Court of Appeal for Saskatchewan **Citation: *R v Pelly*, 2021 SKCA 50**
Docket: CACR3130 **Date: 2021-04-01**

Between:

Her Majesty the Queen

Appellant

And

Larry Robert Pelly

Respondent

Before:	Ottenbreit, Barrington-Foote and Tholl JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Mr. Justice Tholl
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Barrington-Foote
On appeal from:	2018 SKQB 160, Saskatoon
Appeal heard:	October 21, 2020
Counsel:	Dean Sinclair, Q.C., for the Appellant Christopher Funt for the Respondent

Tholl J.A.

I. INTRODUCTION

[1] After Larry Pelly was convicted of aggravated assault, the Crown applied to have him declared a dangerous offender and sought an indeterminate sentence pursuant to Part XXIV of the *Criminal Code.* At the conclusion of the sentencing hearing, the sentencing judge designated Mr. Pelly as a dangerous offender, but determined a fixed-term sentence was appropriate. After applying credit for pre-sentence custody, she sentenced him to 66 months of additional incarceration followed by a long-term supervision order.

[2] The Crown appeals from the imposition of a determinate sentence and argues that the sentencing judge erred by misinterpreting s. 753(4.1) of the *Criminal Code*. It asserts this error is demonstrated in the trial judge's misapplication of the sentencing principles from Part XXIII of the *Criminal Code*, her misunderstanding the scope of her discretion under s. 753(4.1), and by imposing a lesser sentence in the absence of evidence capable of supporting a finding that a lesser sentence would adequately protect the public. It seeks the imposition of an indeterminate sentence.

[3] Mr. Pelly has not appealed his conviction or his designation as a dangerous offender. He submits the Crown is asking this Court to reweigh the sentencing considerations or ignore the governing jurisprudence. He asserts the sentencing judge crafted a sentence that addressed his risk to reoffend, appropriately reflected his degree of moral culpability and adequately protected the public.

[4] For the reasons that follow, it is my view that the trial judge erred in imposing a determinate sentence. The appeal is allowed and an indeterminate sentence is substituted.

II. BACKGROUND

[5] Mr. Pelly was born in 1983 into a dysfunctional family. He experienced extreme poverty, neglect and abuse as a child. His lengthy criminal record commenced with his first conviction at the age of 13; and, by the time of the current offence, he had amassed 52 criminal convictions. His convictions include numerous offences involving violence and weapons.

[6] On October 6, 2016, Mr. Pelly was convicted of aggravated assault under s. 268 of the *Criminal Code*. The trial judge described the circumstances of the offence as follows:

> The evidence establishes that on July 19, 2015, Mr. Pelly and [Mr. T.S.] were at a small one-bedroom apartment rented by their mutual friend, [Ms. L.L.]… . Sometime after nine o'clock in the morning, Mr. Pelly and [Mr. T.S.] were sitting at the kitchen table; [Ms. L.L.] was in the bedroom. The two men drank some beer and smoked some pot. They chatted about Mr. Pelly's background and about his relationship with [Ms. L.L.]. [Mr. T.S.'s] evidence was that just before he was about to leave the apartment, he decided to call his brother to come and give him a ride home. As he was about to do so, as he sat sideways on the kitchen chair, he was grabbed from behind by Mr. Pelly who pulled him off the chair and proceeded to choke, punch and attack him with a stick. At one point, [Mr. T.S.] said, he was able to pull the stick away from Mr. Pelly, but he was unable to hold onto it and keep it from being taken back because it was slippery with blood.
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> [Mr. T.S.] suffered a number of serious injuries, including wounds to his head and face. Those injuries included a serious gash to his head requiring 14 staples to close, a laceration behind his left ear requiring stitches, a grossly swollen nose, bruising around his eyes, two missing teeth and bruising on most of his body. [Mr. T.S.] spent two days recovering in the hospital. He testified that today he still has difficulty moving his head properly without pain.
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> … Although it's not necessary for me to reach this conclusion to find Mr. Pelly guilty of aggravated assault, I believe [Mr. T.S.'s] evidence that Mr. Pelly used the four foot stick with a hammer and hook on one end as a weapon in his assault.

[7] After conviction, the Crown requested and received an adjournment to determine whether it would be applying for an assessment of Mr. Pelly pursuant to s. 752.1(1) of the *Criminal Code*. It decided to pursue such an assessment and the Crown's application was set for hearing. At the conclusion of the hearing on December 7, 2016, the trial judge granted the requested order and appointed Dr. Shabehram Lohrasbe to conduct the assessment. The trial judge subsequently retired and the sentencing judge was assigned to this matter. The assessment was completed and it was filed on September 21, 2017. In his report, Dr. Lohrasbe summarized his opinion as follows:

> To summarize this lengthy report, it is my opinion that at this time and in the foreseeable future:
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> 1. Mr. Pelly poses a high risk for acts of violence.
> 2. That risk will decline with age.
> 3. His prior engagement in treatment has been limited and superficial.
> 4. He will require high intensive programming, as typically delivered by [Corrections Service of Canada (CSC)].
> 5. Some additional and customized treatment (medications, DBT) may be helpful.

> 6. There is a reasonable possibility that with such programming and treatment, his risk can be lowered to the point where he can be managed in the community.
> 7. His mental health will need periodic monitoring, with particular foci on the possibilities of severe depression, decline in cognitive functioning and the emergence of frank paranoia.
> 8. Prior to his release, an updated risk assessment can identify particular foci for monitoring and supervision.
> 9. Any transition to the community should be very slow and closely supervised due of his high degree of institutionalization.
> 10. The longest possible period of supervision in the community will assist in risk management.

[8] The Crown gave notice that it intended to seek an order, pursuant to s. 753 of the *Criminal Code*, designating Mr. Pelly as a dangerous offender and imposing an indeterminate sentence. A *Gladue* report was ordered at Mr. Pelly's request and was filed on February 7, 2018. The hearing was conducted from February 5 to 12, 2018. The sentencing judge delivered her decision on May 24, 2018: *R v Pelly*, 2018 SKQB 160 [*Sentencing Decision*].

III. SENTENCING DECISION

[9] The sentencing judge applied the two-stage approach that is required in an application to have a person declared a dangerous offender and sentenced as such: first addressing the designation stage and then moving to the penalty stage. At the designation stage, she agreed with Mr. Pelly's concession that the predicate offence – the aggravated assault – was a serious personal injury offence within the meaning of s. 752(a) and s. 753(1)(a) of the *Criminal Code*. She examined the evidence in detail and concluded that Mr. Pelly had exhibited a pattern of repetitive behaviour showing an inability to restrain himself from causing personal injury to other persons. She also concluded that such behaviours and consequences to other persons are likely to continue into the future. As a result, she declared Mr. Pelly to be a dangerous offender pursuant to s. 753(1)(a)(i). That determination has not been challenged on appeal so a more detailed description of her analysis of this issue is not required.

