, were used elsewhere in Part XV in 1983. Their earliest use was in Part XLV (Procedure on Appearance of Accused) of The Criminal Code, 1892, S.C. 1892, c. 29:

- s. 586 A justice holding the preliminary inquiry may in his discretion-- (a.) permit or refuse permission to the prosecutor, his counsel or attorney to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused; (b.) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused; (c.) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused if required by warrant in the form P in schedule one hereto: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day; and further provided, that if the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before the same or such other justice as shall be there acting at the time appointed for continuing the examination; (d.) order that no person other than the prosecutor and accused, their counsel and solicitor shall have access to or remain in the room or building in which the inquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by doing so; (e.) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.
 - s. 590 When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.
 - (6) Every justice holding a preliminary inquiry is hereby required to cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written. [Emphasis added.] See also: ss. 596, 598.
- [109] The words "holding an inquiry"/"holding a preliminary inquiry" were carried forward into other iterations of the Criminal Code: see R.S.C. 1906, c. 146, Part XIV (Procedure on Appearance of Accused Before Justice), ss. 679, 683, 690, 692; R.S.C. 1927, c. 36, Part XIV (Procedure on Appearance of Accused Before Justice), ss. 679, 683, 690, 692. In particular, s. 679, which had been s. 586 of The Criminal Code, 1892, began with, "A justice holding a preliminary inquiry may in his discretion ."

[110] Major revisions to the Criminal Code took place in 1954 with the enactment of the Criminal Code, S.C. 1953-54, c. 51. This version of the Code contained Part XV (Procedure on Preliminary Inquiry), commencing with s. 449. In addition to powers that can be traced back to The Criminal Code, 1892, s. 451 of the 1954 Code conferred on a justice the power to: (a) grant bail to an accused charged with an indictable offence other than murder and a limited number of other offences (see s. 464); and (b) remand an accused for a psychiatric assessment. Of significance is that the exercise of those powers was no longer limited to "a justice holding a preliminary inquiry":

- s. 449 Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other charge against that person.
- s. 451 A justice acting under this Part may
 - (a) order that an accused, at any time before he has been committed for trial, be admitted to bail
 - (i) upon the accused entering into a recognizance in Form 28 before him or any other justice, with sufficient sureties in such amount as he or that justice directs, (ii) upon the accused entering into a recognizance in Form 28 before him or any other justice and depositing an amount that he or that justice directs, or (iii) upon the accused entering into his own recognizance in Form 28 before him or any other justice in such amount as he or that justice directs without any deposit;
 - (b) adjourn the inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits, or for any other sufficient reason, but no such adjournment shall be for more than eight clear days unless the accused
 - (i) is at large on bail and he and his sureties and the prosecutor consent to the proposed adjournment, or (ii) is remanded for observation under subparagraph (i) of paragraph (c);
 - (c) remand an accused,
 - (i) by order in writing, to such custody as the justice directs for observation for a period not exceeding thirty days where, in his opinion, supported by the evidence of at least one duly qualified medical practitioner, there is reason to believe that (A) the accused is mentally ill, or (B) the balance of the mind of the accused is disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child, or (ii) orally, to the custody of a peace officer or other person, where the remand is for a period not exceeding three clear days;
 - (d) remand an accused to custody in a prison, by warrant in Form 14;

- (e) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;
- (f) order in writing, in Form 26, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;
- (g) issue a warrant in Form 8 or 9, as the case may be, for the arrest of an accused
- (i) who does not appear pursuant to service of a summons upon him, if service is proved, or (ii) who does not appear at the time and place to which an inquiry has been adjourned;
- (h) grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply upon any evidence that is given on behalf of the accused;
- (i) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;
- (j) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing; and
- (k) regulate the course of the inquiry in any way that appears to him to be desirable and that is not inconsistent with this Act. [Emphasis added.] However, limiting words continued to be used in s. 453, which dealt with the taking of evidence at a preliminary inquiry: "When the accused is before a justice holding a preliminary inquiry, the justice shall ."

[111] Given the presumptions that legislative changes are purposeful and that different expressions are intended to have different meanings, the absence of the words "holding a preliminary inquiry" in s. 451 indicates that when the Criminal Code was revised in 1954, Parliament did not intend to limit the exercise of the powers conferred by that provision in the manner contended by Mr. Tallio: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at §§ 8.32-8.38, 23.21-23.22; Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 93-94, 127-28. Indeed, to accept Mr. Tallio's argument would be to accept that, prior to the passing of the Bail Reform Act, R.S.C. 1970, c. 2 (2nd Supp.), Parliament intended that a person taken before a justice following arrest--as required by what was then s. 438--and who was entitled to apply to a justice for bail could not do so until the preliminary inquiry stage of the proceedings had been reached. It would also be to accept that the power to remand an accused in custody conferred by s. 451(d) could be exercised only by a justice holding a preliminary inquiry. Such an interpretation would be counter to the "well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 at para. 96, 437 D.L.R. (4th) 567.

- [112] The words "the justice holding a preliminary inquiry" were again used by Parliament in the Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38, s. 33, in amending Part XV to add s. 452A to provide for making publication bans in regard to the evidence taken at a preliminary inquiry.
- [113] Part XV remained unchanged in the Criminal Code, R.S.C. 1970, c. C-34, except for renumbering and some non-substantial revisions. Section 438 became s. 452, s. 449 became s. 463, s. 451 became s. 465, s. 452A became s. 467, and s. 453 became s. 468.
- [114] The Bail Reform Act made significant changes to the Criminal Code. These included repealing s. 465(1)(a) and (g), repealing most of Part XIV (Compelling Appearance of Accused Before a Justice), and replacing it with Part XIV (Compelling Appearance of Accused Before a Justice and Interim Release). Under the new Part XIV, the requirement to take an accused who had been arrested before a justice was in s. 454 and the authority of a justice to grant that person bail, except for murder and the other offences listed in s. 457.7, was in s. 457. Changes were also made to other parts of s. 465, including those dealing with remands for observation. However, all the powers conferred by s. 465 remained exercisable by "[a] justice acting under this Part".
- [115] Further amendments to s. 465 were made by the Criminal Law Amendment Act, 1972, S.C. 1972, c. 13, s. 38, and the Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 58. Those resulted in s. 465 being in the form it was in when Mr. Tallio was remanded for observation. At that time, the limiting words Mr. Tallio seeks to have read into s. 465(1) were found in ss. 467(1) and 468(1) dealing with publication bans and the taking of evidence at a preliminary inquiry.
- [116] Absent binding judicial authority to the contrary, we are of the view that, as a matter of statutory interpretation, the powers conferred by s. 465 in 1983 were not limited to a justice holding a preliminary inquiry.
- [117] We turn now to Vaillancourt, the authority Mr. Tallio submits is dispositive in his favour. That case involved a conviction for capital murder. At trial, the Crown called several psychiatrists in reply on the issue of insanity. In February of 1973, those psychiatrists had examined Mr. Vaillancourt in the jail at the request of the Crown. This occurred shortly after his arrest and well before the preliminary inquiry. At the time Mr. Vaillancourt was examined, he was not represented by counsel and no remand for observation had been made under s. 465(1)(c).
- [118] On appeal, Mr. Vaillancourt argued the evidence of the Crown's psychiatrists was inadmissible because no remand for observation had been made. That argument was rejected and the appeal dismissed. In giving the unanimous judgment of the Court, Justice Spence stated (at 18): It must be remembered that these examinations took place prior to the preliminary inquiry and it would appear that in the opinion of the Crown counsel it was necessary in the due administration of justice to have these psychiatric examinations at that time. Counsel for the appellant referred to s. 465[1](c), s. 543 and s. 608.2 of the Criminal

Code, but reference to these actions indicates that they are all concerned with a later period when the accused was at preliminary inquiry, at trial, or before the Court of Appeal, and I am of the opinion that they are quite inapplicable to the circumstances in the present appeal. Sections 543 and 608.2 provided for remands for observation being made at trial or on appeal.

- [119] As the question of when a remand for observation could be made under s. 465(1)(c) was not in issue in Vaillancourt, the above statement is obiter. More importantly, it is incompatible with what the Supreme Court decided 10 months later in Doyle, a unanimous judgement in which Spence J. concurred.
- [120] On December 7, 1973, Mr. Doyle was charged in an information with several indictable offences and a warrant was issued for his arrest. The offences were ones in respect of which Mr. Doyle had a right to elect his mode of trial, i.e., he had the option of being tried before a magistrate or before a superior court judge with or without a jury. A preliminary inquiry would take place only if Mr. Doyle elected trial before a superior court judge.
- [121] Mr. Doyle was taken before Magistrate O'Neill on December 8, 1973, at which time he applied for bail. Following the bail hearing, Magistrate O'Neill remanded Mr. Doyle in custody until December 11, 1973. On December 11, Magistrate O'Neill ordered Mr. Doyle released on a recognizance, the conditions of which included a \$25,000 cash deposit and two sureties. This was done on the understanding that the case would proceed on January 30, 1974. On January 30, Mr. Doyle was prepared to proceed but the Crown was not. This resulted in Magistrate O'Neill, with Mr. Doyle's consent, granting an adjournment to April 1, 1974. When the case came before Magistrate Scott on April 1, the charges were read for the first time, but Mr. Doyle was not put to his election. The Crown was still not prepared to proceed. Over Mr. Doyle's objection, Magistrate Scott adjourned the proceedings to August 1, 1974.
- [122] Mr. Doyle then brought an application for mandamus, seeking to have his recognizance declared void, the cash deposit returned to him, and the sureties released. His position was that Magistrate Scott acted without jurisdiction in granting a four-month adjournment because, by virtue of s. 465(1)(b), no adjournment in excess of eight clear days could be granted without an accused's consent. That argument failed both at first instance and on appeal. However, it succeeded before the Supreme Court of Canada. That Court held Magistrate Scott did not have authority to adjourn the proceedings for more than eight days without Mr. Doyle's consent because: (i) the powers of a magistrate are circumscribed by the provisions of the Criminal Code; and (ii) s. 465(1)(b) governed the granting of adjournments because Magistrate Scott was engaged in an inquiry under Part XV of the Code: at 602, 606, 608. It is manifest that the Supreme Court was of the view that the power to adjourn under s.465(1)(b) was not limited to a justice holding preliminary inquiry because in Doyle it was not known whether there would be a preliminary inquiry when the adjournment at issue was granted.

- [123] If, as in Doyle, the power to adjourn conferred by s. 465(1)(b) was engaged when an accused charged with an indictable offence was before a justice acting under Part XV of the Criminal Code, then it follows that the other powers conferred by s. 465(1) were also engaged. In particular, it follows that the direction in s. 463 to "inquire into that charge" included the authority conferred by s. 465(1)(c) to inquire into whether the accused was mentally ill.
- [124] That the jurisdiction conferred by s. 465(1)(c) was exercisable even before it was known whether there would be a preliminary inquiry is reflected in *Re Attorney-General of Saskatchewan and Attorney-General of Canada* (1980), 57 C.C.C. (2d) 181 (Sask. C.A.). In that case, Peter Richard Solowan, who had been declared a habitual offender, was charged with committing indictable offences while on parole. The offences were ones in respect of which Mr. Solowan had a right to elect his mode of trial. Mr. Solowan's parole was revoked and he was returned to the Saskatchewan penitentiary.
- [125] After several appearances, but before Mr. Solowan was put to his election, a magistrate made orders under s. 465(1)(c)(i) of the Criminal Code directing: (i) Mr. Solowan to attend at the office of a psychiatrist for examination as to his competency to elect; (ii) the keeper of the penitentiary to deliver Mr. Solowan to the RCMP; and (iii) the RCMP to transport Mr. Solowan to and from the psychiatrist's office. A Court of Queen's Bench judge set the magistrate's orders aside on an ex parte application brought by the Attorney General of Canada. The Attorney General of Saskatchewan appealed. In allowing that appeal, Chief Justice Culliton said the following in holding that the magistrate had jurisdiction to make the orders in issue (at 183): The contention by the Attorney-General of Canada that the Magistrate had no jurisdiction to make the orders, is without merit. Part XV of the Criminal Code relates to the procedure on preliminary hearings. As a condition precedent to a preliminary hearing, the accused must be put to his election pursuant to s. 484 of the Criminal Code. If the Magistrate before whom an accused is brought for election is of the opinion the accused may be mentally ill, he may remand him in custody for examination in accordance with s. 465(2) or if in custody, direct an examination in accordance with s. 465(1)(c)(i). This is what the Magistrate did and which he had a right to do. By a parity of reasoning, if a preliminary inquiry must be held but there is reason to believe the accused may be mentally ill, then a justice has authority to initiate an inquiry into the accused's condition before that stage of the process is reached.
- [126] For these reasons, we are of the view that Diebolt P.C.J. had jurisdiction to remand Mr. Tallio for observation. We are also of the view that the in-custody remands made by the justice of the peace on April 24, 1983, and by Diebolt P.C.J. on April 25, 1983, were made under s. 465(1)(d) and not, as Mr. Tallio argues, under s. 457.1. The latter section applied only to bail hearings under Part XIV of the Criminal Code and conferred jurisdiction to remand an accused in custody when such a hearing was adjourned. It had no application in Mr. Tallio's case because there was no bail hearing to adjourn. Could the Crown Call Dr. Pos as a Fact Witness?

- [127] Mr. Tallio says that a common law rule of evidence prevented the Crown from adducing any statements he made to Dr. Pos for their truth, i.e., as an admission or confession. He further says he was ineffectively represented by Mr. Rankin because Mr. Rankin was ignorant of this rule and, but for that ignorance, plea negotiations would never have occurred.
- [128] Mr. Tallio submits that by 1983 the Supreme Court of Canada had repeatedly affirmed the existence of a common law "class exemption" that prevents statements made to a psychiatrist from being tendered for their truth. He says that jurisprudence held such statements are hearsay and can only be adduced as evidence when a psychiatrist is called as an expert witness, and then only in the context of the psychiatrist providing the basis for their opinion.
- [129] Mr. Tallio submits this class exemption was confirmed in *R. v. Abbey*, [1982] 2 S.C.R. 24, decided approximately 15 months before his trial. He further says this exemption was codified in the 1992 amendments that added Part XX.1 (Mental Disorder) to the Criminal Code: see *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, S.C. 1991, c. 43, s. 4. Those amendments included s. 672.21, which today reads:
- (1) In this section, "protected statement" means a statement made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment order or the disposition, or to anyone acting under that person's direction.
 - (2) No protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.
 - (3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
 - (a) determining whether the accused is unfit to stand trial;
 - (b) making a disposition or placement decision respecting the accused;
 - (c) determining, under section 672.84, whether to refer to the court for review a finding that an accused is a high-risk accused or whether to revoke such a finding;
 - (d) determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;

- (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
- (f) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
- (g) establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding. (Note: The only changes to s. 672.21 since its enactment have been to subsection (3)(c): see An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts, S.C. 2005, c. 22, s. 12; Not Criminally Responsible Reform Act, S.C. 2014, c. 6, s. 5.)

[130] Mr. Tallio cites a number of pre-Abbey decisions, the majority of which are referred to in Abbey. He places particular emphasis on the following from the judgment of Justice Ritchie in *Phillion v. The Queen*, [1978] 1 S.C.R. 18 at 24, which was quoted with approval by Justice Dickson (as he then was) in Abbey (at 44): Statements made to psychiatrists and psychologists are sometimes admitted in criminal cases and when this is so it is because they have qualified as experts in diagnosing the behavioural symptoms of individuals and have formed an opinion which the trial judge deems to be relevant to the case, but the statements on which such opinions are based are not admissible in proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognized professional procedures.

[131] The flaw in Mr. Tallio's argument is that it disregards the context in which the hearsay issue arose in *Phillion* and *Abbey*. Those cases are concerned with the out-of-court statements of an accused relied on by psychiatrists in forming their opinions. They do not address whether the Crown can adduce, as part of its main case, statements made by an accused to a psychiatrist or other medical professional as factual evidence.

[132] In *Phillion*, the Crown adduced statements Mr. Phillion made to a friend and to the police that implicated him in a murder. Mr. Phillion did not testify but called a psychiatrist and a psychologist to give evidence directed at showing he had a tendency to lie to attract attention to himself. In addition, he sought to call a polygraph operator to testify that he was telling the truth during a polygraph examination when he denied stabbing the victim. The trial judge allowed the psychiatrist and psychologist to testify with respect to the basis of their opinions, including statements Mr. Phillion made to them, but refused to allow the polygraph operator to testify: (1972), 10 C.C.C. (2d) 562 (Ont. H. Ct. J.). Mr. Phillion was convicted by a jury and his appeal was dismissed by the Court of Appeal for Ontario: (1974), 20 C.C.C. (2d) 191 (Ont. C.A.).

- [133] On Mr. Phillion's further appeal to the Supreme Court of Canada only the admissibility of the polygraph operator's evidence was in issue. In holding that the trial judge had properly excluded that evidence, Ritchie J. noted that the operator's opinion as to Mr. Phillion's veracity was not based on statements Mr. Phillion made during the examination but on the operator's interpretation of the polygraph readings. With respect to the admissibility of Mr. Phillion's out-of-court statements, Ritchie J. held there was no doubt that what Mr. Phillion had said could not be adduced for the truth of their contents because Mr. Phillion had not testified.
- [134] In the passage from Phillion Mr. Tallio relies on, Ritchie J. did no more than point out that when an expert witness such as a psychiatrist bases an opinion on statements made by the accused, they are permitted to recount those statements in the witness box solely to provide the trier of fact with the basis on which they formed their opinion. Nothing in Phillion supports the arguments Mr. Tallio advances with respect to the Crown's ability to call Dr. Pos as a fact witness.
- [135] In *Abbey*, Mr. Abbey was charged with drug-related offences arising from cocaine found in his bag when he arrived in Canada on a flight from Peru. His sole defence was insanity. After the Crown closed its case Mr. Abbey called one witness, Dr. Vallance, a psychiatrist. Dr. Vallance based his opinion that Mr. Abbey was insane when he committed the offences substantially on what Mr. Abbey told him about the events surrounding his trip to Peru, e.g., that he had various delusions, visions, etc., and that he had engaged in bizarre and unstable conduct both before departing for Peru and while in Peru. The Crown called a psychiatrist in rebuttal. In finding Mr. Abbey not guilty by reason of insanity, the trial judge accepted as factual much of what Mr. Abbey told Dr. Vallance. This Court dismissed an appeal by the Crown: (1981), 60 C.C.C. (2d) 49 (B.C.C.A.).
- [136] The Supreme Court of Canada allowed the Crown's further appeal. In holding that the trial judge erred in accepting the hearsay evidence on which Dr. Vallance based his opinion as proof of the facts on which that opinion was based, Dickson J. stated, in part (at 45): In the present case Abbey did not testify. Dr. Vallance testified, in the course of his opinion, as to many events and experiences related to him during several interviews. This testimony, while admissible in the context of the opinion, was not in any way evidence of the factual basis of these events and experiences. The trial judge in his decision fell into the error of accepting as evidence of these facts, testimony which if taken to be evidence of their existence would violate the hearsay rule. There was no admissible evidence properly before the Court with respect to: the delusions experienced by the accused; the accused having described the symptoms of his disease to his mother some six months prior to the commission of the offence; the accused having seen a psychiatrist before leaving for Peru; the accused's unstable conduct at the airport some days prior to leaving for Peru or his bizarre behaviour in Peru. [Emphasis added.] Nothing in *Abbey* supports Mr. Tallio's position that the Crown cannot call a psychiatrist as a fact witness.