[10] Moving on to the penalty stage, the sentencing judge referenced s. 753(4) and s. 753(4.1) of the *Criminal Code* as the sentencing provisions that relate specifically to the sentencing of dangerous offenders:

Sentence for dangerous offender

753(4) If the court finds an offender to be a dangerous offender, it shall

> (a) impose a sentence of detention in a penitentiary for an indeterminate period;
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> (b) impose a sentence for the offence for which the offender has been convicted – which must be a minimum punishment of imprisonment for a term of two years – and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
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> (c) impose a sentence for the offence for which the offender has been convicted.

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[11] The sentencing judge rejected the Crown's submission that an indeterminate sentence is presumptively appropriate once a person is designated a dangerous offender, relying on *R v Boutilier*, 2017 SCC 64 at paras 60 and 65, [2017] 2 SCR 936 [*Boutilier*], for this conclusion. She further noted that she had to consider the fundamental sentencing principle of proportionality from s. 718.1 of the *Criminal Code*, along with the other sentencing principles set out in s. 718.2, in crafting an appropriate sentence. She stated that Mr. Pelly faced an indeterminate sentence unless she was satisfied that a lesser measure would adequately protect the public.

[12] During her examination of the gravity of the predicate offence, and the other offences for which Mr. Pelly had been convicted, the sentencing judge noted that none of his victims had died as a result of his violence. She commented on the circumstances of many of his offences, including several assaults, a home invasion robbery where he was armed with a knife, an assault of a police officer while attempting to take the officer's firearm, another robbery with violence, a sexual assault, and the predicate offence. Her conclusions regarding the offences included an observation that none of the offences fell "into the worst of the worst categories" for serious personal violence offences and the violence he exhibited was "not at the highest level that can be seen" in such offences (*Sentencing Decision* at para 46).

[13] Pivoting to Mr. Pelly's moral culpability, the sentencing judge stated that his moral culpability, on one level, was relatively high and noted that he is aware that substance use affects his self-control, yet he continues to turn to drugs and alcohol. She further observed that despite his

three periods of penitentiary time, along with the treatment opportunities offered during that time, Mr. Pelly had demonstrated little interest in overcoming his addictions. Countervailing these observations, the sentencing judge noted that Mr. Pelly has "various mental health issues" that affect not only his ability to exercise self-control but also his ability to "understand, learn and effectively utilize alternate coping strategies" (at para 47). She quoted from Dr. Lohrasbe's report and Mr. Pelly's testimony in support of this latter finding. The sentencing judge further reviewed Mr. Pelly's upbringing, education, addictions, and history of incarceration. On the basis of an examination of all of these factors, she determined that Mr. Pelly's moral responsibility was not at a high level for the personal violence offences he had committed.

[14] The sentencing judge then conducted an examination of the application of the following two sentencing principles:

> **Other sentencing principles**
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> **718.2(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[15] In examining these two principles, the sentencing judge noted that they are largely subsumed in s. 753(4.1) of the *Criminal Code*. She returned to the future threat posed by Mr. Pelly noting that, notwithstanding treatment possibilities, he was likely to continue to be a threat to the public in the future. The sentencing judge concluded that the future threat from his past behaviour did not include death or severe psychological harm but did include a risk of significant personal injury.

[16] After reiterating that she had not found Mr. Pelly's moral culpability to be high, the sentencing judge returned to the question of whether a lesser measure than an indeterminate sentence would adequately protect the public. She noted that an indeterminate sentence would best protect the public but reminded herself that s. 753(4.1) of the *Criminal Code* requires a sanction that *adequately* protects the public not one that *best* protects the public. She referenced her earlier discussion of the *Gladue* issues from her designation analysis and found a clear link between Mr. Pelly's early childhood traumas and his criminal history. She then concluded as follows with regard to the adequacy of a determinate sentence:

> [55] The unique systemic factors applicable to all Aboriginal offenders as well as Mr. Pelly's own tragic personal circumstances were considered at the designation stage. Nevertheless, there were no systemic factors that the court heard in evidence or could took judicial notice of that showed that designating Mr. Pelly as a dangerous offender would improperly perpetuate historic injustices against Aboriginal peoples. However, I am satisfied that the legacy of colonization, residential schools and inter-generational trauma generally experienced by those of Aboriginal decent in Canada, and by Mr. Pelly personally, are relevant to the penalty stage of these proceedings.
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> [56] Mr. Pelly has spent the majority of his life incarcerated where he has never been taught, in a manner that has been accessible to him, how to live cooperatively or to manage his anger or fears. Until Dr. Lohrasbe's comprehensive psychiatric report, those around Mr. Pelly have apparently not appreciated the many complex emotional, cognitive and psychological issues that give rise to his behaviours and, more importantly, that negatively impact his ability and motivation to learn how to modify them. Mr. Pelly has obviously made many bad choices, most significantly his failure to take treatment for his addictions. Mr. Pelly's choices have also been impacted by his personal circumstances and most likely by the well documented systemic bias of the criminal justice system against Aboriginal people who have been raised in pathogenic circumstances.
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> [57] Although not entirely clear, based on the Offence Index filed as Exhibit P-5 and the Convictions Binder filed as Exhibit P-1, I calculate that since age 17, the longest consecutive period of time that Mr. Pelly has spent in the community is about seven months. This is when he was unlawfully at large from October 27, 2011 to May 15, 2012 before turning himself into the police. Other than that, Mr. Pelly, who is now 35 years of age, has only been in the community for very short periods of time that, in total, amount to less than 12 months. He has never earned money because he has never had a job or any training to obtain one. Since 13 years of age, he has never had his own or a family place of residence. He has experienced little hopefulness other than his recent "behind the glass" relationship with a women who testified at this hearing and who appears to be a positive role model. Institutionalization, including long term solitary confinement, is all that Mr. Pelly has known. In short, Mr. Pelly has no understanding of what it is to be a free human being and tragically, this has been his life notwithstanding limited moral culpability for his offending.
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> [58] Mr. Pelly's future treatment prospects are not promising, but they are also not negligible. Dr. Lohrasbe has opined that the prognosis is poor unless Mr. Pelly makes a "heart felt and sustained commitment to change and takes full advantage of the programs that he will be offered". Mr. Pelly faces real challenges to reintegration but that does not necessarily require that he be indefinitely imprisoned, which represents the harshest sentence that this Court can impose on any offender. In my view, this is a case where the degree of protection that society would consider adequate must be informed by a collective desire to stem the systemic over incarceration of Aboriginal peoples. Based on the totality of the evidence, I am satisfied that there is a reasonable expectation that a sentence imposed in accordance with s. 753(4) will adequately protect the public from the threat of future serious harm from Mr. Pelly.