- [137] Whether the Crown can call a doctor who conducted a fitness assessment as a fact witness was at issue in *R. v. Stewart* (1980), 54 C.C.C. (2d) 93 (Alta. C.A.), leave to appeal ref'd [1980] 1 S.C.R. xii, a conviction appeal on a charge of murder. Following his arrest, Mr. Stewart was examined in police cells by a doctor retained by the Province of Alberta to conduct examinations of prisoners suspected of having a mental disorder; the request for the examination had been made by the office of the clerk of the Provincial Court. That doctor did not warn Mr. Stewart that anything he said could be used against him. Rather, the doctor, based on his honest belief, told Mr. Stewart that anything Mr. Stewart said was confidential and that he would not be obliged to reveal what Mr. Stewart had told him in court. During the course of the examination, the doctor concluded Mr. Stewart was fit to stand trial. Thereafter, when the doctor mentioned he had seen the deceased's body, Mr. Stewart said he was at the scene of the murder when it occurred.
- [138] At trial, the Crown subpoenaed the doctor to testify as a fact witness in regard to what Mr. Stewart had told him about being at the scene of the murder. Mr. Stewart was convicted. He appealed. In dismissing that appeal, the Court of Appeal held that although the doctor was a person in authority, Mr. Stewart's statement was voluntary and, therefore, admissible as part of the Crown's main case. Mr. Tallo submits Stewart is distinguishable because Mr. Stewart's incriminating statement was made after the doctor formed the opinion he was fit to stand trial. In our view, this is too fine a distinction. The statement was made during the course of a forensic mental health examination.
- [139] Also pertinent is *R. v. Warren* (1973), 14 C.C.C. (2d) 188 (N.S.S.C. (A.D.)), leave to appeal ref'd [1973] S.C.R. xiv. Mr. Warren was charged with murder. To support his contention that he should only be convicted of manslaughter, Mr. Warren called a psychologist to testify he was immature and susceptible to influence by others. The trial judge permitted Crown counsel to cross-examine the psychologist on what Mr. Warren had told him about the events in issue. Later, the judge charged the jury that what Mr. Warren told the psychologist could be considered corroborative of the evidence of an accomplice. The jury convicted him of murder.
- [140] Mr. Warren appealed. In his report to the Appeal Division under what was then s. 609 of the Criminal Code (now s. 682), the trial judge stated he was of the opinion that Mr. Warren's statements were not hearsay but declarations against interest. In dismissing the appeal, the Court of Appeal rejected Mr. Warren's arguments that: (a) the psychologist was a person in authority; (b) the statements should not have been admitted because they were hearsay; and (c) the statements could not be considered corroborative because they were either inadmissible hearsay or admissible only as evidence they were made and not for the truth of their contents: at 198-200.
- [141] Last, there is *R. v. Bonds* (1991), 49 O.A.C. 156. In that case, at a first degree murder trial, the Crown tendered statements Mr. Bonds had made to psychiatrists while he was under a psychiatric remand. On appeal, he argued that the admission of those statements violated his rights under the Canadian Charter of Rights and Freedoms, Part I of the Constitution

Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. In rejecting that argument, the Court stated that "no common law or statutory privilege attached to the making of the statements": at para. 17.

- [142] Academic writings reflect the fact that prior to the coming into force of s. 672.21, the common law did not prevent the Crown from calling a psychiatrist as a fact witness. For example, in "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1982) 27 McGill L.J. 196, Professor Allan S. Manson, after noting (at 222) that "[i]n Canada, there is no privilege to protect communications between psychiatrist and patient" and discussing the Stewart case, concluded (at 226): Thus, it appears that there can be no expectation of control in respect of psychiatric opinions obtained either as a result of a previous treatment relationship or a court ordered remand for "observation". Furthermore, so long as the authority of *Regina v. Stewart* remains unchallenged, psychiatric assessments pursuant to court orders may produce an unexpected--even unsuspecting--Crown witness as to factual issues. [Emphasis added; footnote omitted.] See also: Paul S. Lindsay, "Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada" (1976-77) 19 *Crim. L.Q.* 303 at 336; Ed Ratushny, "Self-Incrimination: Nailing the Coffin Shut" (1977-78) 20 *Crim. L.Q.* 312 at 336; Marc E. Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworth, 1978) at 36-40; S.A. Tacon, "A Question of Privilege: Valid Protection or Obstruction of Justice" (1979) 17 *Osgoode Hall L.J.* 332 at 337, 347; Jared Craig, "Admitting 'Protected Statements' to Impeach Credibility After *R. v. Henry*" (2008) 71 *Sask. L. Rev.* 219 at 221; Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Toronto: Thomson Reuters, 2019) (loose-leaf, updated 2019, release 3) at 2-40.
- [143] Most importantly, it is clear from the historical record that Parliament enacted s. 672.21 in response to concerns expressed for many years in regard to the Crown's ability to adduce statements made by an accused remanded for a fitness/mental capacity assessment in its main case. It was because the common law did not prevent the Crown from calling such evidence that the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Toronto: Carswell, 1982) at 422-23, 594-95, included the following provision in its proposed Uniform Evidence Act:
- s. 176 Any statement communicated by an accused to a qualified medical practitioner during the course of a court-ordered psychiatric observation, examination or assessment is privileged and, unless the accused has first put his mental condition in issue, no evidence of or relating to that statement is admissible against the accused in any proceeding before a court, tribunal, body or person having power to compel the production of evidence, other than a hearing to determine the fitness of the accused to stand trial or conduct his defence.
- [144] The Senate took steps to give effect to the Task Force's proposed legislation when Senator H.A. Olson (Leader of the Government) presented Bill S-33--a proposed Canada Evidence Act, 1982--for first reading: *Debates of the Senate*, 32-1, Vol. 4 (18 November 1982) at 5008. Clause 165 of Bill S-33 was essentially identical to s. 176 of the Uniform Evidence Act. In

moving for second reading of Bill S-33, Senator P. Derek Lewis stated (Debates of the Senate, 32-1, Vol. 5 (30 November 1982) at 5074): There is a further provision under clause 165 dealing with the question of privilege respecting a psychiatric assessment. While the bill leaves the question of solicitor-client privilege to the common law, it sets out a new professional privilege with respect to statements made to a qualified medical practitioner during the course of a court-ordered psychiatric observation, examination or assessment. I am sure that this extension of privilege, though limited in scope, will be welcomed by the medical profession. [Emphasis added.] Bill S-33 was referred to the Standing Senate Committee on Legal and Constitutional Affairs, which presented an interim report: Debates of the Senate, 32-1, Vol. 5 (7 December 1982) at 5875. However, no new version of the bill was ever presented.

- [145] In *Mental Disorder Project: Criminal Law Review-Final Report* (Department of Justice, 1985) at 17-18, concern was expressed that clause 165 of Bill S-33 did not provide an accused with adequate protection in regard to statements made during a remand for observation. That report recommended that the privilege proposed by clause 165 be expanded to protect the accused against the use in court of such statements except in relation to: "(a) the issue of the fitness to stand trial, (b) an issue of sanity or mental condition raised by the accused; (c) an allegation that the accused made a previous inconsistent statement; or (d) a charge of perjury."
- [146] Last, that the s. 672.21 protected-statement regime created a privilege that did not otherwise exist is evinced by the speech given by the Honourable Kim Campbell, Minister of Justice and Attorney General of Canada, in moving that Bill C-30, which enacted Part XX.1 of the Criminal Code, be referred to the Standing Committee on Justice and the Solicitor General (House of Commons Debates, 34-3, Vol. 3 (4 October 1991) at 3296): At present there is a risk that incriminating statements made to a doctor during a court-ordered psychiatric assessment may be used as evidence against the accused. As a result, many defence counsels advise their clients to refuse to answer questions during such assessment. This deprives the doctor of a very important source of information about the accused and undermines the effectiveness of the court order. At the same time, concern has been expressed by prosecutors that completely prohibiting the use of this evidence would deprive the court of important information needed to learn the truth about the accused and the offence. [Emphasis added.] In *R. v. G.(B.)*, [1999] 2 S.C.R. 475, a case dealing with s. 672.21 and whether an accused can be cross-examined on a protected statement, Justice Bastarache, after setting out Minister Campbell's above-quoted remarks, continued (at para. 38): Parliament thus sought a balance between the need to learn the truth and the protection of accused persons ordered to undergo an assessment of their mental capacity.

- [147] In conclusion, we are of the view that in 1983 nothing prevented the Crown from seeking to adduce Mr. Tallio's statements to Dr. Pos as part of its main case. Mr. Rankin's understanding of the law was correct and he was right to have been concerned about the effect Dr. Pos's evidence could have had on the outcome of the trial. Mr. Tallio's Credibility Overview
- [148] A core issue on this appeal is the validity of Mr. Tallio's guilty plea. There is a presumption Mr. Tallio's plea is valid. Mr. Tallio's credibility and reliability are central to whether he can establish, on a balance of probabilities, that there has been a miscarriage of justice warranting setting aside his guilty plea. Accordingly, we first intend to set out our assessment of Mr. Tallio's credibility and reliability before addressing his cognitive claims.
- [149] In our view, Mr. Tallio's credibility and reliability are adversely affected by the fact that he has advanced inconsistent and irreconcilable alternative positions throughout these proceedings. For example: · Initially, he claimed his guilty plea was both uninformed and involuntary. · Then he took the position his guilty plea was only uninformed because of ineffective legal representation. · He denied he gave Mr. Rankin oral instructions to negotiate a plea or written instructions to plead guilty. · He maintained he did not enter the guilty plea in court. · Alternatively, he claimed he did not remember pleading guilty, or he did not understand and did not have the cognitive capacity to understand the legal concepts encompassing his plea. · Now, he no longer takes the position Mr. Rankin did not have instructions to enter the guilty plea. Assessment of Credibility
- [150] Mr. Tallio did not challenge Mr. Rankin's evidence concerning the entry of the guilty plea. While he does not believe he gave instructions to Mr. Rankin to plead guilty, he says he chose not to cross-examine Mr. Rankin on this issue because Mr. Rankin is an officer of the court. We find Mr. Rankin to be a credible and reliable witness and prefer his evidence where it differs from that of Mr. Tallio. We accept Mr. Rankin's evidence that Mr. Tallio gave him verbal instructions to initiate plea discussions with the Crown and later gave him written instructions with respect to a guilty plea to second degree murder. Mr. Rankin's evidence is corroborated by historical documentary evidence that we will canvass in assessing Mr. Tallio's cognitive claims.
- [151] Mr. Tallio testified before this Court for three days. His evidence was fraught with evolving positions and inconsistencies that severely affect his credibility and reliability. He was prone to adopting one position in his affidavit only to later resile from it when cross-examined by Crown counsel, either by claiming not to remember or by stating it was "possible" that the opposite of his position was true.
- [152] In addition, Mr. Tallio's demeanour while testifying affects his credibility and reliability. Mr. Tallio had a tendency to pause for very lengthy periods before responding to certain questions from Crown counsel during cross-examination. Mr. Tallio says this is due to cultural speech patterns and his cognitive issues, including slow verbal processing. The Crown suggests these pauses should be taken into account in assessing Mr. Tallio's

credibility and reliability, but does not suggest an adverse inference should be drawn. We do not draw any adverse finding from these lengthy pauses. We note, however, that Mr. Tallio seemed to have no difficulty answering most of Crown counsel's questions. The pauses tended to come with respect to questions that would potentially undermine his credibility. On two occasions, Mr. Tallio explicitly stated after a lengthy pause that he was not sure what the questioner was "getting at." In one instance, Mr. Tallio was cross-examined about multiple inconsistent versions he had given about whether, when, or where he slept on the night of Delavina's murder (on the couch or in the chair) or if he had, instead, cleaned the kitchen. After a lengthy pause, he said he was stuck on what the questioner was trying to establish and he was at a loss. It was clear to the Court he understood the questions but was trying to determine how to construct an answer to difficult questions that had an obvious impact on his credibility.

- [153] Another significant factor affecting Mr. Tallio's credibility was his rote response in cross-examination to explain away historical records, damaging to his case, which he had allegedly signed. When presented with these records, he occasionally denied it was his signature. When he did acknowledge his signature on a number of documents, he cycled mechanically through a series of unbelievable explanations: either he did not sign; he did not remember signing; or he left things to his social worker and lawyer to take care of and would sign whatever was put in front of him to make things easier for himself, without knowing what it was, because he trusted authority figures to handle his affairs, although he also stated he felt disdain, distrust, and anger for these same authority figures.
- [154] It is understandable that Mr. Tallio might have limited recall of events that transpired, conversations that took place, or documents that he signed decades ago. However, his selective memory and lack of recall when questioned about his upbringing and youth criminal court history were such that he professed to be unable to remember matters he had recently sworn to in his affidavits. Our impression was that he often claimed he could not remember when presented with evidence that was unfavourable to him, yet was forthcoming with information that was supportive. For example, he claimed that he told Dr. Koopman he was innocent (his claim of innocence was not documented by Dr. Koopman), despite the fact that otherwise he stated he could not remember his interviews with Dr. Koopman.
- [155] Mr. Tallio asks us to accept that anomalies in his evidence are indicative of cultural and cognitive issues rather than his lack of credibility. It is our view that the discrepancies are more likely indicative of selective memory, reconstruction, and/or dishonesty. Significant Inconsistencies in Mr. Tallio's Evidence
- [156] Mr. Tallio says he now understands that the evidence in support of his guilt at trial was, essentially, twofold: the Mydlak statement, which he says he did not make, and the Pos statement. However, we note Mr. Rankin's view that the strength of the Crown's case at trial was far more robust than Mr. Tallio now suggests: · Mr. Tallio found Delavina. · There was a very small window of opportunity (approximately 30 minutes) from when Gert Mack put

Delavina to sleep on the couch beside her to when Mr. Tallio returned to Cyril and Nina Tallio's house to report that Delavina had been raped and not simply that the baby was dead. · Mr. Tallio did not wake either Sam or Gert Mack when he entered their house or when he left. · Delavina's mother, Lotta Bolton, denied sending Mr. Tallio to check on Delavina. · Delavina's father, Blair Mack, said Lotta Bolton asked Mr. Tallio to check on Delavina, but he was less adamant about this at trial. · Mr. Tallio was not wearing socks when he was arrested. Socks were "a big deal" in the case, having been used by the perpetrator to wipe himself. · There were "various inconsistencies and corroboration of evidence" in the first statement to Constable O'Halloran. · Mr. Rankin was concerned about Mr. Tallio's credibility if he had to testify on a voir dire with respect to the Pos statement, stemming from what Mr. Tallio said in his second statement to Constable O'Halloran (which was excluded at trial) to explain the presence of seminal fluid (that he had sex with a blonde white girl he could not identify). · Mr. Tallio had seminal fluid on his foreskin, on the hem of his t-shirt, and on his shorts, and had blood on his joggers. · Pubic hairs found on Delavina resembled Mr. Tallio's (but could also have matched any number of persons).
The Mydlak Statement

- [157] For the purpose of this appeal, Crown counsel did not rely on or question Mr. Tallio about the contents of his statement to Corporal Mydlak because the trial judge had ruled it inadmissible. Nonetheless, for credibility purposes, Crown counsel cross-examined Mr. Tallio about his signature on the Mydlak statement, since he steadfastly denied making that statement or signing it.
- [158] In his 2011 statement to the police, Mr. Tallio denied he confessed to Corporal Mydlak and denied he signed the Mydlak statement. He repeated this in his first affidavit. He claimed he told Mr. Rankin he always had the same signature and, although he had never seen the Mydlak statement, he could say it was not his signature because he had never signed anything. He was adamant this was not simply something he did not remember. In an about-face, Mr. Tallio acknowledged his signature on the Mydlak statement during his testimony. He offered his rote explanation that he would sign anything put in front of him, but his signature did not mean he understood what he was signing. Further, Mr. Tallio testified he could neither confirm nor deny whether he told Mr. Rankin he did not confess to Corporal Mydlak. The Pos Statement
- [159] In his reporting letter to Dr. Murphy in 1983, Dr. Pos indicated that he had questioned Mr. Tallio about the difference between first and second degree murder. Mr. Tallio had seemed lost in thought and Dr. Pos asked him what he was thinking about. According to Dr. Pos, Mr. Tallio responded, " I don't think I understand why (they made it) first degree I didn't think she died when I put the pillow on her head I made sure it was not on her face it came out of the blue I didn't plan on the pillow doing this to her I don't know I don't know why I did it ."

- [160] Mr. Tallio's position with respect to meeting with Dr. Pos has shifted dramatically over the course of this appeal. Mr. Tallio has asserted: · He never met with Dr. Pos. · Alternatively, he did not confess to Dr. Pos. · In the further alternative, if he did meet with Dr. Pos and confess, he has no memory of it. · In any event, the confession was inadmissible.
- [161] In his factum, his 2011 police statement, his affidavits, and his testimony, Mr. Tallio said he never met with Dr. Pos, whom he described as a man of questionable professional ethics who likely fabricated the meeting. He told this Court he knew he did not meet Dr. Pos because "I'd remember meeting somebody and telling them something that's going to ruin the rest of my life."
- [162] In his testimony, Mr. Tallio seemed to remember almost nothing from his time at the FPI, where he was seen by multiple professionals. In our view, his position that he never met with Dr. Pos is simply not credible in the face of a substantial body of evidence that indicates he did, including Dr. Murphy's and the FPI's records.
- [163] Mr. Tallio claims he told Mr. Rankin that he did not meet with Dr. Pos, and Mr. Rankin's response was it was Dr. Pos' "word against [his]." Further, he indicates he cannot remember, and cannot confirm or deny, whether Mr. Rankin spoke to him about the admissibility of the Pos statement. To the contrary, Mr. Rankin said he discussed the Pos statement with Mr. Tallio several times, particularly when he took plea instructions, and Mr. Tallio said of Dr. Pos, "He tricked me." Mr. Rankin testified that Mr. Tallio never denied meeting with Dr. Pos.
- [164] Mr. Tallio now acknowledges he cannot prove Dr. Pos fabricated the statement. He also no longer relies on any of the affidavits he filed that raised ethical issues about Dr. Pos's conduct and reputation. In oral submissions, his position was that we are entitled to assume he did meet with Dr. Pos and make the statements attributed to him because he cannot prove otherwise. The Guilty Plea
- [165] Mr. Tallio's 2011 police statement and his affidavits demonstrate a specific recollection of things he says he and Mr. Rankin did not do.
- [166] In his 2011 police statement, Mr. Tallio said he had no conversations with Mr. Rankin about a guilty plea. He did not know Mr. Rankin was going to plead him guilty. He was in the courtroom but he could not recall, or was not aware, if the judge talked to him about his plea. He was certain he did not say anything in court and denied pleading guilty.
- [167] In his first affidavit, Mr. Tallio states he did not plead guilty and that the plea was entered on his behalf. He says that during the trial, Mr. Rankin stood in front of his cell door and told him "there was going to be something coming up in court that afternoon" and Mr. Tallio was "going to go along with it." Mr. Tallio also claims Mr. Rankin just spoke in legal jargon. Accordingly, Mr. Tallio did not understand at the time that it was a plea bargain. He says Mr. Rankin never asked him what he wanted to do and never explained that a guilty plea meant he was saying he had raped and killed Delavina. He always maintained that he was innocent and did not kill Delavina.

- [168] In his second affidavit, Mr. Tallio says Mr. Rankin never asked if he wanted to plead guilty. He did not understand what a guilty plea was. He did not understand he was admitting to the offence.
- [169] In his fourth affidavit, Mr. Tallio claims he did not know he had entered a guilty plea to second degree murder and was "extremely confident" he did not say anything in court. As far as Mr. Tallio can remember, Mr. Rankin did not tell him that a guilty plea was an admission that he committed the crime of raping and murdering Delavina. Mr. Tallio does not remember Mr. Rankin explaining it was impossible to withdraw a guilty plea. Contrary to Mr. Rankin's affidavit, Mr. Tallio also claims Mr. Rankin did not tell him the Mydlak statement was inadmissible. He does not remember if Mr. Rankin told him that the Pos statement remained a problem. He says he was never told Dr. Pos was claiming he had confessed.
- [170] When cross-examined, there were many things Mr. Tallio said he could not remember but could not dispute, sometimes agreeing it was possible or stating he could neither confirm nor deny it. Some examples are whether Mr. Rankin discussed his police statements with him, whether Mr. Rankin discussed Dr. Pos's evidence with him, and whether Mr. Rankin met with him many times during the weekend before the plea was entered.
- [171] While in his fourth affidavit Mr. Tallio admits it is possible he signed the plea instructions prepared by Mr. Rankin without understanding them, he was adamant in cross-examination that he did not sign them because that is something he would remember. However, he also said in cross-examination that it was possible, or he could neither confirm nor deny, that Mr. Rankin took written instructions from him, which he initialled and signed.
- [172] When Mr. Tallio was shown the trial judge's bench notes, which indicate he entered a guilty plea to second degree murder, he agreed it was possible that he entered that plea. Yet he still maintained he never gave Mr. Rankin instructions to enter a guilty plea. Mr. Rankin's evidence and the documentary evidence clearly establish that Mr. Tallio entered the guilty plea in court.
- [173] Mr. Tallio claims he is not saying Mr. Rankin railroaded a guilty plea. He has no memory of a guilty plea. What Mr. Tallio takes issue with is what Mr. Rankin said he did leading up to the plea. Mr. Tallio never challenged Mr. Rankin's evidence and he maintains the differences in their recollections come down to his cognitive deficits. What he seems to be saying is that he was not able to enter a valid guilty plea and Mr. Rankin should have done more to ensure he understood, though he acknowledges Mr. Rankin was not expected to have known he should have done more in the circumstances. We note Mr. Tallio never suggested in his affidavits that Mr. Rankin tried to explain the plea bargain but that he did not understand.

- [174] Despite advancing inconsistent and irreconcilable alternative positions, Mr. Tallio denies his evidence is incompatible with Mr. Rankin's because of his lack of cognitive capacity. In our opinion, all the objective evidence establishes that Mr. Tallio understood the plea bargain, signed and initialled the plea instructions, and entered the guilty plea. We will consider the cognitive issues below. The Meaning of "Appeal"
- [175] In his first affidavit, Mr. Tallio says that he did not know what the word "appeal" meant until 1992. However, there are numerous documents indicating Mr. Tallio considered appealing his conviction well before 1992, when he claims other inmates explained the appeal process to him.
- [176] In his 2011 police interview, Mr. Tallio stated his reason for not appealing was because immediately after he was sentenced, while he was sitting in a holding cell, Mr. Rankin told him that if he appealed, then he would "more than likely get stuck with life twenty-five", whereas if he were paroled after 10 years, then he would still be a "young guy" when he was released from prison. In cross-examination, Mr. Rankin did remember a conversation with Mr. Tallio in which he indicated "that the silver lining in an otherwise sad day" was that he was sentenced to 10 years instead of the possible alternative.
- [177] Mr. Tallio signed a Notice of Waiver of Appeal on January 26, 1984. When cross-examined about his signature on this document, at first he was not sure it was his signature, but eventually he agreed that it was. He employed his rote response that he could not remember signing it, but that he would sign anything put in front of him by a person in authority just to survive and denied he had read the document.
- [178] Mr. Tallio attached to his first affidavit a CSC Needs Analysis and Individual Program Plan dated June 3, 1985. Under "Outstanding Charges" there is a note: "Tallio states that he will be appealing his conviction at some future date. However, it is likely to be a few years before he has the resources to conduct an appeal." He testified he cannot recall saying this but it is possible he did. He testified that he used the word "appeal" because his IPO used that word, but he did not know what it meant at the time.
- [179] Mr. Tallio sent a letter to his IPO, Vivian Toles, dated October 20, 1988, apparently in response to her asking why he did not fight his conviction since he maintained he was innocent, stating: When it went to trial I had it beat, and then the Prosecutor brought in a psychiatrist. I tried to tell my lawyer that I had not seen him at all during my stay at the Forensic unit, looking back on it now, I regret not changing lawyers. I guess I can really blame my loss of the case to youth. Being a ward of the Human Resource people, I let them do all of the work. And having had them doing so, for most of my life, I just went along when they told me to stay with the lawyer I had. Anyway ... When they brought in the psychiatrist, he came in with a statement he said I gave to him. The psychiatrist's name is doctor pos, and the only other doctor that I saw was Dr. Murphy, and she did not show up for my trial. And the only other person that could help me, was sent home by the R.C.M.P. before she could be called to testify on my behalf. Therefore my lawyer made a plea

bargain. The deal was this. I agree to 2nd degree murder, and they would not use doctor pos' testimony. Although my family wanted me to keep fighting it, I felt that parole eligibility sounded better at ten years, rather than at twenty-five years. But if I had known more like I do now, I would have tried to fight it. [Emphasis added.]

- [180] Mr. Tallio says that at the time he spoke with the RCMP in 2011 he was combining what Mr. Rankin and IPO Jan Fox told him about appealing; in other words, he knew life-10 was better than life-25 even though he did not know what an appeal meant. He also claims his brain was "foggy" at that time because he had started taking a medication for depression. In his second affidavit, Mr. Tallio says his letter to IPO Toles was written to explain events in "hindsight." He testified it was a "retrospect" letter based on what IPO Fox and Mr. Rankin had told him about life-10 being better than life-25 and the risk of ending up with the latter sentence if he appealed and lost.
- [181] In our view, there is overwhelming evidence that immediately after being sentenced, Mr. Tallio knew he could appeal. This affects his credibility. Despite his knowledge of its availability, and his continued claims of innocence, he failed to diligently pursue an appeal. Other Inconsistencies in Mr. Tallio's Evidence
- [182] There are multiple inconsistencies affecting Mr. Tallio's testimony, some more significant than others, arising from his affidavits, his first O'Halloran statement, his 2011 police statement, and his cross-examination before this Court. When He Slept Before the First Statement to Constable O'Halloran
- [183] Constable O'Halloran first interviewed Mr. Tallio at 9:30 a.m. on Saturday, April 23, 1983. This was shortly after Mr. Tallio had been detained and approximately three hours after Delavina's death. When confronted in cross-examination with inconsistencies arising from what he said in that interview, Mr. Tallio stated that before the interview, he been held for 10 to 14 hours without being allowed to sleep. When pressed on this he said he had been awake for two days, since the previous Thursday evening. This is clearly untrue. When He Was Asked to Check on Delavina
- [184] Mr. Tallio provided a number of versions of when Delavina's mother (Lotta Bolton) asked him to check on Delavina. He gave Constable O'Halloran two different time ranges: about 6:00 a.m. to 6:30 a.m. or 5:40 a.m. to 5:45 a.m. In his first and fourth affidavits, Mr. Tallio said it was while the party was still going on. In his 2011 police statement, he said it was close to 3:00 a.m., and that he did not check when Lotta Bolton first asked because Nina Tallio and Celestine Vickers (Nina's sister who was also in attendance at the party) told him not to go; they felt uncomfortable and did not feel it was right. The time to check on Delavina had long passed if Lotta Bolton had indeed asked Mr. Tallio earlier in the evening before she went to sleep. That she would wake him around 6:00 a.m. to check on Delavina does not make any sense. Minimal Relationship with Delavina

- [185] In his 2011 statement, Mr. Tallio claimed Delavina was someone he babysat and that he wanted to check on her as a result of this connection and because he was concerned that Sam and Gert Mack, who were babysitting that night, may have been drinking. However, he admitted she was not a close relative.
- [186] Mr. Tallio admitted during his testimony that, in the four months he had been in Bella Coola, he had been in Delavina's presence only once, when she was one of a group of children his girlfriend, Theresa Hood, was babysitting. When asked if he played with her or held her or anything of the sort, he said he was just at the house to visit with Theresa. Any interaction with Delavina was minimal. If, When, and Where He Slept and When He Left to Check Delavina
- [187] There was a significant evolution in Mr. Tallio's first and fourth affidavits about whether he slept before checking on Delavina and/or cleaned the kitchen.
- [188] In his first statement to Constable O'Halloran, Mr. Tallio said he went to bed about 4:30 a.m. and slept on a chair in the living room for about an hour and a half before Lotta Bolton woke him and asked him to check on Delavina at about 6:00 a.m. to 6:30 a.m. or 5:40 a.m. to 5:45 a.m. In his first affidavit, Mr. Tallio said he told Celestine Vickers close to 4:30 a.m. that he was going to see if he could get his uncle, Cyril Tallio, to bed because Cyril Tallio was sleeping on the couch that was supposed to be Mr. Tallio's bed. He could not wake Cyril Tallio so he told Celestine Vickers he would snuggle up at the end of the couch. In that affidavit, he does not mention cleaning up the kitchen.
- [189] In his fourth affidavit, however, Mr. Tallio said he tried to sleep on the couch where Cyril Tallio was sleeping when Celestine Vickers went to bed at 4:30 a.m. but there was not enough room. As he could not find a place to sleep, he decided to clean up the kitchen, from where he could not see into the living room (and therefore could no longer account for Cyril Tallio sleeping on the couch). At around 5:45 a.m., after cleaning up the kitchen, he left to check on Delavina. Attached to this affidavit is a diagram he drew of Cyril and Nina Tallio's house that does not show the living room chair he told Constable O'Halloran he slept in.
- [190] In re-examination, Mr. Tallio essentially admitted he lied in his affidavit when he said there was no room for him to sleep on the couch and, since he was wide-awake at 5:45 a.m., he thought it would be a good time to check on Delavina. He testified that his statements in both his first and fourth affidavits were accurate. Obviously, both versions cannot be true. In yet another version of this story, Mr. Tallio said in his 2011 police statement that after he got back from walking Aubrey Edgar (another partygoer) home, he helped Nina Tallio and Celestine Vickers clean up the kitchen. After Nina Tallio went to bed, he helped Celestine Vickers until she went to bed. He said he cleaned up the kitchen until about 5:45 a.m., then had something to eat, and went to check on Delavina just after 6:00 a.m.

- [191] Mr. Tallio's evolving story as it pertains to Cyril Tallio must be placed into context. In his 2011 police statement, Mr. Tallio implicated Sam Mack and Wilfred Tallio as possible suspects in Delavina's murder but never mentioned Cyril Tallio as a possible suspect. Of note is that Mr. Tallio's fourth affidavit was sworn after the uterine tissue sample DNA testing. That testing, which is discussed below, did not exclude Cyril Tallio as a possible contributor of the male DNA found on that tissue. Thus, it appears Mr. Tallio constructed a scenario in which he could say he could not account for Cyril Tallio's whereabouts for over an hour before he went to check on Delavina. The Route to Sam and Gert Mack's House
- [192] Mr. Tallio's evidence is inconsistent with respect to the route he took when he went to check on Delavina. He told Constable O'Halloran that when Lotta Bolton asked him to check on Delavina, he left the Mack house and walked around the neighbourhood for several blocks and described seeing certain people. This is inconsistent with his first affidavit and his 2011 police statement. In both of those, he said he went straight to Sam and Gert Mack's house and described seeing different people. Delavina's Grandparents
- [193] Mr. Tallio's evidence is inconsistent concerning whether he tried to wake Sam and Gert Mack up upon entering the house or after finding Delavina. He told Constable O'Halloran he did not try to wake them after he found Delavina because Blair Mack and Lotta Bolton should know first. In his 2011 police statement, he said he knocked on the wide-open door prior to entering and no one answered. In his first affidavit, he said he hollered, "Is anyone home?", but no one answered. In his 2011 statement and first affidavit, he said he tried unsuccessfully to wake up Sam and Gert Mack both before and after he found Delavina. Socks
- [194] Mr. Tallio's evidence is inconsistent concerning whether he was wearing socks. He told Constable O'Halloran he was not wearing socks and, in fact, he was not wearing socks when arrested. In his first affidavit, he specifically remembered he was wearing socks when he checked on Delavina and provided a detailed description: "a pair of white, black and burgundy gym socks." This description did not match the socks found near Delavina that appear to have been used by the perpetrator to wipe away semen and blood. Although Gert Mack testified at the preliminary inquiry that the socks belonged to her son, Blair Mack denied they were his when he testified at the preliminary inquiry. Bloodstain on the Sheet
- [195] In his first statement to Constable O'Halloran, Mr. Tallio did not describe a large bloodstain on the bedding between Delavina's legs. However, in his first affidavit he said there was a large bloodstain on the bedding, implying it was a crime scene with a lot of blood that would transfer to the perpetrator. This description is inconsistent with the forensic evidence. Theresa Hood
- [196] Mr. Tallio told Constable O'Halloran that before going to Sam and Gert Mack's house, he never left the party except to walk Aubrey Edgar home. In his first affidavit, he said Theresa Hood was at the party, he walked her home, and they had sex. Consumption of Alcohol

- [197] Mr. Tallio's evidence is inconsistent about how much alcohol he consumed that night. He told Dr. Koch, who saw him at the FPI, that he was intoxicated at the party. He testified he does not remember saying this and that if he did, it is not true. He told Constable O'Halloran he had a couple of beers. In his first affidavit, he said he maybe had one beer.
- Conclusion with Respect to Mr. Tallio's Credibility
- [198] There are many layers to Mr. Tallio's evidence. As we have said, a number of factors adversely affect Mr. Tallio's credibility. In our view, he lacks credibility and his evidence is simply not believable. Did Mr. Tallio Lack the Capacity to Enter a Guilty Plea?
- [199] Mr. Tallio asserts he was cognitively unable to instruct Mr. Rankin to enter a guilty plea or understand he had pleaded guilty. His position is that he did not give Mr. Rankin those instructions or, if he did, then he did not understand what he was doing. Mr. Tallio maintains that he is not saying that Mr. Rankin should have been aware of the extent of his cognitive limitations in 1983 but, at the same time, he appears to be saying Mr. Rankin should have done something more to ensure he understood the guilty plea as a result of Dr. Koopman's evidence as to his cognitive abilities given at the voir dire.
- [200] There is no doubt Mr. Tallio had a tragic childhood. His parents separated. He witnessed his mother's death by suicide. His family could not manage his behaviour so his father placed him into care. His father died. He was expelled from schools for behavioural issues; he was aggressive and delinquent, committing thefts of automobiles, guns, and money, break and enters, and assaults. His most serious offence was shooting his foster mother's mother, for which he received a youth custodial sentence. The historical records demonstrate that he apparently received considerable cross-disciplinary care, attention, and intervention. He had multiple assessments done by psychiatrists and psychologists, as well as medical tests, and brain imaging in 1984. None of those professionals suggested he had an inability to communicate or that he was cognitively impaired. He was considered to have dull-normal intelligence, meaning just below normal intelligence, but was an avid reader and writer. Steps Taken in Regard to Entering a Guilty Plea
- [201] An assessment of Mr. Tallio's cognitive capacity in the context of his guilty plea essentially comes down to what occurred between Mr. Tallio and Mr. Rankin. Mr. Rankin gave detailed evidence about the steps he took leading up to Mr. Tallio's guilty plea. Mr. Rankin testified he developed a rapport with Mr. Tallio. He did not use legal jargon. He broke things down and was careful to ensure Mr. Tallio understood legal concepts and the court proceedings. Mr. Rankin wrote the plea instructions out and explained them to Mr. Tallio. He had Mr. Tallio read and initial each paragraph and then sign the instructions at the end. Mr. Rankin was satisfied Mr. Tallio admitted his guilt to the sexual assault and murder of Delavina, and understood the nature and consequences of a guilty plea to second degree murder.
- [202] Mr. Tallio confirmed in open court, in the presence of the jury, that he was pleading not guilty to first degree murder but guilty to the included offence of second degree murder. Mr. Tallio did not challenge Mr. Rankin's evidence on this point and Mr. Rankin's evidence

is confirmed by both the trial judge's notes and the court clerk's notes. While Mr. Tallio says that did not happen, his alternative position is that if he did enter the guilty plea, then he either does not remember or did not know because he did not have the cognitive capacity to understand at the time that this was what he was doing. We note Mr. Tallio is not saying he was cognitively unable to enter a guilty plea. He is not arguing his guilty plea was involuntary. Ruling on the Voir Dire