[17] Pursuant to s. 753(4)(b) of the *Criminal Code*, the sentencing judge imposed a determinate sentence of 66 months of additional incarceration, after providing credit for the 679 days Mr. Pelly had spent in pre-sentence custody. She ordered the maximum period of 10 years of long-term

supervision. Additionally, the sentencing judge granted ancillary orders pursuant to s. 109, s. 487.051 and s. 760 of the *Criminal Code*. Lastly, she provided three non-binding recommendations to the Correctional Service of Canada regarding Mr. Pelly's further assessment and treatment while in custody and his registration under the *Indian Act*, RSC 1985, c I-5.

IV. ISSUES

[18] The following issues arise in this matter:

(a) Did the sentencing judge err in her use of the sentencing principles from s. 718.1 and s. 718.2 of the *Criminal Code* and exceed the scope of her discretion under s. 753(4.1)?

(b) Did the sentencing judge err in imposing a lesser sentence in the absence of any evidence capable of supporting a finding that a lesser sentence would adequately protect the public?

(c) If so, what is the appropriate sentence?

V. ANALYSIS

A. Jurisdiction and standard of review

[19] Under s. 759(2) of the *Criminal Code*, the Crown may only appeal a decision in a Part XXIV proceeding on a question of law: *R v Natomagan*, 2012 SKCA 46 at paras 49–52, [2012] 8 WWR 444, and *R v J.J.P.*, 2020 YKCA 13 at paras 41–46, 390 CCC (3d) 513.

[20] The applicable standard of review is summarized in *R v Lawrence*, 2019 BCCA 291, leave to appeal to SCC requested, 39003 [*Lawrence*]: "As always, this court must recognize our task is not that of a trial court. Rather, we function to correct errors. In respect to the principles and law applied, we test against the standard of correctness" (at para 56).

B. Use of s. 718.1 and s. 718.2 and the exercise of discretion under s. 753(4.1)

[21] The Crown submits the sentencing judge erred by failing to contextually apply the sentencing principles from s. 718.1 and s. 718.2 of the *Criminal Code* and to do so in accordance with the principles that apply to Part XXIV proceedings. It argues the sentencing judge failed to properly address the question she was required to answer under s. 753(4.1) and instead improperly focussed on an assessment of the gravity of Mr. Pelly's offences, his moral culpability and the *Gladue* factors. The Crown also contends that, in conducting this flawed analysis, the sentencing judge used an incomplete and understated version of Mr. Pelly's offences, resulting in a wrong assessment of the gravity of the offences and his moral culpability. Lastly it submits there was an absence of evidence capable of supporting the exercise of the sentencing judge's discretion to impose a determinate sentence.

[22] Mr. Pelly argues that the Crown is asking this Court to impermissibly reweigh the factors that were properly considered by the sentencing judge. He contends there was evidence to support a finding that a determinate sentence would adequately protect the public.

[23] Section 753(4.1) requires a judge to impose an indeterminate sentence unless they are satisfied by the evidence adduced during the hearing that there is a reasonable expectation that a lesser sentence will adequately protect the public in the future from the commission of murder or a serious personal injury offence by the offender. This does not create a presumption of an indeterminate sentence, but a judge is required to address the question head-on of whether something less than an indeterminate sentence can be reasonably expected to adequately protect the public.

[24] A person is only designated as a dangerous offender once they have crossed the threshold of posing a future threat to the public. In any such case, the protection of the public would be most completely accomplished by the imposition of an indeterminate sentence in order to remove the offender completely from society and eliminate the risk faced by members of the public. However, such a draconian result is not how proceedings under Part XXIV are meant to function. As noted by the sentencing judge, s. 753(4.1) requires that the sentence provide *adequate* protection of the public not the *best* protection possible.

[25] Further, a sentencing judge is required to utilize the least restrictive means that will provide an adequate level of protection to the public. In *Boutilier*, Côté J. described the approach to be followed in these terms:

> [65] Section 753(4.1) guides the discretion of the judge, who ultimately must determine the fittest sentence in a given case based on the evidence adduced during the sentencing hearing. This Court in *Johnson* [2003 SCC 46] stated that the "sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level": para. 44. Again, s. 753(4.1) is simply a codification of the exercise of discretion required by *Johnson* in light of the regime's general purpose of public protection in dealing with offenders presenting a very high likelihood of harmful recidivism.
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> [68] Under s. 753(4.1), the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community: *Johnson*, at para. 50. The judge considers all the evidence presented during the hearing in order to determine the fittest sentence for the offender:
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> > The judge should … take into account all the evidence available before making a determination, which will inevitably require a thorough investigation. Once such an investigation has been conducted, it will be up to the judge to determine the sentence; there is no obligation on any of the parties to prove on any standard the adequate sentence one way or another.
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> > (*Neuberger*, [*Assessing Dangerousness: Guide to the Dangerous Offender Application Process*. Toronto: Carswell, 2011 (loose-leaf updated 2017)] at p. 4-4.1; see also p. 10-10.)
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> [69] In other words, s. 753(4.1) provides guidance on how a sentencing judge can properly exercise his or her discretion in accordance with the applicable objectives and principles of sentencing. As explained above, it is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their discretion. Once the sentencing judge has exhausted the least coercive sentencing options to address the question of risk based on the evidence, indeterminate detention in a penitentiary is the last option.
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> [70] The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained by Justice Tuck-Jackson of the Ontario Court of Justice: *R. v. Crowe*, No. 10-10013990, March 22, 2017. First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact that, just as nothing less

> than a sentence reducing the risk to an acceptable level is required for a dangerous offender, so too is nothing more required.

[26] Subsequent to *Boutilier*, Ottenbreit J.A., in *R v S.P.C.*, 2018 SKCA 94, discussed the requirement that the judge determining the penalty must assess the management of risk, not its complete elimination:

> [41] Management of the risk posed by the individual is central to the application of the test set out above and to the determination of the appropriate sentence. Of necessity, this is partly an exercise of looking into the future and examining the prospective evidence as described in *Boutilier* (at para 31).
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> [42] Justice Côté in *Boutilier* referred to the role of the sentencing judge as "managing" the risk or threat posed by the accused (at paras 44–45). While the decision of the sentencing judge in the matter under appeal was issued prior to *Boutilier*, the language of "management" employed by him is reminiscent of Côté J.'s language.
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> [43] Other courts have also determined that management of the risk or threat is a relevant consideration in achieving a fit sentence. For example, Watt J.A. in *R v Spilman*, 2018 ONCA 551, 362 CCC (3d) 415, focuses on "management":
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> > [30] Section 753(4.1) provides guidance on how hearing judges can properly exercise their discretion, in accordance with the applicable objectives and principles of sentencing, to impose the appropriate sentence to manage the established threat that the offender poses to society. The provision requires the judge to examine the evidence adduced at the hearing to determine whether there is a reasonable expectation that a lesser measure – a conventional fixed-term sentence or a fixed-term sentence of at least two years followed by a long-term supervision order – will adequately protect the public against the risk that the offender will commit murder or a serious personal injury offence. The hearing judge must first exhaust the less coercive sentencing options to address this risk of recidivism before imposing a sentence of indeterminate detention in a penitentiary: *Boutilier*, at para. 69.
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> [44] It was therefore essential for the sentencing judge to consider what mechanisms could be used to manage the risks posed by S.P.C. Examination of whether the offender's risk could be managed by some internal or external controls informs whether the risk is such that there is a reasonable expectation the public will be adequately protected by the lesser sentence.