- [203] Mr. Tallio submits this Court has to start with the trial judge's findings on the voir dire.
- [204] The trial judge excluded Mr. Tallio's second statement to Constable O'Halloran and his statement to Corporal Mydlak on the basis that the Crown had failed to prove their voluntariness beyond a reasonable doubt. The judge admitted Mr. Tallio's first statement to Constable O'Halloran, which he found to be voluntary. The judge further found that although Mr. Tallio would not have understood his right to counsel (Charter, s. 10(b)), the admission of that statement would not bring the administration of justice into disrepute (Charter, s. 24(2)).
- [205] In his ruling, the trial judge discussed Dr. Koopman's opinion that Mr. Tallio "was of low-normal intelligence, and thereby greatly impaired in relation to other young men of his age" and that "[s]he considered his level of functioning to be the equivalent of that of a child ten to twelve years of age." He described Dr. Koopman's testimony and her conclusions regarding Mr. Tallio's mindset in answering the police officers' questions:
- [10] Further, that because the [right to silence] statements were meaningless to him, and as the questioning proceeded after the asking of the questions, he would have concluded that he was required to answer. The doctor advised that the effect of the isolation imposed by the police would be devastating to Mr. Tallio. She explained that this would be due to the fact that he had few inner resources, and had an enormous dependence on others. She was also asked if she had an opinion as to what effect, if any, the tandem approach of interrogation would have had upon him, that is to say, the interrogation by Constable O'Halloran followed quickly by Corporal Mydlak. Her opinion was that, as he was submissive, he would be brought to believe he must respond, that the repeated questioning would cause him fatigue to a point where he would feel a need to bring it to an end, and that he would speak to stop the speaker.
- [206] Further, the judge commented:
- [14] Phillip Tallio appears as a well-developed seventeen year old. Nonetheless, as a result of a number of factors, he apparently has a functioning level of a child ten to twelve years of age. His actions, or lack of action, his responses to the questions to the police officers, his weak, at times inaudible, answers to the questions would seem to confirm Dr. Koopman's opinion.
- [207] Mr. Rankin testified he was surprised the judge accepted Dr. Koopman's evidence that Mr. Tallio was apparently functioning at a 10-12-year-old level. That was not Mr. Rankin's experience with Mr. Tallio. In cross-examination, Mr. Rankin described Dr. Koopman's voir

dire evidence as helpful defence evidence in relation to whether Mr. Tallio understood his right to counsel. However, her evidence did not fit with Mr. Rankin's assessment of Mr. Tallio during their interactions. Further, neither Dr. Marcus nor Dr. Koopman (both retained as experts to assist the defence) reported to Mr. Rankin that Mr. Tallio did not have the cognitive capacity or ability to understand legal proceedings. We do not accept Dr. Koopman's testimony that she told Mr. Rankin that Mr. Tallio could not understand the proceedings.

- [208] Mr. Tallio suggests Mr. Rankin did nothing wrong, but just did not realize his cognitive impairment, since Mr. Tallio was capable of giving the impression he did understand. Mr. Tallio says he is not saying Mr. Rankin provided ineffective assistance based on a failure to appreciate his lack of cognitive capacity.
- [209] Notwithstanding the trial judge's conclusions on the voir dire, we note that he still admitted the first statement Mr. Tallio gave to Constable O'Halloran, still accepted his guilty plea to second degree murder, and did not find it necessary to try the issue of fitness to stand trial. Dr. Murphy
- [210] Dr. Murphy assessed Mr. Tallio shortly after he was arrested. Her opinion was that he was fit to stand trial. This meant he had the ability to understand abstract legal concepts such as the nature of the proceedings, the role of the various players, and the available pleas. On the occasions Dr. Murphy saw Mr. Tallio, she asked him a number of fitness-related questions and recorded his answers. During cross-examination in this Court, Dr. Murphy testified that she asked the following questions and received the following answers from Mr. Tallio: · Do you know what you are charged with at this time?--Murder. · Do you know what pleas are available to you?--Guilty or not guilty. · What is the job of your lawyer, your defence lawyer?--Helps me in any way he can to get released or get a light sentence. · What about the prosecuting lawyer; what is the job of that person?--Tries to get me put away. · What does the judge do in court?--Decides whether the prosecutor or my lawyer is right, decides whether I go in or out. · What does a jury do if there is a jury in court?--Decides whether I am guilty or not guilty. · What would a witness do in court?--Person that was there on the scene. · Do people make a promise in court?--Concerning whether I'll tell the truth or not. · What happens in court if you don't tell the truth?--Perjury. · What does that mean?--It is serious to lie under oath. It could be serious enough to get you more time. · What is evidence in court?--Proof of the crime.
- [211] Mr. Tallio did not recall the specific fitness questions and his answers but agreed in cross-examination it was possible he was asked those questions and gave those answers.
- [212] Dr. Murphy repeated the questions to ensure Mr. Tallio truly understood. At times, Mr. Tallio was irritable and uncooperative. One time he refused to answer the questions. Sometimes, he provided a patchy history, but when asked in a different context would mention information he claimed to have forgotten. Dr. Murphy concluded that Mr. Tallio was able to answer all the fitness questions accurately and concluded that although his

intelligence was low, it was within the normal range, and he could understand court processes.

- [213] Dr. Murphy's notes of her first meeting with Mr. Tallio, which took place in the City Jail, indicate that the "circumstances leading to his arrest were not discussed by mutual agreement, since his defence lawyer had cautioned him concerning this." Mr. Tallio testified it was possible Mr. Rankin cautioned him not to discuss the offence with anyone, so by mutual agreement he did not discuss it with Dr. Murphy. He also agreed it was possible he refused to sign a form to release his youth forensic records until he had a chance to speak with his lawyer. This shows he was cognizant of his legal jeopardy to some extent and capable of relying upon advice from his lawyer.
- [214] Mr. Tallio did not directly challenge Dr. Murphy's fitness assessment. Yet he relies on some unidentified cognitive deficit that, by his version of events, at the time of trial, no one was aware of (other than purportedly Dr. Koopman). The considerable documentary evidence in the historical records obtained after he launched his appeal, some of which we will consider below, does not substantiate that deficit.
- [215] Dr. Murphy's final diagnosis of Mr. Tallio was antisocial personality disorder and alcohol abuse. Because Dr. Murphy saw Mr. Tallio as "not very accessible and somewhat irritable" with an IQ that "was not very high", she asked Dr. Pos to provide a second opinion. Dr. Pos
- [216] Dr. Pos's opinion was that Mr. Tallio was fit to stand trial in that he: [A]ppeared to know what he was charged with, the consequences of a conviction, what an oath is and the penalty for lying under oath, the general purpose of the trial, the role of the participants in the courtroom, pleas open to him and consequences of pleas. He appeared able to concentrate and participate. He appeared able to instruct counsel and be instructed by counsel, in my view. He has sufficient intelligence to understand the proceedings and follow the evidence with understanding. He is able to communicate and it appeared from what little he said concerning the alleged crime, that he has a reasonable memory of the events. If need be, he could testify on his own behalf.
- [217] Dr. Pos's opined that Mr. Tallio was able to "conduct his own defence, instruct his lawyer and be instructed by him." He diagnosed Mr. Tallio as "a conduct disorder, under socialized, aggressive". Dr. Marcus
- [218] Dr. Marcus's opinion was that Mr. Tallio was oriented to time, place, and person, and he was well aware of the subject matter under discussion. Mr. Tallio suggests this is different from suggesting he understood the complexities of what he was pleading to. We disagree.
- [219] Dr. Marcus saw Mr. Tallio three times: September 28, October 3, and October 12, 1983. He described him as "quiet and slow in communicating, but this is both cultural and he is naturally wary." When asked what happened with respect to Delavina, Mr. Tallio told Dr. Marcus he did not remember anything about it, not even going to Sam and Gert Mack's house. Mr. Tallio told Dr. Marcus he knew he was charged with the murder of the baby,

"they" were trying to accuse him of doing it but he did not do it, he was at home when he was picked up, and he did not remember giving a statement.

- [220] In his reporting letter addressed to Ellen Bond, Mr. Rankin's co-counsel, dated October 13, 1983, Dr. Marcus noted that Mr. Tallio "did convey to Dr. Pos and to the RCMP some aspects of culpability, however, over the time he has spent in custody and with myself, he has blocked out those memories, and adamantly stuck to the type of statements reported here." Dr. Marcus expressed, "[i]t is my clinical opinion Phillip has now suppressed his recall, using the mechanism of denial for, to admit it would be too catastrophic for him." He described Mr. Tallio as a deeply psychologically damaged young man who had an explosive sociopathic personality and is a danger to both himself and others. He concluded Mr. Tallio did, however, comprehend the difference between right and wrong.
- [221] Dr. Marcus also wrote: In an interview with Corporal Mydlak, Phillip did not know why he went to the Mack house and stated that he did not feel drunk. Phillip appears to have signed the statement with an x as acknowledgement. In his first interview with myself he said he had a blackout, "Just after I undressed her up at Delavina's and for just about the whole time I was doing it to her." He spoke of blacking out twice during the time it is alleged he attacked Delavina. [Emphasis added.]
- [222] Mr. Tallio says the above portion of Dr. Marcus's letter contains a typographical error and that he did not confess to Dr. Marcus. The letter reads, "In an interview with Corporal Mydlak " followed by "In his first interview with myself ." Mr. Tallio says "myself" should be "Mydlak." The Crown says the letter should be read as written, which would mean that Mr. Tallio also confessed to Dr. Marcus in words similar to those in his statement to Corporal Mydlak.
- [223] It does not make sense that "myself" is a typographical error given that Corporal Mydlak interviewed Mr. Tallio only once, whereas Dr. Marcus interviewed him three times. It is apparent Dr. Marcus read over the letter as he made a spelling correction and used the word "myself" again later.
- [224] The first part of the letter appears to be where Dr. Marcus is relating the history and the second part refers to his interaction with Mr. Tallio. The Crown suggests that had this appeal been brought in a timely fashion this could have been resolved while Dr. Marcus was still alive and that gaps in the evidence properly lay at Mr. Tallio's feet. Dr. Marcus died before the fall of 2016. He had no memory of the case when interviewed by the police in 2011; he apparently had dementia when contacted by the Innocence Project.

- [225] Mr. Tallio was cross-examined about whether he told Dr. Marcus that "just after I undressed her up at Delavina's, and for just about the whole time I was doing it to her" he had blacked out. He responded, "I don't recall that, no." He was asked if it was possible he said that and he responded, "I can't confirm or deny." Asked if it was possible he told Dr. Marcus that he blacked out twice during his attack on Delavina, Mr. Tallio said, "Again, I don't--remember this conversation." Asked if it was possible, he again said, "I can't confirm or deny."
- [226] Mr. Rankin was cross-examined about how he read Dr. Marcus's letter. He understood it to be an admission against interest by Mr. Tallio and this was one reason why he was concerned about putting Mr. Tallio in the witness box on a voir dire concerning the admissibility of the Pos statement. The Sentencing Hearing
- [227] Dr. Marcus testified at the sentencing hearing. He described Mr. Tallio as having "extreme difficulty in handling his own emotions, in terms of being able to sort them out in terms of planning, understanding and anticipating events. Although, on the surface level he can understand the difference between right and wrong, below that Phillip has great difficulty in dealing with actions when he is confronted with his own emotional impulses." He asked Dr. Koopman to see Mr. Tallio and adopted the following comment from her report: His ability to assess the relative importance of events and the seriousness of consequences is very impaired. He is unable to think through to the conclusion of most events he cannot predict or guess the probability of outcomes. He lets the chips fall where they may and lacks the responsibility for his acts, in the sense, your honour, that he rarely sees himself as the prime act in their existence. Dr. Marcus then gave his own opinion: I feel absolutely in accordance with that view in relation to this young man. The ultimate tragedy for which he stands before this court, is one again in which it is in a sense the climax of a series of enormous social unhappiness in the young man and yet he had gone to Bella Coola at the time in terms of a place to be, that was to be enduring, he had a young lady, a girl friend, she has had his own child, he is - he has emotions of a good sort in relation to that. I had to come to the conclusion, your honour that he represents the diagnostic category in the DSM-3, which is the American psychiatric standard, its called the diagnostic and instructional manual of the American Psychiatric Association. That he fits the category of a sociopathic personality, a young man with impulsive difficulties uninhibited under alcohol, who has been in a lot of trouble. Who has explosive outbursts on occasion. But your honour, that is - that diagnosis is only a way of communicating, it no way explains Phillip's tremendously deep seated psychological turmoil and his almost unsocialized quality.
- [228] When questioned by Crown counsel, Dr. Marcus expressed an opinion about what had happened to Mr. Tallio that had led to Delavina's death: he was going to school and he had a girl friend. And what I am saying your honour, is that I do not believe you wish the events traced that particular night, but in a sense, again, Phillip felt lost. There was nowhere to sleep, there was nowhere to sleep in the house. The house was totally occupied by the maximum, they had come to stay, he was sitting on a chair and falling asleep. He had had a few drinks. He wandered into the night. I am saying your honour, that such events, such

small events can precipitate a young man like this to sometimes terrible tragedies. They are not necessarily connected. Phillip Tallio is not and has no history of being a previous sexual offender, for instance. Do you follow me? It's an unpredictable, totally inconsistent moment.

- [229] Dr. Marcus was aware there was a history of spontaneous violence, including the shooting incident of a woman in Williams Lake. The Crown then asked, "Is it your opinion then, that small and otherwise insignificant events what can trigger some very impulsive, very violent behavior on the part of Phillip Tallio, such that nobody around could see that this is what's happening?" Dr. Marcus replied: Absolutely. I find that he develops attitudes and ideas to situations and to people, that his emotions influenced his appropriate judgment. He does for instance, not know sometimes, who's on his side and who isn't. Because he can't really sort it out. In response to a later question, Dr. Marcus gave the following opinion: Phillip is just under the average range in intelligence. I think he can have the capacity to change, with assistance, with very experienced assistance.
- [230] The trial judge's reasons referred to the circumstances of the offence as "a senseless tragedy". Based on the opinions of Dr. Marcus and Dr. Koopman he commented, "Phillip Tallio's unfortunate childhood has made him an individual whose emotions influence his judgment." His "childhood was a total tragedy"; "his emotional problems started at an early age with his mother's suicide and he has gone from crisis to crisis since then." His life was described as a "turmoil". The judge said, "Phillip Tallio, in his present condition, is a danger to society", but, based on the opinions of Dr. Marcus and Dr. Koopman, the judge felt he could be helped.
- [231] There was never a suggestion by Dr. Marcus that Mr. Tallio lacked cognitive capacity. Dr. Koopman
- [232] Mr. Rankin retained Dr. Koopman in 1983 on the recommendation of Dr. Marcus. Dr. Koopman's 1983 notes and letters contradict Mr. Tallio's present recollection and assertion of innocence, as well as her present evidence that Mr. Tallio denied the offence. In 1983, Dr. Koopman was of the view that Mr. Tallio had the capacity to understand legal matters. Today, she seems to suggest he did not have the ability to understand anyone but her.
- [233] In 1983, Dr. Koopman documented that Mr. Tallio had no memory or recollection of what happened at Sam and Gert Mack's house. He talked about blackouts and loss of conscious awareness for events that tend to be aggressive. These blackouts occur when he is angry or when someone is angry or aggressive towards him. Her notes indicate that Mr. Tallio understood the nature of the allegations and the offence with which he was charged. She concluded he did not satisfy the legal definition of insanity and considered him to be dangerous to himself and others.

- [234] Mr. Tallio's assertion that he told Dr. Koopman what happened from the time he left Cyril and Nina Tallio's house until he returned from Sam and Gert Mack's house is not reflected in Dr. Koopman's notes.
- [235] In her testimony before this Court, Dr. Koopman confirmed that Mr. Tallio never denied speaking with Corporal Mydlak or Dr. Pos. She frequently offered her opinions, impressions, and speculations, some of which were beyond her expertise (for example, linguistics and fitness to stand trial). In her 2014 affidavit, she said in her clinical experience Mr. Tallio "did not understand the court proceedings, the differences between first and second degree murder, his plea or the consequences of that plea." In her opinion, Mr. Rankin did not know this. Everyone else believed Mr. Tallio was cognitively functioning except Dr. Koopman who said, "I do not believe that Phillip understood what he thought he understood or what others thought he understood." She then offered a clinical opinion that "Phillip, the RCMP and Mr. Rankin did not appreciate that his emotional, cognitive and linguistic limitations had rendered it impossible for him to fully appreciate his situation or anticipate what the outcomes would be." And finally, she commented: "During the time after Phillip was arrested and then being tried for the index offence, he was unable to adequately understand his situation or to instruct counsel but he did not know that nor did his counsel or the RCMP."
- [236] These assertions fly in the face of Dr. Koopman's 1983 notes, which describe a conversation she had with Mr. Tallio during the voir dire concerning some evidence suggesting he had not asked to see anyone while detained--evidence which Mr. Tallio disputed when speaking with Dr. Koopman. As well, Dr. Koopman had always maintained Mr. Tallio could understand things if one took time and care in discussing them with him. These assertions also fly in the face of the evidence of Dr. Murphy, Dr. Pos, and Dr. Marcus that Mr. Tallio was fit to stand trial. Most importantly, as a psychologist, Dr. Koopman is not qualified to opine on fitness to stand trial.
- [237] We agree with the Crown that Dr. Koopman's evidence before this Court is so tainted by advocacy as to be unreliable. We go further and say her credibility is severely affected by her assertion before this Court that she was in Prince Rupert when a plea to second degree murder was being discussed. Dr. Koopman testified Mr. Tallio told her he thought a plea to second degree murder did not amount to an admission he killed Delavina and that he hoped he would be home by Christmas. However, it is beyond question that she was not present when the possibility of a plea arose because she had left Prince Rupert on October 26, 1983, two days before the trial judge pronounced his voir dire ruling which was the impetus for the plea discussions.
- [238] Dr. Koopman misled this Court on a second significant point, claiming that in 1983 Mr. Tallio denied committing the offence to her. Her letter to Ms. Bond described Mr. Tallio's history of blackouts. In that letter, Dr. Koopman noted that Mr. Tallio told her he experienced periods of loss of consciousness/awareness for events that tend to be aggressive. These blackouts occurred when he is angry or when someone is aggressive or

angry to him. The loss of consciousness could be from a few minutes to up to an hour or more. He is unaware something has happened until someone tells him. The blackouts come out of nowhere and often when everything is good. He told Dr. Koopman he had no recollection of any of the activities that preceded or caused Delavina's death. He had no recollection of approaching her, lifting and carrying her to another room, undressing her or himself, participating in the sexual act, or placing a pillow over her face. All he recalled was being aware he must tell his aunt, Nina Tallio, that he thought Delavina was dead. He told Dr. Koopman that "he felt almost in a fog or stupor at the time, but was adamant that it was not due to alcohol." Nowhere in Dr. Koopman's 1983 notes, or in her 2014 affidavit, does she suggest Mr. Tallio denied committing the offence.

- [239] In addition, before this Court, Dr. Koopman suggested, for the first time, that Mr. Tallio understood being charged with first degree murder meant he had killed the child but also believed that pleading guilty to second degree murder meant he was not guilty. She testified she told Mr. Tallio to speak to Mr. Rankin about this and she warned Mr. Rankin of Mr. Tallio's confusion. She indicated to Mr. Rankin that Mr. Tallio might misunderstand a plea to second degree murder, yet she testified she never told Mr. Rankin that Mr. Tallio had denied committing the offence to her. Mr. Tallio did not cross-examine Mr. Rankin on this significant point.
- [240] In closing argument, Mr. Tallio submitted we should bifurcate Dr. Koopman's evidence and not rely on anything from her post-1983. He says we should ignore her affidavit and testimony and rely only on her 1983 report and her voir dire evidence. However, he does not withdraw her more recent evidence because he says it provides context for the 1983 analysis. This is an untenable position.
- [241] All that we take from Dr. Koopman's 1983 interactions with Mr. Tallio is that care was needed in explaining things to him to make sure he understood. This is something Mr. Rankin said he did and Mr. Tallio did not challenge that evidence. Further, the corrections records, which we will consider in more detail below, indicate Mr. Tallio was able to advocate for himself and request any assistance he wanted. Historical Records
- [242] Historical Ministry of Children and Family Development records are before this Court as business records. These include records from the Ministry of Human Resources, youth probation records, and youth and adult FPI records. In addition, Mr. Tallio's CSC records are before the Court. No issue was raised with respect to the admissibility of these records.
- [243] These records provide the best evidence of Mr. Tallio's cognitive and communication skills before and after his conviction. They establish he was experienced with the police and the criminal justice system and familiar with court proceedings such that he would have understood Mr. Rankin and the trial proceedings.

- [244] Mr. Tallio's youth records span the years 1978-1982. He was convicted, or entered guilty pleas, to six break and enter and theft offences, discharging a firearm with intent to endanger life, and theft over \$200. For the last two offences, he received custodial sentences and was remanded to the Youth Detention Center ("YDC").
- [245] In a letter dated August 6, 1984, Mr. Tallio wrote to Charlene Mignacco, who was his social worker in Bella Bella and a family friend. He thanked her for helping him through his trial and conviction and lifting his spirits when he wanted to give up. Notably absent is any protestation of innocence or claim of being urged by Mr. Rankin to plead guilty. Mr. Tallio testified Charlene helped him in terms of moral, not legal, support.
- [246] Mr. Tallio's 1988 letter to IPO Toles demonstrates that he knew the Pos statement was the impetus for the plea bargain because of parole eligibility. In our view, the statements in that letter show Mr. Tallio was cognitively aware and engaged in his trial proceedings.
- [247] There are also many documents evincing that Mr. Tallio is a capable writer. He wrote poetry. He wrote a comprehensive letter to his now lawyer, Rachel Barsky, detailing his time in prison and complaining about sexual offender programing he was being offered that he did not think was accredited.
- [248] Mr. Tallio's CSC records contain numerous documents that evince his ability to advocate for himself with respect to legal, medical, educational and work-related matters. These include changing his name because he "wasn't bringing recognition to the Tallio name" while in prison (he later changed his name back); setting up trust funds; requesting institutional and job transfers; requesting a pay raise; and threatening legal action if he did not get knee braces. He requested a language course and dictionary so he could learn to speak Norwegian, and permission to get a marriage licence, engagement ring, and wedding bands so he could marry his Norwegian pen pal. Not long after the breakdown of that relationship he asked for permission to get an engagement ring for another woman. He asked for permission for family visits. He asked to obtain a lawyer for family law proceedings to take his child's mother to court to establish paternity and for access. As early as 1984, he submitted a form where he ticked two boxes for parole information about the dates he would be eligible for parole and day parole but did not tick a third box indicating "appeals".
- [249] Mr. Tallio did well in advancing his education. He completed his GED. He requested permission to take a university creative writing course but did not pursue it. He successfully completed programs and courses to become a welder, a peer facilitator for persons with alcohol and drug problems, and a palliative caregiver. Of note is the description of the palliative care program and the comment that he was a "responsible reliable member of this program", who was "consistent in the things he does" and "organized in his activities and all his homework assignments were done in a high quality", and who "assisted other members of the program in learning hands-on exercises as well as palliative care."

- [250] In cross-examination, Mr. Tallio claimed he had help from educated inmates and "jailhouse lawyers" to author numerous articulate documents, many of which are in his own cursive handwriting. He explained these documents by stating he had a lot of time to write and revise while in lockdown. Mr. Tallio stated in his first affidavit that he preferred to communicate in writing. In fact, Mr. Rankin took written plea instructions. Yet, in re-examination, Mr. Tallio claimed he had difficulty reading cursive writing. That is simply not believable.
- [251] We note, as well, that in his first affidavit Mr. Tallio set out with clarity and detail his understanding of how the corrections system treatment and parole process worked and why he chose to waive some of his parole hearings.
- [252] We do not accept Mr. Tallio's assertion that he was cognitively unable to instruct Mr. Rankin to enter a guilty plea or understand that he was pleading guilty. His evidence is simply not credible. Mr. Rankin swore an affidavit and testified that he fulfilled his obligations to Mr. Tallio in connection with the guilty plea. Mr. Rankin gave detailed evidence of the steps he took leading up to that plea. He made an effort to develop a rapport with Mr. Tallio. He was careful to ensure Mr. Tallio understood the legal issues in his trial by breaking them down and explaining them plainly. He did not use legal jargon. It appeared to him that Mr. Tallio understood what they were speaking about. Mr. Rankin was satisfied that Mr. Tallio admitted to the essential elements of the offence and understood the nature and consequences of a guilty plea. The documentary evidence corroborates Mr. Rankin's perception of Mr. Tallio's cognitive abilities. Fresh Evidence with Respect to Cognition
- [253] We turn now to the fresh evidence Mr. Tallio seeks to adduce in support of his contention that he lacked the cognitive ability to understand what was happening when he pleaded guilty. Asante Report/Dr. Conry
- [254] The Asante Report is a diagnostic assessment with respect to Mr. Tallio prepared by the Asante Centre in Maple Ridge, British Columbia, in January 2016 at the request of the Innocence Project; the assessment took place in early December 2015. Dr. Conry is one of the three professionals who authored the report.
- [255] The purpose of the assessment was to determine whether Mr. Tallio has Fetal Alcohol Spectrum Disorder ("FASD") and "to assess his level of comprehension and identify any struggles that may cause him to have a lower level of comprehension or expressive ability than a typical individual." The report focuses on Mr. Tallio's present ability to function. It was not a forensic opinion of his functioning and ability to understand legal proceedings in 1983, and does not comment on his ability to function in 1983. The "Clinical Profile" at the end of the report with respect to the diagnosis states, "FASD not confirmed". In that regard, it continues: An FASD diagnosis could not be made as we were unable to confirm a history of significant prenatal alcohol exposure. In addition, the functional brain assessment did not meet the criteria for FASD.

- [256] In response to the Asante Report, the Crown filed the affidavit of Anthony Dugbartey, a clinical psychologist. Dr. Dugbartey expressed criticism of the methodology used in assessing Mr. Tallio and with the report's conclusions. He referred to the fact that in British Columbia only a psychiatrist can complete a court-ordered fitness assessment and explained why, in his opinion, the 2015 assessment cannot be taken to reflect Mr. Tallio's cognitive abilities in 1983.
- [257] Mr. Tallio filed Dr. Conry's affidavit in response to Dr. Dugbartey's affidavit. To some extent, her affidavit is a critique of his critique. Dr. Conry is a co-author of the Canadian Diagnostic Guidelines for FASD. In her affidavit, she stated that although Mr. Tallio does not meet the Guideline's criteria she is of the opinion that he "most likely does have FASD" (emphasis in original). In cross-examination she referred to "read[ing] between the lines".
- [258] The Asante Report deals with Mr. Tallio's abilities as of late 2015, yet Dr. Conry asserted in her testimony that Mr. Tallio's cognitive limitations are the same today as they were in 1983. In coming to that conclusion, she placed reliance on Dr. Koopman's affidavit and did not conduct her own examination of the historical records and reports. She acknowledged there is no way to know what legal terms Mr. Tallio understood in 1983, but characterized legal terms as "extremely abstract". She did not accept that Dr. Murphy properly conducted the fitness assessment in 1983, quarrelling with what questions Dr. Murphy asked to elicit Mr. Tallio's responses.
- [259] In our view, Dr. Conry's opinions are neither credible nor reliable. Her evidence is tainted by advocacy and reliance on Dr. Koopman. We, therefore, attach no weight to her opinions. As the Asante Report sheds no light on Mr. Tallio's cognitive abilities in 1983, we also attach no weight to it.
- [260] Given our conclusion with respect to the Asante Report, there is no need for us to consider Dr. Dugbartey's criticisms of it. In effect, his affidavit has become irrelevant. Accordingly, it is excluded. Colleen Burns
- [261] Colleen Burns provided an affidavit in 2015 describing Mr. Tallio as "glazed-over" when she visited him in the jail cells in Nanaimo in 1982. She said, "Phillip appeared to have some kind of cognitive difficulties and he struck me as having difficulty following conversations."
- [262] Ms. Burns was Mr. Tallio's social worker in Bella Coola for periods from about 1980 to 1983. Mr. Tallio was not under her direct supervision because, for the most part, he was in the YDC and then lived in Nanaimo and Bella Bella. It appears she may have met Mr. Tallio only once or twice. Contrary to what Ms. Burns said in her affidavit, when she completed a referral for him to The Maples, a youth treatment center, she described his verbal ability to communicate with adults as a positive characteristic. Her contemporaneous notes do not mention any cognitive deficits. Marie Spetch

- [263] Marie Spetch met Mr. Tallio when he was in the YDC, where she worked as a youth probation officer, and she became like an adoptive mother to him. In 2011, she signed a solemn declaration in which she related Mr. Tallio told her about a proposed plea bargain where he would receive life imprisonment with parole eligibility after 10 years and that Mr. Rankin told him, "[T]his is what I suggest you do." He did not want to plead guilty and wanted to fire his lawyer. After Mr. Tallio was sentenced, she asked him why he pleaded guilty and he said Mr. Rankin told him he would be out in ten years. She could not recall if Mr. Tallio told her he agreed to the plea. She described Mr. Tallio as "slow mentally", and said that she had to explain things to him and had to be careful about the words she used.
- [264] Mr. Tallio has filed an affidavit Ms. Spetch swore in 2013. In that affidavit, she said Mr. Tallio told her he had been pressured into pleading guilty. She thought he did not understand the legal proceedings. He always seemed somewhat slow mentally and she often had to explain things to him repeatedly. Paul Wilson
- [265] Paul Wilson was Mr. Tallio's social worker at the time of the offence. He testified on the voir dire at the preliminary inquiry so this Court has his evidence from 1983 with respect to Mr. Tallio's ability to understand and advocate for himself. In 2016, he provided an affidavit addressing whether Mr. Tallio could grasp concepts and whether he was "mentally challenged". He was not qualified to give those opinions so he provided a revised affidavit in 2020, which did not contain the offending statements. There are inconsistencies between his notes, written in 1983, and his revised affidavit about his impressions of Mr. Tallio's cognitive abilities. In the end, Mr. Wilson appears to say Mr. Tallio was able to ask for things he wanted and he was capable of understanding instructions if one took time to explain things to him. Dr. O'Shaughnessy and Dr. Semrau
- [266] Dr. Roy O'Shaughnessy and Dr. Stanley Semrau provided affidavits. Both are psychiatrists. In argument, Mr. Tallio indicated that he relies on these affidavits solely to summarize what is in other reports. This evidence is unnecessary and does not assist the Court, as it is simply a restatement of what is already before the Court. These affidavits are, therefore, inadmissible. Accordingly, the affidavit of Monica Bell, which only provides Dr. O'Shaughnessy's curriculum vitae, is irrelevant and is also inadmissible. Leslie Hall Pinder
- [267] Leslie Hall Pinder is a lawyer who spoke with Mr. Tallio once by telephone on the night of April 23, 1983. She testified on the voir dire at the trial. In an affidavit sworn in 2012, Ms. Pinder stated that, based on the phone call, she was concerned Mr. Tallio did not understand her, lacked tone, and was not responsive. She could not say the cause, but surmised it could be a mental deficiency. Dr. McIlwain
- [268] Dr. Raymond McIlwain interacted with Mr. Tallio in police cells on the morning of April 23, 1983, when he examined Mr. Tallio for forensic evidence. Dr. McIlwain testified at the preliminary inquiry. In an affidavit sworn in 2014, Dr. McIlwain described his impression of Mr. Tallio as naive. However, Mr. Tallio understood verbal requests and provided medical consent. Mr. Barnett and Mr. Cairns

- [269] Charles Cunliffe Barnett presided over Mr. Tallio's preliminary inquiry in 1983. Jeffrey Cairns was the court reporter at Mr. Tallio's trial. Mr. Tallio relies on an affidavit Mr. Barnett swore in 2016, and one that Mr. Cairns swore in 2012. Neither had any direct interactions with Mr. Tallio. Both described observing what can be said to be immature behavior by Mr. Tallio. For example, Mr. Barnett said that on a flight from Bella Coola to Vancouver, Mr. Tallio sat in the back of the aircraft reading comic books and seemed unconcerned about his situation. Mr. Cairns described Mr. Tallio being upset about missing Halloween and the sheriffs giving him candy. Conclusion with Respect to Cognition
- [270] We consider that the best evidence of Mr. Tallio's cognitive abilities in October of 1983 is found in the historical records of the Ministry of Children and Family Development relating to him, the contemporary opinions that he was fit to stand trial and instruct counsel (which are not challenged on this appeal), and the answers to the questions posed by Dr. Murphy that support that conclusion. Weighing this evidence with the observations in the fresh evidence, we are not satisfied that the allegation of lack of competence has been made out. In our view, Mr. Tallio has failed to establish that, as a result of a cognitive disability, he did not understand what the term "guilty plea" meant or appreciate that he was admitting to sexually assaulting and killing Delavina. The DNA Evidence
- [271] Tissue samples taken from Delavina at the time of the autopsy in 1983 were stored at Children's Hospital. DNA testing was not yet known, and no testing for DNA was done. Starting in 2011, and continuing until shortly before the evidentiary hearing phase of this appeal, a number of DNA tests were conducted on these tissue samples. While the results of the DNA testing are not in dispute, the significance of those results is very much at issue in this appeal.
- [272] Mr. Tallio relies on evidence derived from this DNA testing. He submits that the results of the testing demonstrate that there was a miscarriage of justice in respect of his conviction in 1983. The Crown has introduced responsive evidence to support its position that the DNA testing is inconclusive. In addition to receiving this evidence by affidavit, we heard cross-examination of two experts relied on by Mr. Tallio--Dr. Staub and Dr. Hampikian--and one expert relied on by the Crown--Dr. Bieber.
- [273] The cogency of the DNA evidence turns on whether the DNA that was tested (or some of it) came from the perpetrator of the crime and if so, whether any conclusions can be drawn as to Mr. Tallio's participation in the crime.
- [274] The most significant results came from tests of a uterine tissue sample obtained at the time of the autopsy and tests of a fluid referred to as the xylene wash associated with a vaginal tissue sample also obtained at the time of the autopsy. It is common ground that the male DNA found on these two samples came from two different males. The DNA test associated with the vaginal tissue sample excludes Mr. Tallio as a contributor. If that DNA was left by the perpetrator, then Mr. Tallio would be exonerated. The DNA from the uterine tissue sample does not exclude Mr. Tallio. If that DNA was left by the perpetrator, then the

perpetrator could be Mr. Tallio or someone in his patrimonial lineage. A recent test of the vaginal tissue itself yielded results inconsistent with the results from the xylene wash, further complicating the analysis.

- [275] Much of the evidence we heard focused on whether it was likely that the tissue samples had been contaminated after the crime (or perhaps before the crime) so that the DNA being tested cannot be assumed to have come from the perpetrator. If so, the test results can have no relevance to the case. The Crown submits that the process by which the tissue samples were obtained, preserved, and handled prior to testing, as well as the testing process itself, makes the possibility of contamination high. The fact that the test results show that DNA associated with the uterus and the vagina came from two different males may also be suggestive of contamination in at least one of the samples, if not both.
- [276] Before explaining the issues that divided the experts, we will explain the type of DNA testing that was done, with its potential benefits and its limitations. Testing for Y-STR DNA Evidence
- [277] Human DNA consists of 23 pairs of chromosomes: 22 pairs of "autosomes" and one pair of "sex chromosomes" (X and Y). Autosomal DNA evidence includes all 22 autosome pairs, which every individual possesses and which are unique to every individual. If autosomal DNA evidence can be identified as coming from the perpetrator of an offence, then that evidence can be matched to a unique individual, leading to either exoneration or virtually certain guilt. No autosomal DNA evidence was obtained in this case.
- [278] This case concerns male DNA evidence found on the Y chromosome. Testing for DNA on the Y chromosome can be particularly useful in cases where the tissue is from a female victim, and thus it can be expected that there will be a large amount of female DNA and a comparatively small amount of male DNA on the tissue. Identifying DNA on the Y chromosome will exclude female DNA. If sufficient DNA is found on a sample, then a profile can be generated of the donor of the DNA. One nanogram of DNA is usually sufficient to obtain at least a partial DNA profile.
- [279] The method used to test for male DNA is called Y-STR testing. STR stands for short tandem repeats. STRs are repeating sequences of DNA arranged in succession at a particular location on the chromosome (also referred to as a locus, or marker). The number of repeats at each marker is referred to as an allele, and is identified in each case by a number. By graphing the allele number to a specific marker on the chromosome, a DNA profile of the donor of the DNA can be obtained. That profile can then be compared to the DNA profile of other male subjects by determining their allele numbers at the same markers. This means of testing has been available since about 2004. There are now tests that can sometimes distinguish between patrilineally related males, but those tests were not available when the original Y-STR testing in this case was done. Subsequent tests at the Netherlands Forensic Institute to attempt to further differentiate the results of the uterine tissue analysis in order to distinguish between patrilineally related males were unsuccessful.