[27] In conducting the assessment of whether a lesser sentence will adequately protect the public, as mandated under s. 753(4.1) of the *Criminal Code*, a judge is required to apply the sentencing principles found in Part XXIII. This is made in clear in *Boutilier*:

> [52] … The sentencing principles and objectives set out in the *Criminal Code*, including the fundamental principle of proportionality in s. 718.1, do not have constitutional status and may be limited by Parliament where necessary to achieve a valid penal purpose, so long as a sentencing judge is not required to impose a sentence that is "grossly disproportionate" to the sentence normally mandated by ss. 718 to 718.2 of the *Criminal Code* … .

> [53] This Court has consistently affirmed that dangerous offender proceedings are sentencing proceedings: *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138 (S.C.C.), at para. 40; *Jones*, at pp. 279–80 and 294–95; *Lyons*, at p. 350. Accordingly, a sentencing judge in a dangerous offender proceeding must apply the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2: *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357 (S.C.C.) , at para. 23; *Neuberge*r, at p. 3–4. These sections of the *Criminal Code* set out the purpose and objectives of sentencing (s. 718), the fundamental principle of proportionality (s. 718.1) – "the *sine qua non* of a just sanction" (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 (S.C.C.), at para. 37) – and the other sentencing principles that a court "shall" consider before imposing any sentence on an offender (s. 718.2). An error in the application of these principles is reviewable by an appellate court: *R. c. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 (S.C.C.).
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> [56] Mr. Boutilier contends that, by referring solely to the objective of public protection, the wording of s. 753(4.1) excludes other sentencing objectives and principles from the sentencing judge's discretion. In my view, a fair reading of s. 753(4.1) does not result in the exclusion of these principles. Parliament is entitled to decide that protection of the public is an enhanced sentencing objective for individuals who have been designated as dangerous. This does not mean that this objective operates to the exclusion of all others. It is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their ability to look at the whole picture. Emphasis on the public safety component is consistent with the fact that public protection is the general purpose of Part XXIV of the *Code*: *Steele* at para. 27. Further, because the enhanced objective of public safety parallels the justification for imposing an indeterminate detention, such emphasis is also consistent with the principles of sentencing generally.
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> [61] Against this backdrop, it would strain credulity to suggest that the principles enumerated in ss. 718 to 718.2 are irrelevant to the exercise of the sentencing judge's newly codified discretion in s. 753(4) and (4.1) when they were relevant even under the former scheme, which imposed automatic indeterminate detention for every dangerous offender. The 2008 amendments replaced mandatory indeterminate detention with a codification of the principle that a sentencing judge must impose a sentence that is tailored to the specific offender and consistent with the principles of sentencing. When considered in its historical context, the current s. 753(4.1) confers a discretion to apply general sentencing principles more explicitly than the former scheme did. It does so for the benefit of the offender, who cannot complain of a discretion that can only operate to his or her benefit: see *Lyons*, at pp. 348–49.
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> [63] For all these reasons, an offender's moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public.

[28] Despite the requirement that the sentencing principles from Part XXIII of the *Criminal Code* are to be applied, a judge cannot lose sight of the fact that Part XXIV proceedings are different than conventional sentencing, and their sentencing deliberations must give paramount

consideration to the protection of the public as set out in s. 753(4.1). Protection of the public through the prevention of further offences has been described in the jurisprudence as the "enhanced objective", "dominant purpose", "paramount sentencing objective", "paramount purpose" and "primary consideration" in the sentencing process under Part XXIV: *Boutilier* at paras 55–56; *R v Steele*, 2014 SCC 61 at para 29, [2014] 3 SCR 138; *R v Standingwater*, 2013 SKCA 78 at para 49, [2013] 10 WWR 277 [*Standingwater*]; *R v Spilman*, 2018 ONCA 551 at para 32, 362 CCC (3d) 415; and *R v Warawa*, 2011 ABCA 294 at para 38, 278 CCC (3d) 409, leave to appeal to SCC refused, 2012 CanLII 39731. It is an error of law to allow the factors from Part XXIII to dominate the determination of an appropriate sentence under Part XXIV: *Boutilier* at paras 55–57, *Standingwater* at para 49, *R v Toutsaint*, 2015 SKCA 117 at paras 22–25, [2016] 5 WWR 269 [*Toutsaint*], and *R v Osborne*, 2014 MBCA 73 at paras 95–97, [2014] 10 WWR 262 [*Osborne*].

[29] The problem that arises in this matter is that the sentencing judge's analysis focussed heavily on the sentencing principles from s. 718.1, s. 718.2(d) and s. 718.2(e) of the *Criminal Code* and allowed them to overshadow her analysis. She did this in a manner that had the effect of minimizing the paramount requirement to arrive at a sentence that would adequately protect the public.

[30] After concentrating on the sentencing objectives from s. 718.1, s. 718.2(d) and s. 718.2(e), the sentencing judge did not move on to put these factors into the appropriate context demanded by an analysis under s. 753(4.1). While the sentencing judge discussed the need to protect the public at many points of her judgment, a reading of the judgment as a whole reveals that she did not give this aspect of the analysis the paramount consideration that is required. This is illustrated by comparing her lengthy and careful discussion of the three sections from Part XXIII with her short conclusory analysis conducted regarding the adequacy of a lesser sentence. These differences between the content of these two portions of the *Sentencing Decision* reflect the fact that the sentencing judge approached her deliberations in a manner more consistent with a conventional sentencing than a proceeding under Part XXIV.

[31] In my view, the sentencing judge committed an error of law by focusing on the principles and factors that inform a sentence deliberation under s. 718.1, s. 718.2(d) and s. 718.2(e) – while not fully engaging in the analysis required by s. 753(4.1) of the *Criminal Code* – in a manner that

obscured the main issue she faced. While she correctly set out the test at the commencement of her analysis in the penalty phase, the trial judge allowed other factors to dominate her analysis, which should have been focused on whether there was a reasonable expectation that a lesser sentence could adequately protect the public. The sentencing judge did not emphasize the paramount and overarching position that s. 753(4.1) should have had in her deliberation. She erred in law as a result. This error in law is sufficient to set aside her determination that a determinate sentence should be imposed.