- [280] Individuals can either be excluded (because their Y-STR profile is different from the DNA evidence extracted from the crime scene) or not excluded (because their Y-STR profile is the same, but is not unique to them).
- [281] The significance of a conclusion that an individual is "not excluded" from the relevant DNA profile depends on the number of individuals who share that Y-STR profile. Identifying the size of that pool can be statistically difficult, particularly in a community such as an Indigenous community where there may be a higher degree of common ancestry than would exist in the general population. The Test Results
- [282] The procedure by which DNA was identified on the tissue samples is relevant to the central issue that divided the experts: the likelihood of contamination of the samples. There are two relevant stages to consider: the handling of the tissue at the time of the autopsy and the processing of the tissue when it was tested. Preservation of Tissue Samples at the Autopsy
- [283] Dr. Taylor conducted the autopsy on April 23, 1983, at Children's Hospital. Dr. Taylor deposed that tissue samples were collected to be examined later for cellular injury or disease. The tissue samples were taken for pathology or diagnostic purposes, not for forensic DNA purposes. Dr. Taylor was unable to find evidence of spermatozoa.
- [284] In their respective affidavits, Dr. Taylor and Richard Mah, a lab technologist at Children's Hospital at the time, explained the process for handling and preserving tissue samples taken at an autopsy as of 1983. The tissue samples were approximately 3 mm by 5 mm in size. They were placed in small permeable cassettes with a plastic bottom and metal lid which were in turn put into metal racks. The metal racks were then put into open containers of formalin for preservation after the autopsy. The metal racks used at the time held at least 150 tissue cassettes. Records indicate that the samples from Delavina's autopsy remained in the cassettes in formalin for four days. Formalin does not destroy DNA, though it can degrade it.
- [285] The tissue cassettes were closed in order to keep the tissue samples inside. However, the tissue cassettes were shallow, permeable containers with holes or vents throughout the tops and bottoms because the chemical solutions needed to be able to flow in and out of the tissue cassettes in order to bind and process the tissue sample. The metal racks also had holes throughout to allow the chemical solutions to move through the rack.
- [286] It was common for a single metal rack to contain tissue cassettes from multiple autopsies, and for multiple metal racks containing tissue samples from multiple autopsies to be put in the same container of formalin at the same time. The effect of this process was potentially to expose the tissue to formalin containing other persons' DNA. The view at the time was that there was no need to keep any autopsy tissues separate because the tissue samples were taken to study the tissue itself, not to assess foreign matter that may have attached itself to the tissue sample.

- [287] After the metal racks had been in formalin for some time, the metal racks were taken out of the formalin and put into a tissue processor for overnight processing. This involved a series of chemical solutions and wax being pumped into and later drained out of the container holding the metal rack of tissue cassettes. The chemicals and wax used for these processes were changed twice a week, or when they were visibly dirty or no longer effective.
- [288] After processing the tissue in the tissue processor, the rack of tissue cassettes would be removed and each piece of tissue embedded into a paraffin wax block. After the paraffin wax tissue blocks had hardened, the lab technician would cut them on a microtome to create thin sheets that would be mounted as microscope slides for examination. Mr. Mah stated that the technicians did not usually wear gloves when using the microtome or when organizing the cassettes for storage. What remained of the tissue wax block would be stored in the condition it was in as it came off the microtome without further protective coverings. No additional wax would be added. The effect of this was that part of the tissue would be exposed when stored.
- [289] These tissue blocks, referred to as formalin fixed paraffin embedded ("FFPE") tissue blocks, provided the basis for the subsequent DNA testing. The Orchid Cellmark Testing
- [290] In July 2011, the Innocence Project asked the RCMP to determine whether any histology samples taken at the autopsy survived. The RCMP located 45 samples stored at Children's Hospital. At the request of the Innocence Project, the RCMP sent seven of the samples to Orchid Cellmark ("Cellmark"), a private lab in Texas, for testing. The purpose of the testing was to determine whether any male DNA could be extracted from the tissue samples.
- [291] The procedure by which Y-STR DNA testing is done requires extraction of the DNA in liquid form, quantitation or measurement of the DNA, copying of the DNA regions through a process called PCR amplification, and analysis through specialized testing kits to assign alleles to the DNA fragments based on size. The alleles at all markers tested make up the DNA profile of the sample or individual.
- [292] Cellmark used a testing kit known as Yfiler. A complete Yfiler profile would assign an allele number to 17 markers. In this case, there was not enough DNA to identify the alleles at the 17 markers used by Yfiler. Thus, in all of the testing that is included in the proposed fresh evidence, the results represent a partial DNA profile.
- [293] At Cellmark, the usual purpose for DNA testing of tissue was to identify the donor of that tissue. For that purpose, their protocol was to remove a piece of the tissue, soak it in the chemical xylene to dissolve the paraffin wax, discard the xylene, soak the tissue in various chemicals to release the DNA from the tissue in liquid form, and then analyze the resulting liquid containing the DNA with the use of a commercial testing kit. If there was enough DNA to exceed the minimum thresholds, then the result would be a graph of numbers (representing the size of the alleles) at specified markers that could be compared to the size of the alleles at the same markers for specific individuals. If any allele number was different, then the individual was excluded. If all the allele numbers were the same, then

the individual was not excluded.

- [294] In this case, the standard protocol had to be modified, as the goal was not to determine the identity of the tissue donor (Delavina), but to identify DNA foreign to her on the surface of the tissue. For this purpose, Cellmark modified its procedure by preserving and testing the xylene wash to determine if any foreign DNA was on the surface of the tissue, as well as extracting the DNA from the tissue itself.
- [295] Dr. Staub, who was the Forensics Laboratory Director and Y-STR Technical Leader at Cellmark when the testing took place, testified that he thought it would be very difficult to get results from these samples because he thought it likely that any male DNA would be washed away in the processing of the samples. The procedure he adopted of preserving and testing the xylene wash after melting the paraffin instead of discarding it had not been done before at Cellmark.
- [296] The seven FFPE tissue blocks provided to Cellmark in August 2011 were identified as vaginal laceration, thigh, three vagina tissues, and two lesions from leg tissues. The first block tested was labeled vaginal laceration. Both the xylene wash and the tissue itself were tested, but no male DNA was identified on either. The next block tested was labeled thigh. Again, both the xylene wash and the tissue itself were tested but again, no male DNA was identified.
- [297] Cellmark then tested the three tissue samples labeled vagina. The decision was made to test the xylene wash from each of these tissues, but not the tissue itself, as no male DNA had been detected in the previous two tissue samples. No male DNA was found in two of the xylene washes, but a partial male DNA profile was obtained from the third xylene wash. Results were obtained at 8 of the 17 markers. The results excluded Mr. Tallio (and his male paternal relatives) as a possible contributor to the sample. The tissue itself was not tested by Cellmark and was not tested by anyone until shortly before this appeal was to be heard.
- [298] Following the results of the xylene wash of the vaginal tissue, the RCMP took over the case and requested additional DNA testing. Blood samples of several known individuals involved in the autopsy and the storage of the tissue samples at Children's Hospital were sent to Cellmark, but the DNA profiles from these samples did not match the partial profile obtained from the xylene wash.
- [299] Following these results, the issue of possible contamination of the samples was raised. In her affidavit, Huma Nasir, the Senior Forensics Analyst at Cellmark at the time, described the discussions in March 2012 about possible contamination: The issue of contamination was brought up and since all tested individuals were excluded from the DNA profile, there was a concern that this DNA profile may have been a result of contamination originating from the hospital's preparation process of the FFPE tissue. This contamination concern was suggested because the top surface of the tissue block containing one side of the embedded tissue is exposed and therefore may contain foreign DNA. Furthermore, the paraffin used to prepare the tissue block could be contaminated. Therefore, any male DNA

present on the top surface of the tissue block or in the paraffin wax would have been extracted in the first xylene wash of the tissue.

- [300] To address the possibility of contamination, Cellmark tested the remaining paraffin in the tissue block cassette, but no male DNA was detected from this sample. Because the tissue had already been removed, it was no longer possible to test the top, exposed surface of the tissue block, and the decision was made not to test any of the vaginal tissue itself.
- [301] For the final test of the other tissue samples labeled lesion from leg, Cellmark scraped off the top layer of the tissue sample in order to remove any DNA that might be present on the surface of the tissue block before the xylene wash. The xylene wash was tested for each of these samples but no male DNA was detected.
- [302] In December 2012, the RCMP requested DNA testing on the 38 remaining FFPE tissue blocks that had been located at Children's Hospital. For these tests, the RCMP asked Cellmark to take the additional step of first swabbing the exposed surface of the tissue block to collect any DNA that might be present on that surface. Four DNA extracts generated from these 38 FFPE tissue blocks exhibited male DNA and produced partial DNA Y-STR profiles. The samples that produced results were the surface swabbing of left motor FFPE tissue, the surface swabbing of left basal ganglia FFPE tissue, the surface swabbing of upper lobe lung FFPE tissue, and the FFPE tissue labeled uterus. It is common ground among the experts that the surface swabbing of the first three samples (the brain and lung samples) produced male DNA from contamination of the samples. It appears likely that this DNA came from a lab technician at Children's Hospital.
- [303] The fourth sample, however, from the uterine tissue, yielded a partial Y-STR profile for 7 of the 17 markers tested. An additional allele was obtained at an eighth marker--YGATA H4--during the testing, but was not reported in Cellmark's final report. This profile was consistent with the Y-STR profile for Mr. Tallio and Cyril Tallio (and by extension, their paternal relatives). Thus, Mr. Tallio could not be excluded as the donor of the male DNA found on the uterine sample. Testing of the Vaginal Tissue in 2019
- [304] Shortly before this appeal was heard, vaginal tissue samples that Cellmark had removed from paraffin blocks but had not tested were sent to the British Columbia Institute of Technology ("BCIT") for testing to determine whether any male DNA could be identified. BCIT was able to use a more sensitive testing kit than was available to Cellmark, called Yfiler Plus. This kit can measure alleles at as many as 27 markers if the amount of DNA is sufficient.
- [305] BCIT was able to extract a small amount of DNA from two of the vaginal tissue samples. Male DNA was detected at one marker on one of the tissue samples and at four markers on another tissue sample. These partial profiles were consistent with the profile of Mr. Tallio, so that he could not be excluded from being the donor, but the small amount of DNA located on these samples suggests that little weight should be given to them. What can be said is that this DNA came from a different male than the DNA in the xylene wash tested by

Cellmark and also that the profile of that male does not exclude Mr. Tallio.

- [306] Dr. Hampikian raised the possibility that the BCIT laboratory was experiencing contamination issues, based on the failure of a negative control at the BCIT lab. The negative control had revealed female DNA from one of the BCIT lab technicians.
- [307] Notwithstanding this concern, Dr. Hampikian considers the two vaginal samples to have provided "potentially meaningful results" and observed that they were consistent with the partial profile obtained by Cellmark from the uterine tissue sample. He concluded these results were consistent with two males having contributed to the DNA recovered from the vaginal and uterine samples. Summary of DNA Testing
- [308] The following table summarizes the results of the various tests. As there is a publication ban with respect to the allele numbers comprising a DNA profile, we have used "M" to indicate where there is a match between the test result and allele number associated with the identical profiles for Phillip Tallio and Cyril Tallio (who provided a DNA sample in 2012), and "NM" to indicate where there is no match. Yfiler markers 2011 vaginal xylene wash 2013 brain (left motor) swab 2013 brain (left ganglia) swab 2013 lung lobe swab 2013 uterine tissue 2019 vaginal tissue 2019 vaginal tissue DYS456 NM M M M M M DYS389 I M NM M DYS390 DYS389 II DYS458 NM NM NM NM M M DYS19 M DYS385 a/b DYS393 M NM NM M DYS391 M NM NM NM M DYS439 DYS635 M M DYS392 YGATA H4 M DYS437 M M M M M DYS438 NM DYS448 NM
- [309] Thus at the conclusion of the testing, male DNA had been located in the xylene wash from one of the vaginal tissue samples and on the uterine tissue sample, as well as a small amount of DNA on two other vaginal tissue samples. Mr. Tallio was excluded from being a donor of the DNA found in the xylene wash but not excluded from the DNA found on the uterine tissue sample or the small amount found on the vaginal tissue samples. The question is what, if anything, can be concluded from these results. The Contamination Debate
- [310] As previously noted, the possibility of contamination of the tissue samples was raised at the early stages of the Cellmark testing process. All of the experts agree that contamination is always a concern in DNA testing, but they disagree on whether contamination was an issue in the DNA testing that took place in this case.
- [311] It is important at the outset to clarify what we mean by the term "contamination" in relation to the tissue sample. Contamination could, for scientific purposes, refer to any male DNA found in a female child's body, and there was testimony in this case that appeared to use the term in that sense. For our purposes, however, by contamination, we refer to DNA that was inadvertently added to the tissue or the tissue block after the tissue was removed from Delavina's body. When we consider the question whether the tissue samples were contaminated prior to testing, we are asking whether we can reliably conclude that the DNA that was tested was on the tissue when it was removed at the autopsy. It is only DNA that was left on the tissue at the time of the crime that is of importance to the questions posed in

this appeal. DNA that was added later, through either the preparation of the tissue blocks or the handling of the blocks once they were prepared, "contaminates" the sample and has no probative value to the identification of the perpetrator of the crime.

- [312] Dr. Staub identified three potential sources of contamination, but is of the view that there was a very low likelihood that contamination had taken place. First, he considers that the chance that a sample was contaminated by the DNA of a pathologist involved in the autopsy, an autopsy assistant, or a hospital laboratory technician is "extremely remote". He also commented that "the fact that all tissue samples are enclosed in cassettes would make it very difficult for physical contamination of a processed tissue sample to occur" and pointed out that all males who were involved in processing these samples or in the autopsy facility or tissue processing lab had been excluded as potential DNA donors.
- [313] Second, Dr. Staub also considers it unlikely that DNA contamination could have occurred through the use or reuse of laboratory instruments at the time the tissue blocks were prepared, and specifically through the microtome used to prepare the microscope slides. He recognizes that if a microtome blade had residual tissue on it from previous samples, then it would likely be transferred to the initial sections that were cut from the next sample, but considers that if that had occurred, it would likely have been present on the previous numbered vaginal tissue samples.
- [314] Finally, Dr. Staub contemplated the possibility that DNA might have been deposited on the surface of the paraffin blocks, but considers that if this had happened, then it would be likely that the analysts at Cellmark would have removed it because they removed most of the paraffin that was not immediately adjacent to the tissue.
- [315] Dr. Hampikian is also of the view that "[w]hile contamination occurs at even the best labs, there is no sound reason to assume contamination in this particular case." In particular, Dr. Hampikian opines that the existence of what was conceded to be contamination on the surface of three of the paraffin blocks (the brain and lung samples) had no relevance to the possibility of contamination of the tissue itself, which was protected from contamination by the paraffin wax. He stated that the paraffin block had been "swabbed clean" (although that was not the case in relation to the xylene wash of the vaginal tissue sample).
- [316] The Crown led evidence on this topic from Dr. Bieber. Dr. Bieber's opinion is that the risk of cross-contamination of DNA during the processing of the tissue samples and the handling and storage of the paraffin blocks was significant. He disagrees with Dr. Staub's reliance on the fact that the tissue had been enclosed in cassettes during processing, pointing out that the cassettes were perforated on two sides specifically to allow solutions to enter the cassettes as fixatives. Dr. Bieber also noted the presence of a possible second allele at the DYS456 marker on the xylene wash, suggesting the possibility of a DNA mixture from more than one male, as well as the less significant possibility that the second allele resulted from an artifact or "stutter" in the amplification process. He concludes it was not possible to know with any reasonable degree of certainty the origin or source of the male DNA

recovered from the autopsy tissues in this case.

- [317] Ms. Nasir also expressed an opinion on the contamination question. She considers that the uterine tissue sample was likely not contaminated, based largely on two factors. She pointed out that this DNA was not generated from the surface swabbing or the first xylene wash, but from the tissue itself. She also noted that the amount of DNA generated in this tissue was the highest amount of male DNA detected from any sample tested, and that the Y-STR profile obtained was from a single source with no indication of a mixture. She agreed that the three DNA profiles obtained from the surface swabs originated from contamination sources.
- [318] Ms. Nasir was unable to come to a conclusion with respect to the DNA profile obtained from the xylene wash of the vaginal tissue block, for four reasons. First, the Y-STR profile is partial and originated from a low amount of male DNA (0.105 nanograms, compared to 1.45 nanograms for the uterine tissue sample). Second, the partial DNA profile originated from the first xylene wash of the tissue. She made the following comment to explain the significance of this distinction: At the time of testing this sample, a surface swabbing of the tissue block was not being taken. Therefore, if there was any male DNA present on the exposed surface of this tissue block or in the paraffin adhering to the tissue, it would likely be extracted in the first xylene wash resulting in a profile from a contaminating source.
- [319] The third factor identified by Ms. Nasir was the fact that the vaginal tissue itself had not been tested, so there was no information whether the same male DNA was present in the tissue itself. (Her opinion was prepared before BCIT tested the vaginal tissue, producing the result that the DNA profile from that tissue was from a different male than the DNA profile in the xylene wash.)
- [320] Finally, Ms. Nasir observed that there was a possible indication of DNA from a second male contributor at marker DYS456. (This is the same point made by Dr. Bieber.) The reported allele at this location is NM (i.e., it is not a match to Mr. Tallio's profile). However, there is indication of an additional peak adjacent to the reported allele NM. This could be what is termed "stutter", an artifact from the amplification process, but also could indicate a mixture of DNA suggesting more than one contributor. Conclusions with Respect to DNA
- [321] There is a significant possibility that all the DNA extracted from the tissue samples was contaminated from the simple fact that the samples were not prepared for DNA testing and were not handled with the care necessary to ensure their integrity for subsequent testing. The samples were placed in perforated cassettes in metal racks that were placed in a formalin mixture that could easily have led to cross-contamination. The microtome was not always cleaned after each use, another potential source of contamination, and the technicians using the microtome did not always wear gloves.