C. Imposing a sentence that is adequate to protect the public

[32] Having found that the sentencing judge erred in the manner that she did, this Court must consider afresh whether a lesser sentence could be reasonably expected to adequately protect the public: *Toutsaint* at para 26. Section 759(3)(a)(i) of the *Criminal Code* provides this Court with the authority to impose the appropriate sentence. If required, the determination of an appropriate sentence may be referred back to the sentencing court for a new hearing, although there remains an open question as to whether such a hearing can be conducted on a basis limited to the determination of whether an indeterminate sentence should be imposed: *R v Starblanket*, 2019 SKCA 130 at paras 108–110, [2020] 6 WWR 288, and *R v Piche*, 2019 SKCA 54 at para 115, [2020] 2 WWR 240 [*Piche*]. However, it need only go back to the sentencing court if there is a requirement for further findings of fact or for some similar purpose that requires determination by a sentencing judge. In the matter at hand, it is not necessary to order a new hearing because the record is sufficient for this Court to make a proper determination as to the appropriate sentence.

[33] In my view, when the analysis is properly focussed on s. 753(4.1) of the *Criminal Code*, there is not a reasonable expectation that a lesser sentence will adequately protect the public.

[34] Section 753(4.1) requires the imposition of an indeterminate sentence unless there was a reasonable expectation that a lesser measure will adequately protect the public against the commission by Mr. Pelly of a serious personal injury offence. This requires a consideration of the term *reasonable expectation*.

[35] The term *reasonable expectation* suggests a “likelihood”, “a belief that something would happen” or “a confident belief, for good and sufficient reasons”: *R v Bunn*, 2014 SKCA 112 at

para 36, 446 Sask R 184, *Osborne* at paras 72–73, and *R v Sanderson*, 2018 MBCA 63 at para 20. In *Lawrence*, Saunders J.A. examined what reasonable expectation means*:*

> [72] This court considered the words "reasonable expectation" in *D.J.S.* [2015 BCCA 111]:
>
> > [30] Of course as we have seen, since *Dagenais* [2003 ABCA 376] was decided, the dangerous offender sentencing provisions have been amended at ss. 753(4) and (4.1) to permit an indeterminate sentence only where there is a "reasonable expectation" that a lesser measure would adequately protect the public. There is little doubt that, as stated in *R. v. B.A.R.*, 2011 BCSC 1313, this imposes a higher standard than was previously the case in that an "expectation" speaks to a belief that something will happen, as opposed to the mere possibility. (See also *R. v. Osborne*, 2014 MBCA 73 at paras. 70–73, with which I respectfully agree.)
> >
> > [Emphasis added [in *Lawrence*].]
>
> See also *R v. Sanderson*, 2018 MBCA 63 at para. 20.
>
> [73] *Boutilier* did not disapprove of this conclusion in *D.J.S.* and like decisions. While *Boutilier* did say that ss. 734(4) and (4.1) represent a codification of *Johnson* [2003 SCC 46], the statement of Justice Côté was in the context of imposing the least restrictive sentence. I take these words in *Boutilier* as adopting the *Johnson* approach of considering the individual circumstances of the offender, with the intention of refraining from overshooting the public purpose of adequately protecting the public.
>
> [74] I conclude that the judge was correct in stating in his para. 65 that the new language of "real expectation" requires "a somewhat higher degree of confidence that the risk can be managed in the community," than had the prior standard for the purposes of selecting the appropriate penalty.

[36] In *R v Groves*, 2020 ONCA 86, the Ontario Court of Appeal described reasonable expectation as being more strenuous than the previous *reasonable possibility* test.

> [15] … The trial judge was satisfied, based on Dr. Pallandi's report, that the appellant could not pass the "reasonable possibility of eventual control" test set out in the previous legislation. It followed from that, and the trial judge so found, that he must also fail the arguably more strenuous "reasonable expectation" test in the present legislation.

[37] In my view, when considering s. 753(4.1) with the above noted guidance in mind, the evidence in this matter is not sufficient to establish that there is such a reasonable expectation.

[38] The sentencing judge set out and considered the factors related to Mr. Pelly's difficult childhood and ongoing addictions. As noted above, those factors are relevant to this analysis to some extent. However, it is necessary to further examine the circumstances that inform the determination of whether there is a reasonable expectation that a sentence of less than indeterminate length can adequately protect the public. This is a future-looking analysis based on the evidence tendered at the hearing.

[39] Mr. Pelly's criminal record now includes 53 convictions, commencing when he was 13 years old. Thirteen of those offences were violence- or weapons-related offences. Mr. Pelly spent the majority of his youth in open or closed custody, escaping several times and frequently violating the conditions that were imposed in an attempt to control his behaviour and protect the public. While incarcerated as a youth, he committed violent offences against his fellow residents of youth facilities. His violence escalated after he turned 18 years old and has continued unabated.

[40] As an adult, Mr. Pelly has committed a violent home invasion robbery, an additional robbery with violence, assaults, an assault with a weapon, a major sexual assault and the predicate offence of aggravated assault. The offences have caused high amounts of physical and psychological damage to his victims. For the purposes of this decision, it is particularly troubling that most of these offences took place while Mr. Pelly was subject to conditions that were imposed in an attempt to control his behaviour or shortly after his release from lengthy periods of incarceration. For example, when he was released from custody in August of 2003, he was subject to conditions in a probation order. Despite those conditions, he committed numerous additional offences in November and December of 2003, including the following: a robbery with violence where he threatened to stab the victim with a knife, an unprovoked assault, and a home invasion robbery where he broke in, awoke a sleeping couple in the middle of the night, brandished a knife, demanded money, assaulted both victims and generally terrorized them. When he was finally arrested on December 14, 2003, for committing these offences, he violently resisted the police officers and attempted to take one of their sidearms.

[41] On March 5, 2004, Mr. Pelly was sentenced to three years and seven months of incarceration for the offences arising out of his actions in November and December of 2003. Less than two weeks into his sentence, he had two knives in his possession in his cell and received a sentence of three additional months. A few months later, he and several other inmates severely beat a fellow inmate, resulting in three additional months of incarceration. In January of 2007, he was released on statutory release, but violated the conditions within three weeks resulting in the revocation of his statutory release and his reincarceration. In July of 2007, he assaulted a fellow inmate causing him bodily harm. Mr. Pelly was twice more released on statutory release during the course of this first penitentiary sentence, in April of 2008 and November of 2008, but quickly violated his terms of release and was reincarcerated both times.

[42] After sentence expiry in March of 2009, Mr. Pelly, while not subject to any controls, committed an assault less than two months later. He was released on bail but violated his release conditions by consuming alcohol and not attending court. He received a two-year conditional sentence order for these offences but, within a week, he breached the conditions by committing a robbery with violence while in violation of his curfew and abstention terms. The conditional sentence order was terminated and he received an additional one year of incarceration, resulting in his second term in the penitentiary.

[43] Mr. Pelly was released on statutory release from his second penitentiary sentence in September of 2011. He violated his residency condition less than two months after release and remained at large for over six months. He returned to the penitentiary in May of 2012 and was again released on statutory release in December of 2012. Mr. Pelly again quickly absconded and ended up serving his sentence in custody until warrant expiry in March of 2013.

[44] Less than one month after being released in March of 2013, Mr. Pelly sexually assaulted a woman. The victim awoke to find Mr. Pelly having sexual intercourse with her. When she tried to resist, he refused to stop and held her down until he finished. He was sentenced to three years incarceration and returned to the penitentiary. Mr. Pelly was released on statutory release in May of 2015 and started to abuse substances almost immediately. He absconded and remained at large for two months, coming back into custody when he committed the aggravated assault in July of 2015 that forms the predicate offence in this matter. Mr. Pelly committed this offence while he was subject to the most stringent supervision available in the community.

[45] By this point, Mr. Pelly had been released on statutory release five times and had promptly violated the associated conditions all five times. He had also breached the terms of a probation order and a conditional sentence order. As an adult, Mr. Pelly has not successfully complied with any conditions for the length of the term for which they have been imposed.

[46] In reviewing the offences committed by Mr. Pelly, the sentencing judge determined that the offences were not the worst of the worst and noted that no one had been killed. Given the sheer number of violent offences committed by Mr. Pelly, the egregious circumstances of many of them, and the significant nature of the harm caused to the victims, this conclusion was as generous as the sentencing judge could have made it. To say that an offender has never killed anyone and that his

violence has not yet reached the worst level that could be imagined is not a factor that should have weighed in his favour. This is a statement that could be made in relation to the vast majority of persons in reported cases where indeterminate sentences were imposed. Indeterminate sentences are not reserved for those offenders whose history of violence has led to a death or whose violence could not have been worse. This is aptly described by Caldwell J.A. in *Standingwater*, albeit in the context of the first stage of the test:

> [21] In a limited respect Dr. Wormith's understanding was correct: the dangerous offender designation is reserved for the very small group of the worst offenders. However, the *Criminal Code* neither sets forth a specific percentage of risk which is intolerable nor does it state that only a certain percentage of all offenders may be considered dangerous offenders. Moreover, other than under s. 753(1)(a)(iii), the measures set forth in the *Criminal Code* for determining whether an offender is a dangerous offender do not mandate any qualitative comparison of the brutality of a predicate offence with the brutality of like offences committed by those offenders who have been designated dangerous offenders. A predicate offence does not have to meet a defined level of brutality before a dangerous offender designation is warranted; rather, any offender may be designated a dangerous offender if the evidence establishes, to the satisfaction of the court, that any of the three alternative measures set forth in s. 753(1)(a) has been met.

[47] More pertinently, it is unusual for a judge to determine the *overall* level of gravity of *all* of an offender's past offences, use that finding to inform proportionality under s. 718.1 of the *Criminal Code* and then apply that to a determination under s. 753(4.1). It is hard to see the utility in conducting such an assessment at the penalty stage. The issue to be determined is whether a lesser sentence will adequately protect the public. It is not a determination regarding the *overall* gravity of the aggregate of past offences.

[48] Turning to moral blameworthiness, the sentencing judge examined Mr. Pelly's addictions and background, including his *Gladue* factors, in depth. After doing so, she concluded that his moral culpability was not high. The Crown does not concede this finding but recognizes it is not an issue that can be disturbed in this appeal. However, as stated by Watt J.A. in *R v Radcliffe*, 2017 ONCA 176, 347 CCC (3d) 3, leave to appeal to SCC refused, 2017 CanLII 82301 [*Radcliffe*], such factors, while still relevant, may have little impact in a dangerous offender proceeding:

> [57] As a matter of general principle, characteristics that make an offender "less blameworthy" have little impact on a dangerous offender application: *R. v. B.(D.V.)*, 2010 ONCA 291, 254 C.C.C. (3d) 221, leave to appeal refused, [2011] S.C.C.A. No. 207, at para. 80. Where *Gladue* factors serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of re-offence posed by the Aboriginal offender, a sentencing judge must make reference to them: *R. v. Jennings*, 2016

BCCA 127, 384 B.C.A.C. 152, at paras. 35, 38; *R. v. Standingwater*, 2013 SKCA 78, 417 Sask. R. 158, at para. 51.

[49] Despite this strong statement in *Radcliffe*, moral culpability remains relevant at the penalty phase: *Piche* at para 84 and *Boutilier* at para 63. In the matter at hand, the *Gladue* factors were significant, and Mr. Pelly's moral culpability was found to not be high. While this is a factor that counts in his favour, and I have taken it into account, it is not sufficient to overcome the weight of the other circumstances.

[50] Although the *Gladue* factors were relevant to moral culpability, they had limited relevance to other aspects of the matter that informed the management of the risk created by Mr. Pelly. As noted by Fisher J.A. in *R v Awasis*, 2020 BCCA 23, 385 CCC (3d) 369, leave to appeal to SCC refused, 2020 CanLII 92507, these factors can inform the determination of whether a lesser sentence can adequately protect the public:

> [127] … *Gladue* factors are clearly important considerations for a sentencing judge when determining "the least intrusive sentence required" to achieve the primary purpose of public protection, per *Boutilier* at para. 60. While it may seem counterintuitive to suggest that *Gladue* factors could overcome findings of dangerousness, a high risk of recidivism and intractability – they could, for example, provide a basis for assessing the viability of traditional Aboriginal-focused treatment options aimed at addressing the issues that contribute to or aggravate an offender's risk. If such resources are available and considered appropriate, they could provide a basis for finding that a lesser sentence will adequately protect the public.

[51] The effect the presence of *Gladue* factors can have on management of future risk was also discussed in *R v Garnot*, 2019 BCCA 404:

> [65] Schultes J. in the case at bar received and considered extensive evidence concerning what alternatives for Mr. Garnot's future incarceration and supervision were available; how his Aboriginal background would be 'factored in' to those alternatives; and generally how that background had affected his conduct in the past and might continue to do so in future. The judge acknowledged that the appellant's "moral blameworthiness" for the predicate offence was reduced. As mentioned, the principles of proportionality and restraint were reflected in the statutory scheme for dangerous and long term offenders. Mr. Russell went further, however, and suggested that in assessing "acceptable risk" in this case, the sentencing judge should have considered the fact that Mr. Garnot had been incarcerated for many years of his life and, in counsel's submission, was a victim of discrimination in the justice system. He argued that in recognition of this experience, the public's "tolerance of risk" would be, or should be, higher for an Aboriginal offender than for others – i.e., that a greater degree of risk of re-offending should be "acceptable" in cases such as this.
>
> [66] I have considerable sympathy for a person in the appellant's shoes and fully accept that a court should pay particular attention to restraint and proportionality where an Aboriginal offender is concerned. This is appropriate in an ordinary sentencing situation, where various factors, factual and legal, and of course the statutory objectives of