- [322] It is not necessary to come to a firm conclusion on the possibility of contamination of all the DNA samples. The only DNA result that might assist Mr. Tallio is the result generated from the xylene wash associated with the vaginal tissue. In our view, the evidence concerning the testing procedure and results from the xylene wash leads to the conclusion that the DNA profile obtained from the xylene wash was likely the result of contamination of the sample, and was not left by the perpetrator of the crime.
- [323] The xylene wash DNA is the only DNA generated from a process that did not include swabbing of the paraffin wax surface and the exposed surface of the tissue. The DNA was produced from a wash that was prepared before the protocol was changed to require surface swabbing before any testing was done. After the protocol was changed, three tissue samples, the brain and lung samples, generated DNA from surface swabs. All the experts agreed that these results reflected contamination in the tissue samples. As Ms. Nasir pointed out, if there was any male DNA present on the exposed surface of the vaginal tissue block or the paraffin adhering to the tissue, then it likely would have been extracted in the first xylene wash resulting in a profile from a contaminating source.
- [324] Unlike the DNA generated from the uterine sample and the vaginal tissue samples, the DNA tested from the xylene wash cannot be linked with confidence to the tissue itself. The process of extracting DNA from the xylene wash was itself novel, and the failure of Cellmark to swab the paraffin wax surface and the exposed side of the tissue in the paraffin block before initiating the xylene solution process makes it impossible to have confidence that the resulting DNA came from the tissue and not the surface of the block.
- [325] This conclusion is buttressed by the testing that was done on the uterine and vaginal tissue samples. Each tissue sample yielded DNA that was consistent with the DNA from the other tissue samples, but inconsistent with the results obtained from the xylene wash. To conclude that the xylene wash DNA came from the perpetrator, it would be necessary to conclude either that the results from the uterine and vaginal tissue samples were from contaminants, or that there were two perpetrators. There is nothing in the sequence of events that gives any air of reality to the theory that there were two perpetrators, and even if that hypothesis had any apparent merit, Mr. Tallio would not be excluded as one of the two perpetrators.
- [326] Similarly, the evidence does not provide any plausible support for the conclusion that the two vaginal tissue samples were contaminated but the xylene wash was not. The two vaginal tissue samples were analyzed after surface swabbing had taken place, effectively removing the possibility of surface contamination that remains a likely source of the DNA extracted from the xylene wash. The fact that the DNA results from both the vaginal tissue and uterine tissue are consistent suggests the likelihood that they came from the same male, although identification of that male cannot be made due to the limitations of Y-STR testing and the partial profiles obtained from each sample, particularly the vaginal tissue.

- [327] For these reasons, we conclude that the DNA profile obtained from the xylene wash came from a contaminating source, not the perpetrator.
- [328] It is not necessary to come to a firm conclusion on whether the uterine and vaginal tissue samples were contaminated. If they were, then none of this evidence is probative. If they were not, then the partial DNA profile derived from the uterine tissue sample is likely the profile of the perpetrator. As Mr. Tallio cannot be excluded from that profile, the DNA evidence does not exonerate him. Inadequate Investigation and Third Party Suspects
- [329] Mr. Tallio submits a miscarriage of justice has occurred because the investigation into Delavina's murder was inadequate and fresh evidence points to the reasonable possibility that someone else perpetrated the crime and covered it up. He says the police approached the investigation with "tunnel vision" and, as a result, deprived him of the opportunity of raising a third party suspect defence.
- [330] As discussed below, it is not possible to assess the adequacy of the investigation because, in light of the passage of time, the record before this Court is seriously incomplete.
- [331] There is no need to recount the details of the extensive, but unsuccessful, efforts made to locate the Bella Coola RCMP file. What little we do have from that file comes from other sources. Of particular concern is the lack of what are known as "continuation reports", being the documents on which police officers recorded the details of their investigative actions. For example, at the preliminary inquiry, Constable O'Halloran testified (on July 8, 1983) that he had prepared approximately 20 continuation reports. None of those have been located. What we do have from Constable O'Halloran are copies of 10 continuation reports obtained from his widow in 2018. Those reports concern investigative steps Constable O'Halloran took following the preliminary inquiry and record information he received from 12 persons. Corporal Mydlak and Corporal W.H. Watson prepared the other two continuation reports we have, which deal with their respective actions on April 23 and 24, 1983. Corporal Watson was primarily involved in attending at Sam and Gert Mack's house and seizing various items.
- [332] One of Mr. Tallio's principal submissions is that the police failed to interview people who lived near the crime scene to determine whether they had seen or heard anything that could shed light on who murdered Delavina. He says if the police had done this, then they would have obtained information that would have caused them to investigate other suspects.
- [333] Mr. Hulan was the first officer at Sam and Gert Mack's house on the morning of April 23, 1983. Later that day he transported Delavina's body to Vancouver for an autopsy. His involvement in the investigation did not include conducting neighbourhood inquiries, but in both his affidavit and cross-examination, he stated other officers would have done so. In his affidavit, Mr. Hulan said he recalled that Constable O'Halloran and Corporal Defer "conducted further investigation in the weeks and months after Phillip Tallio was charged".

- [334] That Constable O'Halloran made such inquiries is confirmed by the continuation reports we have, which document interviews he conducted in September and October of 1983. In addition, Celestine Vickers, in an affidavit tendered by Mr. Tallio, deposed that approximately one month before the preliminary inquiry the police asked her to provide a statement. Neither that statement nor a continuation report with respect to that interview have been located.
- [335] Mr. Tallio's fresh evidence includes affidavits sworn by Maureen Tallio and her now deceased parents, Godfrey and Louisa Tallio. The Crown cross-examined Maureen Tallio. It objects to the admissibility of the parents' affidavits--and one other affidavit discussed below--on the basis that the affiants cannot be cross-examined and, therefore, their affidavits are hearsay. Mr. Tallio says these affidavits are admissible because the necessity requirement for the admissibility of hearsay under the principled exception to the hearsay rule is met: *R. v. Khelawon*, 2006 SCC 57 at para. 47, [2006] 2 S.C.R. 787. However, he does not address the reliability requirement of that exception. That both requirements must be considered when an affiant is dead is reflected in *Bouchard v. Canada (Justice)*, 2019 FCA 146 at paras. 6-7, leave to appeal ref'd [2019] S.C.C.A. No. 302.
- [336] We do not find it necessary to resolve the admissibility issue, on which we have not had the benefit of full argument. This is because we would not attach any weight to those affidavits in any event.
- [337] Mr. Tallio relies on the affidavits of Maureen Tallio and her parents to support his claims that: (1) the police failed to conduct an adequate investigation; and (2) had they done so they would have acquired information indicative of him not being the perpetrator. In particular, he relies on these affidavits as evidence that he was not at Sam and Gert Mack's house long enough to have sexually assaulted and murdered Delavina.
- [338] To understand what follows, it is necessary to understand the layout of the streets on the Nuxalk Nation reserve in Bella Coola and where people lived in 1983. As the hand-drawn plan of the reserve that is attached as an exhibit to many of the affidavits tendered by Mr. Tallio is difficult to reproduce, we provide the following description.
- [339] The streets are laid out in a grid. Unfortunately, the plan does not show directions (i.e., north, south, etc.), but we have obtained those from maps available on the Internet. The Internet directions are consistent with the directions used by witnesses at the preliminary inquiry and with a Google map attached as an exhibit to one of the affidavits Mr. Tallio filed. We note that in the body of a number of the affidavits to which the plan is attached incorrect directions are used. This may be because of an assumption that the top of the plan is north when it is in fact east. We are prepared to treat this error as inconsequential, one caused by a lack of attention to detail by the drafters and affiants.
- [340] Tswan-Koos, Q'om-Quits, and Burke Streets run north-south, with Tswan-Koos Street being the farthest east. Mackay, Cliff, MacKenzie, and Ong-Ten-Kai (also known as Omq-Ten-Kai) Streets run east-west, with Mackay Street being the farthest north. Cyril and Nina Tallio's

house was on the southeast corner of Tswan-Koos and Cliff Streets. Godfrey and Louisa Tallio's house was the second house south of Cyril and Nina Tallio's house, at the southeast corner of Tswan-Koos and MacKenzie Streets. Sam and Gert Mack's house (i.e., the crime scene) was the next house to the south, at the northeast corner of Tswan-Koos and Ong-Ten Kai Streets.

- [341] Maureen Tallio was almost 21 years old in April 1983. She lived at her parents' house. In an affidavit she swore on May 16, 2013, she deposed to the following: · Her parents' house "faces Ong-Ten-Kai street." · On April 23, 1983, she had been to the party at Cyril and Nina Tallio's house. · That morning, she was "tired but not intoxicated". · Before 6:00 a.m. that morning, she was sitting at the breakfast table with "my family". From that table "you could see through a window facing Ong-Ten-Kai street" (i.e., a south-facing window). · She saw Mr. Tallio "walk up Ong-Ten-Kai street to [Sam and Gert Mack's] house." "He appeared to be calm and not in a rush." · "About five minutes after I saw him walk up the street, I saw Phillip running quickly back down the street. He ran to Cyril's house. Phillip looked really concerned and scared." · Soon after she saw Mr. Tallio "running back down the street", she saw Blair Mack and Lotta Bolton "run up the street to the Mack's house." · She was shocked when she heard Mr. Tallio had been arrested. · Two police officers came to her parents' house the day after Mr. Tallio was arrested. She told them what she had seen but they did not listen to her. She did not see them write down what she said. She felt she had pertinent information but the officers treated her as if she was unimportant. · She did not speak with any lawyers about the incident until the Innocence Project contacted her in 2010 and 2012.
- [342] In cross-examination, Maureen Tallio stated: · She got home from the party at Cyril and Nina Tallio's house at "[m]aybe 1:00, maybe 1:30, maybe 2:00"; she did not feel intoxicated when she got home. · She and her father were early risers; they were having coffee at the breakfast table on the morning of April 23, 1983. Her mother was still in bed. · She and her father saw Mr. Tallio walk to Sam and Gert Mack's house and then run towards Cyril and Nina Tallio's house. They had several conversations about what they saw; "my dad and I talked about this a lot". · When Mr. Tallio ran to Cyril and Nina Tallio's house, he was not dishevelled, nor did he have any blood on him. · Her mother may have come to the breakfast table after Mr. Tallio ran back to Cyril and Nina Tallio's house; before that, her mother would likely have been awake in her own room. · Referring to racism, she said, "[a]fter the RCMP took over, we were dismissed." · She told Sylvia Brown, a Native Court Worker, what she had seen. Everyone knew what she and her father had seen because "we shared what we saw."
- [343] Godfrey and Louisa Tallio swore virtually identical affidavits on October 9, 2012. In those affidavits they deposed to the following: · On the morning of April 23, 1983, they were up early because they were waiting for their teenaged daughters (Maureen and Mildred) to come home from a party. · At about 5:45 a.m., they were having coffee at their kitchen table. They were watching for their daughters through a window "facing Ong-Ten-Kai street". · At 5:45 a.m., they saw Mr. Tallio "walking up the street" to Sam and Gert Mack's

house. · Less than 10 minutes later, they saw Mr. Tallio "running back down the street". They did not notice anything "out of the ordinary"/"different" about his appearance. · Soon after seeing Mr. Tallio, they saw Blair Mack and Lotta Bolton "running up the street". Blair Mack was "yelling". Cyril Tallio was running behind them. · Louisa Tallio opened a window and yelled, "What's going on?" Cyril Tallio replied, "It looks like the baby's been murdered!" or something to that effect." · The police did not question them about the incident. The first time they were asked about what they saw on April 23, 1983, was when the Innocence Project interviewed them in the summer of 2010.

- [344] The most obvious inconsistency between Maureen Tallio's description of what occurred and that of her parents is that, according to her parents, Maureen Tallio was not home when they say they saw Mr. Tallio go to and from Sam and Gert Mack's house.
- [345] Another issue with respect to the reliability of these observations arises from the fact that all three say they were looking through a window "facing" Ong-Ten-Kai Street, i.e., facing south. If Mr. Tallio did "walk up" Ong-Ten-Kai Street to get to Sam and Gert Mack's house, then he would not have gone "back down" that street to return quickly to Cyril and Nina Tallio's house. The direct route from Sam and Gert Mack's house to Cyril and Nina Tallio's house was north on Tswan-Koos Street. A person looking through a window facing Ong-Ten-Kai Street would not have been able to see Cyril and Nina Tallio's house.
- [346] Of note here is that in his first statement to Constable O'Halloran on April 23, 1983, Mr. Tallio said that when he left Cyril and Nina Tallio's house he decided to go for a walk. He described a route that took him south on Tswan-Koos Street for one block, turning right (west) onto MacKenzie Street for two blocks, turning left (south) onto Burke Street for one block, and then turning left (east) onto Ong-Ten-Kai Street for two blocks to arrive at Sam and Gert Mack's house. However, in his first affidavit (sworn November 29, 2016), Mr. Tallio stated that he had "walked straight from Cyril's house up to Sam and Gert Mack's house", i.e., south on Tswan-Koos Street. When Mr. Tallio was cross-examined, he was unable to explain this inconsistency. In addition, in his first affidavit, Mr. Tallio deposed that he saw Godfrey and Louisa Tallio--not Maureen Tallio--sitting at their kitchen table as he walked by their house.
- [347] A further impediment to giving any credence to the descriptions for events provided by Maureen Tallio, Godfrey Tallio, and Louisa Tallio comes from Constable O'Halloran's continuation reports, which contradict much of what they say. Those reports document the following: · September 27, 1983: Sylvia Brown told Constable O'Halloran there is a person who saw Mr. Tallio going into and leaving from Sam and Gert Mack's house on the day of the offence. That person refuses to come forward out of fear of reprisal by either the Mack family or Mr. Tallio's relatives. · September 29, 1983: Sylvia Brown told Constable O'Halloran that the person who claims to have seen Mr. Tallio running to and from Sam and Gert Mack's house still refuses to come forward. Sylvia Brown said she would continue "to try to get her to come to police." · October 4, 1983: Sylvia Brown told Constable O'Halloran that Louisa Tallio was the person who saw Mr. Tallio running from Sam and

Gert Mack's house. · October 6, 1983: Constable O'Halloran went to Godfrey and Louisa Tallio's house and spoke with Louisa Tallio. Louisa Tallio told him that on April 23, 1983, her daughters were to have gone to Vancouver with Ernie Beadle. They were planning to leave at 6:00 a.m. However, the girls partied all night and were "too hung over to go" when Mr. Beadle came to pick them up. Louisa Tallio said she got up early to get her daughters ready but did not see anyone go up or down the street from Sam and Gert Mack's house. She said that her husband saw Blair Mack go up to and return from Sam and Gert Mack's house. · October 8, 1983: Constable O'Halloran spoke with Ernie Beadle, who confirmed he had gone to pick up Maureen and Mildred Tallio on April 23, 1983, but neither could go with him. He said he drove by Sam and Gert Mack's house at approximately 5:30 a.m. and cannot recall seeing anything unusual, either on the street or about that house. · October 12, 1983: Constable O'Halloran went to Godfrey Tallio's house and spoke with Godfrey Tallio, who confirmed that he was up early on April 23, 1983. He said he saw Blair Mack but never saw Mr. Tallio.

[348] The third deceased affiant is Roseanne Andy. She swore her affidavit on April 18, 2014. In that affidavit, she deposed to the following: · On April 23, 1983, she lived at the corner of Ong-Ten-Kai and Tswan-Koos Streets, "kitty-corner" from Sam and Gert Mack's house. Reg Mack's house was on Ong-Ten-Kai Street next to hers. Bill Tallio's house was on Ong-Ten-Kai Street, next to Sam and Gert Mack's house. · That morning there was a lot of noise coming from parties in the neighbourhood. She and her son Andrew had a hard time sleeping. · Her now deceased sister, Phyllis King-Svisdahl, lived in a trailer in her backyard. She let her sister into the house after hearing her sister call her name and throw rocks at her window. · Through the living room window, she and her sister saw people running back and forth between Sam and Gert Mack's house and Bill Tallio's house. Through a bedroom window, she saw people "carrying things with them" running to the creek behind her house. She does not know who these people were but believes one was Blair Mack. This was because this person was wearing a yellow t-shirt like the one she had seen Blair Mack wearing the day before. This occurred before the police arrived. · As she watched from the bedroom window, she saw flames and smoke from the creek. · It is customary to burn items belonging to a Nuxalk person who has died. This takes place in the deceased's backyard, normally on the fourth day after death. · She and her sister went to the police detachment that day or the following day and told the police what they had seen, but the police were dismissive of them. · The police never came to talk to them. · Sexual abuse of children was rampant in Bella Coola at the time of Delavina's death. "Wilfred Tallio was one of the men commonly alleged to molest children."

[349] Once again, Constable O'Halloran's continuation reports cast doubt on the reliability of Roseanne Andy's account of what occurred some 31 years before she swore her affidavit. In a report dated October 2, 1983, Constable O'Halloran records a conversation he had that day with Roseanne Andy. She told Constable O'Halloran that: · Her son Andrew was up at daybreak. Looking out the front window, he saw a group of people in front of Reg Mack's house. He waved at someone he knew. She and Andrew then went back to bed. · Phyllis

Svisdahl was living in a trailer behind her house. · Stones being thrown against her bedroom window awakened her. She and her husband got up and spoke to Phyllis Svisdahl, who was very upset and said she had heard some unusually loud noises coming from "the MACK residence." · "[I]t was not until later that [her sister] told about having seen MACK run to/from the scene just before HULAN arrived." · Her daughter, Elise Andy, who arrived home at 5:30 a.m., heard someone yelling "at the MACK residence." · She would bring her son to the detachment on October 4, 1983, for an interview. There is no mention in this report of Roseanne Andy saying she saw Blair Mack carry items to the creek, or smoke and flames coming from that area.