> sentencing, are all at play in the crafting of a fit sentence for the individual offender and the offence. But in the present context, where the offender is a dangerous offender, the issue is more constrained and the options available to the sentencing judge are narrower. Under the *Code* as it stood in 2001, once a person has been found to be a dangerous offender the only alternative is a long-term offender order. The protection of the public remains the overarching factor in the dangerous/long-term offender analysis: see *Johnson* at paras. 19 (citing *R. v. Lyons* , [1987] 2 S.C.R. 309), 29 and 32; *R. v. Jones* , [1994] 2 S.C.R. 229 at 290; *R. v. Little* 2007 ONCA 548 at para. 70.
>
> [67] The implications of Mr. Russell's argument regarding a higher tolerance of risk in cases involving Aboriginal offenders are in my opinion unacceptable. No judge should be asked to rule that a dangerous offender should be released into the community before the risk of his or her risk of re-offending has been reduced to an acceptable level. Further, although Mr. Russell did not frame his argument this way, the other side of the coin is also true: no court should be asked to proceed on the basis that a particular segment of "the public" is less deserving of protection from predatory offenders than others. In this instance, for example, it appears that Mr. Garnot wishes to "connect" with his heritage and to live on a reserve if possible. But the victims of his sexual crimes were all of Aboriginal descent themselves – surely they and other members of their communities are no less worthy of protection than other members of the public from his depredations.
>
> (Emphasis in original)

[52] There was no indication that the *Gladue* factors would have a substantial influence on the management of Mr. Pelly's future risk, and they should not have played a significant role in this matter outside of the impact they had on his degree of moral responsibility and the minimal weight that could be given to that factor. Mr. Pelly is entitled to be registered as a member of the Norway House Cree Nation, but he has no connection to this First Nation. There was scant evidence to support a finding of how future registration with his First Nation would enhance the effectiveness of programming in addressing his risk; such a finding would be required to give significant weight to this factor: *R v Montgrand*, 2014 SKCA 31 at para 16–17, 433 Sask R 248, and *Standingwater* at paras 49–52. While Mr. Pelly's ability to be registered as a member of the Norway House Cree Nation would provide greater access to programming in the community, it is not the availability of treatment that has been his problem. He has had access to significant amounts of programming while incarcerated and has largely failed to engage in it. It is his long-standing attitude towards treatment, not its availability, that creates a significant barrier to adequately managing his risk through a lesser sentence.

[53] In his report and testimony, Dr. Lohrasbe noted a critical pre-condition that must occur before there is any chance that Mr. Pelly can succeed in programming and have his risk successfully managed in the community. He has a substance use disorder. In order to address the

risk this creates, Mr. Pelly must commit to, and maintain, complete and total abstinence from the use of drugs, alcohol or other intoxicating substances. While he has once again verbally agreed to take the necessary programming, he has done so in the past and failed to follow through in any meaningful way. Dr. Lohrasbe's testimony regarding the necessity for commitment and success in this area was stark:

> Q I know you talked a lot about substance abuse, into page 20 and 21. Again, I'm not going to go through paragraph by paragraph into today's purposes. I think you gathered from what I was stating earlier, when I was pointing out some other parts of his history, that you would have reviewed, but perhaps not reproduced, that violence, itself, is -- is a separate area for him. I -- I don't think I saw that in terms of discussing his history that substance abuse might exacerbate that risk for violence. But that -- take that off the page, he has violent tendencies, as compared to someone else. He has limited thought process in terms of the choices he makes available to himself, when trying to problem solve.
>
> A Yeah. Maybe just another, sort of, way of looking at that is that -- I mean it's impossible now to artificially, sort of, remove the role of substance abuse, both acute and chronic, from this. But what we know from his history is that his self-control is significantly impaired when he is put under pressure, whether intoxicated or not. And whether he turns to harming himself, or violence, the -- the bottom line is, you know, behavioural self-control, or more broadly from a psychiatric point of view, what's called self-regulation, the ability to, you know, maintain stability and emotions and how you think about things, *et cetera*, he has chronically shown that he is impaired in that area.
>
> Q And so, there's been no issue with the past and the CSC that they've targeted both of those separately, as opposed to the new model where it'll dealt with together in -- in the integrated model, but there's been no issue with that having been targeted each and every time, whether it be sexual violence or mostly other violence, that they generally pointed to VPP, and it generally pointed to some type of substance abuse programming.
>
> A Yeah. And he's -- as I point out in my report, he's acknowledged that his participation was pretty half-hearted.
>
> …
>
> A And -- and, you know, he's got to care about himself enough to work hard --
>
> Q M-hm.
>
> A -- at improving his life, independent of how long he spends in prison and -- and when he gets out. But it -- it -- they go together. You know, these are mirror images. It's only when you care about yourself that you care about other people, and vice versa, in -- in a genuine, connected, emotional way. And so, I agree that it is something he's going to have to be working at.
>
> Q And I think -- I think you're -- you're saying how they do go together. It's clear that he doesn't care about himself, because he certainly doesn't care about others.
>
> A He's -- yeah. Yeah.
>
> Q Abstinence has to be an absolute.
>
> A Yeah.

> Q At the very minimum, that hurdle is -- that's a monumental one, is it not?
> A It's huge. I mean it is disheartening the number of times that people remain abstinent for years, including a guy that I was involved in supervising after he was serving an indeterminate sentence. You know, after a decade, he goes back to booze and gets into trouble again. So, Mr. Pelly -- he's going to have to understand that there's not -- if he's going to stay out, it's got to be not a single beer for the rest of his life.

[54] Based on his past behaviour, this commitment to total abstinence is a steep hill to climb for Mr. Pelly.

[55] Managing Mr. Pelly's level of risk also requires him to participate and succeed in other programming. The evidence was overwhelming in this regard. Mr. Pelly, again, says he will do so. However, his track record regarding this long-required need has been abysmal. There have been significant efforts expended on his behalf in an attempt to assist him in addressing his addictions and psychological issues. At age nine, he was referred to a psychologist as a result of problematic behaviours that included arson, property crimes and animal cruelty. When he was eleven, Mr. Pelly was referred to a psychiatrist. After intentionally injuring a dog at age twelve, psychological and psychiatric assessments were ordered and he was diagnosed with oppositional defiant disorder.

[56] As an adult, the effort Mr. Pelly himself has expended to access and benefit from the programming available to him has been minimal. From 2001 to 2003, while incarcerated in the North Battleford Youth Centre and, subsequently in two different provincial correctional centres, he refused to participate in any programming. He became involved with a gang and frequently violated the rules of the correctional centres. Despite a promise to renounce gang activity and participate in programming when he was sentenced to the penitentiary in 2004, Mr. Pelly generally failed to do so. He entered several programs in 2004 and 2005, but was suspended from all of them because he would not participate. After his statutory release was revoked in 2007, Mr. Pelly successfully participated in an educational upgrading program until he was released in April of 2008. As noted above, he eventually ended up serving until warrant expiry in March of 2009. From 2001 to 2009, he only engaged in one basic educational upgrading program, and would not participate in any other programming offered to him.