- [350] In addition, Roseanne Andy's statement in her affidavit with respect to having seen things taken to the creek behind her house is inconsistent with what she told the police in a June 29, 2011 interview. At that time, she said her sister told her about things being taken to the creek by a young male in a bright yellow shirt. She also said the following: · She feels the police "railroaded" Mr. Tallio and does not believe he killed Delavina. · She believes she saw someone walking down the road and knocking on the door to Sam and Gert Mack's house. She thinks this may have been Mr. Tallio. · When they heard about Delavina, her sister thought evidence was being hidden at the creek. She refused to go look, so her sister and daughter went to look. · She heard that Gert Mack (i.e., Delavina's grandmother) had stolen property in the house and wanted to get rid of it before the police arrived. · Gert Mack told her they burned things because they did not want anything that reminded them of Delavina.
- [351] On October 4, 1983, Constable O'Halloran interviewed Roseanne Andy's children, Andrew and Elise Andy. The continuation reports with respect to those interviews do not contain anything that would have assisted in the investigation of Delavina's death. The report with respect to Elise Andy refers to an "attached" statement from her, but it was not with the material obtained from Constable O'Halloran's widow.
- [352] On October 5, 1983, Constable O'Halloran interviewed Phyllis Svisdahl. The continuation report he prepared states she told him that: · She heard people shouting and recognized Blair Mack's and Lotta Bolton's voices. · She saw Blair Mack run up to Tatsquan Creek and then back to Sam and Gert Mack's house. · She then saw Blair Mack banging on Bill Tallio's front door. · Shortly after that, the police arrived. There was no mention in this report of Phyllis Svisdahl saying she saw things being carried to the creek or flames and smoke coming from that area.
- [353] The inconsistencies and contradictions discussed above leave us with no confidence that decades after the fact, Maureen, Godfrey, and Louisa Tallio, and Roseanne Andy could recall with any degree of accuracy what they personally saw and heard in 1983. Accordingly, we attach no weight to their affidavits.

- [354] Mr. Tallio also relies on the affidavit Angela King swore on April 16, 2014, to support his contention that he was not at Sam and Gert Mack's house long enough to have sexually assaulted and murdered Delavina. Angela King deposed that on the morning of April 23, 1983, she was at Silas King's house, which was located at the southwest corner of Tswan-Koos and MacKenzie Streets, directly across Tswan-Koos Street from Godfrey and Louisa Tallio's house. She describes Silas King's house as "fac[ing] Ong-Ten-Kai street".
- [355] Angela King deposed to the following with respect to the morning of April 23, 1983: · She was up early and "could see onto Ong-Ten-Kai street through a sliding glass patio door." · "Through the patio door, I saw Phillip walking up the street towards Sam and Gert Mack's house." · "Just a few minutes later, I saw Phillip running back down the street to Cyril and Nina Tallio's house." "[H]e looked panicked as he ran back down the street." She further deposed the police never questioned her and that she did not contact the police because she did not think she had anything important to tell them.
- [356] The reliability of Angela King's account of seeing Mr. Tallio "run back down the street" is questionable. Like Maureen Tallio, Angela King says Mr. Tallio "[ran] back down" the same street he had "walk[ed] up", namely, Ong-Ten-Kai Street. As discussed above, that was not in the direction of Cyril and Nina Tallio's house. Further, Cyril and Nina Tallio's house would not have been visible through a window facing Ong-Ten-Kai Street. In any event, the "just a few minutes" timeframe is so imprecise that it lends no support to Mr. Tallio's contention. Accordingly, we attach no weight to Angela King's affidavit.
- [357] In addition to the affidavits of Maureen Tallio, Godfrey Tallio, Louisa Tallio, Rosanne Andy, and Angela King, Mr. Tallio relies on the following affidavits to support his contention that the police failed to conduct an adequate investigation. Each one contains a statement to the effect that the police never spoke to the affiant in 1983; some also contain statements Mr. Tallio relies on to support his third party suspect submission: Affiant Date Sworn Lorna George November 9, 2014 Larry Moody November 10, 2014 Colleen Gabriel November 10, 2014 Anna Edgar November 10, 2014 Jennifer Andy November 11, 2014 Gwen Edgar February 12, 2015 Bill Tallio July 17, 2019
- [358] Mr. Tallio seeks to put the adequacy of an investigation conducted decades ago on trial when the full extent of that investigation is unknown. Given we do not have the police file as a comparator, and in light of the fact that the limited part of the file we do have shows that the police actively sought out information with respect to Delavina's murder after the preliminary inquiry, we are not prepared to find that the police never spoke with the above-mentioned persons. The totality of the evidence advanced by Mr. Tallio is far too tenuous a basis on which to find an inadequate investigation was conducted.
- [359] We turn now to Mr. Tallio's contention that someone else sexually assaulted and murdered Delavina. He advances what is known as the third party suspect defence. At trial, evidence tending to show someone other than the accused committed the crime is admissible for the purpose of raising a reasonable doubt. Provided there is other evidence tending to connect

that person with the crime, evidence of that person's disposition to commit the offence is also admissible: *R. v. Grandinetti*, 2005 SCC 5 at paras. 46-49, [2005] 1 S.C.R. 27; *R. v. Grant*, 2015 SCC 9 at paras. 24-25, [2015] 1 S.C.R. 475. However, as previously discussed, on an appeal seeking to set aside a valid guilty plea, an appellant must establish someone else committed the offence on a balance of probabilities.

- [360] We have already found that the DNA evidence does not support Mr. Tallio's contention that someone else sexually assaulted and murdered Delavina and that evidence with respect to how long he was at Sam and Gert Mack's house is unreliable. What we will now consider is the other affidavit evidence Mr. Tallio relies on. For present purposes, but with one exception discussed below, we will treat that evidence as reliable. However, we will not consider evidence that does not comply with the rules of evidence such as hearsay. Although in *R. v. Tomlinson*, 2014 ONCA 158, 307 C.C.C. (3d) 36, the third party suspect defence is discussed in the context of a trial, the following statement of Justice Watt applies with equal force in the context of this appeal:
- [72] evidence marshalled in support of a third party suspect defence, as with other evidence adduced in a criminal trial, must be compliant with the rules of admissibility. Said in a somewhat different way, the evidence proposed for reception must be relevant, material and admissible. The proponent does not get a free ride through the admissibility thicket upon mere announcement of "third party suspect": *R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), at p. 366, leave to appeal refused, (1985) 18 C.C.C. (3d) 356n.
- [361] Cyril Tallio and Wilfred Tallio are Mr. Tallio's third party suspects. Wilfred Tallio died in 1997; Cyril Tallio died in 2014. Cyril Tallio provided a DNA sample to the police knowing it would be used in testing tissue from Delavina's autopsy.
- [362] With respect to Cyril Tallio, Mr. Tallio proffers evidence of the following: · At various times from the early 1960s through to the mid-1980s, Cyril Tallio molested two young girls and a young boy. He was convicted in 1998 of two historical sexual offences, namely, indecent assault of one young girl and sexual assault of another young girl. · Shortly after 3:30 a.m. or 4:00 a.m. on April 23, 1983, Cyril Tallio was seen standing in front of Godfrey and Louisa Tallio's house. · Shortly after screams were heard coming from Sam and Gert Mack's house, Cyril Tallio was seen leaving that house carrying a green garbage bag, which he took behind the smokehouse. Smoke was later seen coming from that area. The smokehouse was on Ong-Ten-Kai Street directly across from Sam and Gert Mack's house. · After Delavina was taken to the hospital and before the police arrived, Cyril Tallio was seen at Sam and Gert Mack's house carrying plastic garbage bags and taking a plastic bag out of a plastic garbage bin.
- [363] With respect to Wilfred Tallio, Mr. Tallio proffers evidence of the following: · In approximately 1980, Wilfred Tallio began sexually abusing a three-year-old girl multiple times per week. This continued for five or six years. · In approximately 1986, he began sexually abusing an 11-year-old girl and continued to do so until she was 14. From ages 12

to 14, the abuse included intercourse. · After 10:00 a.m. on April 23, 1983, Wilfred Tallio's wife, Daisy Tallio, asked their homemaker to burn a cardboard box that was under Wilfred Tallio's bed. The homemaker built a fire in the backyard and burned the box without looking in it. He later noticed an unspecified amount of what he described as blood around the bathroom sink. (Daisy Tallio died in 2013.)

- [364] What we do not consider reliable are the statements by Anna Edgar in the affidavit she swore on November 10, 2014, that on April 23, 1983, she saw Cyril Tallio walking in front of Godfrey and Louisa Tallio's house shortly after 3:30 a.m. or 4:00 a.m. and saw Wilfred Tallio getting into his truck outside of Sam and Gert Mack's house between 5:00 a.m. and 5:30 a.m. When the police interviewed her on June 28, 2011, she said she saw Cyril Tallio shortly after 2:00 a.m. or 2:30 a.m. but did not mention seeing Wilfred Tallio. In addition, in her affidavit Anna Edgar deposed she went to the party at Cyril and Nina Tallio's house and stayed for about 30 minutes, but in her statement to the police she said she did not go to the party.
- [365] In addition to evidence specific to either Cyril Tallio or Wilfred Tallio, Mr. Tallio relies on evidence of the following: · In the early morning of April 23, 1983, a woman believed to be Gert Mack was seen running from the direction of the creek carrying a small crib mattress spring. · Later that day, a doll that had been left at Sam and Gert Mack's house by another child was found burned behind Roseanne Andy's house along with bedsheets, one of which was partially burned. The burn area was the size of a campfire and was still smoldering.
- [366] For the purpose of what follows, we accept that Cyril Tallio, a convicted offender, had a disposition to sexually abuse children. We will assume that Wilfred Tallio had the same disposition, although he has had no opportunity to refute the allegations made in affidavits sworn after his death. Regardless, the admissible evidence Mr. Tallio relies on does not rise to the level of making it more probable than not that one of them murdered Delavina.
- [367] Mr. Tallio's circumstantial "case" against Cyril Tallio is unpersuasive. Cyril Tallio's removal and possible burning of a garbage bag from Sam and Gert Mack's house could well have been because he was asked to do so. In this regard, we note that at the preliminary inquiry, Cyril Tallio's wife, Nina Tallio, testified they helped others on the reserve by picking up their garbage. As well, the evidence from which it can be inferred that Gert Mack removed and burned items from her house further weakens Mr. Tallio's argument that Cyril Tallio was covering up his own actions. Last, we cannot ignore the fact that at the preliminary inquiry Cyril Tallio testified he fell asleep at 3:15 a.m. and only awoke when Blair Mack was pounding on the floor distraught over Delavina's death.
- [368] Mr. Tallio's circumstantial "case" against Wilfred Tallio is even less persuasive. It would be speculative to draw any connection to Delavina's murder from the fact Daisy Tallio had a box under her husband's bed burned and that there may have been blood around their bathroom sink.

[369] While in some eyes, the evidence Mr. Tallio has proffered may be viewed as suspicious, on the spectrum of proof it falls far short of establishing on a balance of probabilities that either Cyril Tallio or Wilfred Tallio sexually assaulted and murdered Delavina. Summary of Conclusions

[370] Mr. Tallio has not established that:

- (a) he received ineffective representation from Mr. Rankin either because:
 - (i) he was unlawfully remanded to the FPI for assessment; or (ii) the Pos statement was otherwise inadmissible;
- (b) his guilty plea was uninformed because a cognitive disability prevented him from understanding the instructions he gave Mr. Rankin with respect to the guilty plea;
- (c) DNA evidence exonerates him;
- (d) the police investigation was inadequate; or
- (e) someone else sexually assaulted and murdered Delavina.

DISPOSITION

[371] The appeal is dismissed. "The Honourable Mr. Justice Frankel" "The Honourable Madam Justice Stromberg-Stein" "The Honourable Mr. Justice Hunter" APPENDIX The following abbreviations are used in identifying the location of the affidavits listed below: · AFE: Appellant's Fresh Evidence Affidavits (three volumes). · ARFE: Appellant's Revised Fresh Evidence Affidavits (one volume) · AFED: Appellant's Fresh Evidence Documents (one volume) · RFE: Respondent's Fresh Evidence Affidavits (7 volumes) Affidavits Filed by Mr. Tallio

Number	Name	Date Sworn	Location in Materials	Admitted/Excluded
1.	Jennifer Andy	November 11, 2014	ARFE Tab 1	Admitted
2.	Roseanne Andy	April 18, 2014	ARFE Tab 2	Admitted
3.	Charles Cunliffe Barnett	April 12, 2016	AFE Tab 4	Admitted
4.	Jeffrey Cairns	November 7, 2012	AFE Tab 5	Admitted
5.	Jennifer Clay	December 13, 2012	AFE Tab 6	Admitted
6.	Sylvia Brown	November 8, 2014	AFE Tab 8	Admitted
7.	Colleen Burns	June 4, 2015	ARFE Tab 3	Admitted
8.	Anna Edgar	November 10, 2014	ARFE Tab 4	Admitted
9.	Gwen Edgar	February 12, 2015	ARFE Tab 5	Admitted
10.	Colleen Gabriel	November 10, 2014	AFE Tab 13	Admitted
11.	Lorna George	November 9, 2014	ARFE Tab 6	Admitted
12.	Dr. Greg Hampikian #1	September 6, 2017	AFE Tab 16A	Admitted
13.	Dr. Greg Hampikian #2	September 22, 2017	AFE Tab 16B	Admitted
14.	Dr. Greg Hampikian #3	October 24, 2017	AFE Tab 16C	Admitted
15.	Dr. Greg Hampikian #4	July 11, 2019	AFE Tab 16D	Admitted
16.	Dr. Greg Hampikian #5	September 25, 2020	Appellant's Condensed Book of DNA Materials	Admitted
17.	Theresa Hood	October 9, 2012	ARFE Tab 7	Admitted
18.	Angela King	April 16, 2014	AFE Tab 18	Admitted
19.	Katherine Kirkpatrick #2	August 15, 2019	ARFE Tab 18	Admitted
20.	Dr. Peggy R. Koopman	April 30, 2014	AFE Tab 20	Admitted
21.	June Mack	November 26, 2015	ARFE Tab 8	Admitted
22.	Person Y	October 30, 2017	RFE Tab 9	Admitted
23.	Dr. Raymond McIlwain	April 15, 2014	RFE Tab 23	Admitted
24.	Dr. Bruce Granville			

Miller October 22, 2014 ARFE Tab 11 Excluded 25. Larry Moody November 10, 2014 ARFE Tab 12 Admitted 26. Dr. Roy O'Shaughnessy #1 May 2, 2018 AFE Tab 28A Excluded 27. Dr. Roy O'Shaughnessy #2 July 10, 2018 AFE Tab 28B Excluded 28. Monica Bell February 7, 2020 ARFE Tab 19 Excluded 29. Leslie Hall Pinder December 15, 2012 AFE Tab 29 Admitted 30. Deirdre Potheary #1 June 13, 2016 AFE Tab 30 Admitted 31. Deirdre Potheary #2 November 23, 2018 AFE Tab 30 Admitted 32. Deirdre Potheary #3 May 23, 2020 Loose Admitted 33. Dr. Stanley Semrau May 3, 2018 AFE Tab 32 Excluded 34. Person X December 2, 2015 AFE Tab 33 Admitted 35. Marie Spetch January 21, 2013 AFE Tab 34 Admitted 36. Dr. Rick W. Staub #3 April 26, 2017 AFE Tab 35A Admitted 37. Dr. Rick W. Staub #4 April 30, 2017 AFE Tab 35B Admitted 38. Dr. Rick W. Staub #5 October 31, 2017 AFE Tab 35C Admitted 39. Dr. Rick W. Staub #6 July 19, 2019 AFE Tab 35D Admitted 40. Bill Tallio July 17, 2019 AFE Tab 36 Admitted 41. Darlene Tallio January 23, 2015 AFE Tab 37 Admitted 42. Godfrey Tallio October 9, 2012 ARFE Tab 14 Admitted 43. Gordon Robert Tallio October 6, 2015 ARFE Tab 15 Admitted 44. Louisa Tallio October 9, 2012 ARFE Tab 16 Admitted 45. Maureen Tallio May 16, 2013 AFE Tab 41 Admitted 46. Phillip James Tallio #1 November 29, 2016 AFE Tab 42A Admitted 47. Phillip James Tallio #2 June 26, 2017 AFE Tab 42B Admitted 48. Phillip James Tallio #3 July 5, 2019 AFE Tab 42C Admitted 49. Phillip James Tallio #4 July 5, 2019 AFE Tab 42D Admitted 50. Robert Tallio August 13, 2018 AFE Tab 43 Admitted 51. Thomas William Tallio November 13, 2016 AFE Tab 44 Admitted 52. Celestine Vickers March 1, 2013 AFE Tab 45 Admitted 53. Kimberly Wong #2 August 31, 2018 AFE Tab 47 Admitted 54. Paul Wilson #2 January 25, 2020 ARFE Tab 20 Admitted 55. Sigrid Pembroke October 7, 2019 AFED Admitted 56. Dr. Julianne Conry March 10, 2020 Loose Admitted 57. Dr. Edgar Jimenez October 3, 2018 ARFE Tab 17 Admitted Affidavits Filed by the Crown Number Name Date Sworn Location in Materials Admitted/Excluded 1. Dr. Frederick R. Bieber January 31, 2019 RFE Tab 1 Admitted 2. Christine Crossman September 26, 2017 RFE Tab 2 Admitted 3. Janet A.M. Dickie #3 December 16, 2019 RFE Tab 3 Admitted 4. Anthony Dugbartey November 28, 2019 RFE Tab 4 Excluded 5. David Hall October 2, 2017 RFE Tab 5 Admitted 6. Steen Hartsen December 17, 2019 RFE Tab 6 Admitted 7. James Bruce Hulan December 11, 2018 RFE Tab 7 Admitted 8. Tamara M. Levy March 9, 2017 RFE Tab 8 Admitted 9. Bernard R. Macleod June 11, 2019 RFE Tab 9 Admitted 10. Richard Mah May 30, 2017 RFE Tab 10 Admitted 11. Huma Nasir October 18, 2019 RFE Tab 11 Admitted 12. Dr. Glenn P. Taylor September 19, 2017 RFE Tab 12 Admitted 13. Laura Livingstone October 3, 2017 RFE Tab 13 Admitted 14. Kelly Katalinic #3 December 15, 2019 RFE Tab 14 Admitted Not included in either table: Phillip C. Rankin, Q.C. - AFE Tab 31 - Sworn November 19, 2018 - Admitted.

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