[57] When he returned to the penitentiary in October of 2009, Mr. Pelly had some success with engaging in programming. He did well in a further basic education program, took a month-long Aboriginal Basic Healing Program in June of 2010 and successfully completed a moderate

intensity violence prevention program in November of 2010. Unfortunately, his progress in programming halted at that point. He was suspended from substance abuse programs in December of 2010, January of 2011 and July of 2011 because he would not attend. His ability to follow the rules of the institution deteriorated and he spent significant time in administrative segregation.

[58] During his third penitentiary term, which began in May of 2013, Mr. Pelly refused to participate in sexual offender treatment. He took no part in programming of any kind from May of 2013 to May of 2015. This refusal to take part in programming was in the face of the judge who, in sentencing him for that offence, had told him that he could face dangerous offender proceedings if he did not get off the path he was on. This blunt warning had no effect on his motivation to take programming.

[59] It is clear that Mr. Pelly's participation and performance in programming to date, in the words of Dr. Lohrasbe, has been "limited and superficial". While he is capable of taking the programming, he has been unwilling to do so.

[60] In light of this almost total lack of willingness to even begin to engage in programming, I am unable to conclude that Mr. Pelly will do so in the future and do so to the high level required to manage his risk in the community. Mr. Pelly admits he has a poor history of compliance with programming, but he told the author of the *Gladue* report, Dr. Lohrasbe, and the sentencing judge that he will now participate. This bare assertion provides some evidence regarding the likelihood he will follow through. It is also positive that he has renounced gang activity and has a supportive romantic relationship. However, despite these factors, Dr. Lohrasbe did not opine that it was likely that Mr. Pelly would engage in and successfully complete the necessary programming. Likewise, the sentencing judge did not conclude this was likely to occur.

[61] In addition to a substance use disorder, Dr. Lohrasbe concluded Mr. Pelly has anti-social personality disorder and several features of borderline personality disorder and attention deficit/hyperactivity disorder. Fetal alcohol syndrome could also not be ruled out. Dr. Lohrasbe testified about the high level of commitment required by Mr. Pelly in relation to managing these issues:

A Sure. So, the borderline personality disorder is, I presume, the diagnosis you're referring to. And I think it's increasingly recognized that it is a problem in our offender population, and it's often not diagnosed because the behavioural features, and particularly the violence, is understandably the focus of everyone's concern, and tends to lead repetitively to the diagnosis of an anti-social personality disorder. Now, the two aren't incompatible. You know, there -- there's a lot of overlap between the two of them. And among men, in particular, people who have borderline personalities often have anti-social features. That's not the case with women, where you often see a sort of a purer version of the borderline personality.

Now, why I think it's important, is that when you look at the early behaviours, what jumps out for me as a psychiatrist is that this is likely a traumatized kid -- was a traumatized kid at that point. And that leads to the shaping of personality in a variety of ways that influence everything from the way the person thinks, to the way they feel, to the way they behave, to the way they interact with others. And until they make a sustained effort to examine that and change that -- when I say that, all of -- all of the above -- thinking, feeling, relating to others -- they're likely to simply go on with old habits, because they find that tolerating distress or anxiety is unacceptable. They act out.

Luckily, over the past 20, 25 years, a very organized approach to dealing with people who have even some of the features of this disorder, even if they don't have a full on, well established, borderline personality, even if they have some of the features, they are helped by what's called DBT or dialectal behavior therapy. And now, it's being increasingly offered, not just in the community, but even within our correctional institutions. And CSC, to their credit, have occasionally managed to put together fairly sophisticated programs. I know of one in B.C., although I don't know whether it's operating right now. It was operating a couple of years ago. It just depends on whether they get enough referrals to keep it going.

So, if and when Mr. Pelly can be got to the point where he wants to participate in a program like that -- now this would be in addition to the sort of multi-target programming that is now, you know, central to (INDISCERNIBLE) what is offered to all serious violent offenders, and I'm going to assume that that's -- he's going to be offered that too. So, DBT would be an add on to that, if he is willing to participate, because like most, sort of, meaningful and effective treatment programs, it's strenuous. It's not something you can do casually.

Q Let's maybe, before we move on to the other diagnoses that are -- actually that is the diagnoses, but let's -- so, let's say DBT did exist. I think you've already said that he, of course, would have to do that, and it would be in addition to anything else, okay. And so, it would take a level of commitment that we haven't certainly seen to this point.

A Correct.

Q So, that's an obstacle, is coming to that commitment that hasn't been indicated in the past.

A Agree.

Q And let's put DBT to the side, the borderline personality disorder itself then is an obstacle that has to -- that's the underlying diagnoses that has to be addressed.

A One of them, yeah.

[62] Additionally, Dr. Lohrasbe spoke of the general obstacles faced by Mr. Pelly in successfully accessing and completing treatment:

> Q He -- he tends to just not interact very much.
>
> A Yeah. So, if you look at the file as a whole, you'll -- you'll get a lot of facts, but you don't really get -- even -- even from the mental health professionals who've seen him, you don't really get a sense of the man, what makes him tick. You get a lot of risk factors described. You get a lot of historical factors. All of the things are fairly obvious. So, there's this contradiction. On the one hand, we have a lot of information about him, just factual knowledge. But we don't really have a good sense of the human being.
>
> Q M-hm.
>
> A And that -- again, I don't think is necessarily because of his guardedness, although I think that's a factor -- I don't think he knows how to communicate things.
>
> Q And the -- the ability to communicate will be something, I think, that is an obstacle. He'll need to learn to communicate to get better.
>
> A You need to learn to trust. Trust is huge for any meaningful progress at therapy. Never mind, as I'm sure I'm going -- you're going to get to this in terms of risk management --
>
> Q M-hm.
>
> A -- when he's out there, trust is huge. If he doesn't lower his guard, it's not going to happen. Meaningful treatment is not going to happen. Management in the community is not going to happen.
>
> Q And I think without repeating what we've already talked about -- whether it has to do with what he learned from being in the gang, or how to survive, all of those things in and out of the institution, what have you -- the way it is though right now, it's an obstacle he has to overcome.
>
> A Yes.
>
> …
>
> Q And so, perhaps, we don't tend to compare one individual to another. But certainly, as you said, it's more notable with him that we're not -- we're still in that "if" stage of what is it that -- if there is and if something happened, we don't have a handle on it at this stage in terms of just exposition.
>
> A Correct.
>
> Q That's --
>
> A It would need him to be much more trusting and disclosive.
>
> Q And that again, is an obstacle at this stage.
>
> A Well, I'm -- I'm assuming that. I mean I don't know. In the year or so since I've seen him, maybe with this girlfriend, he's disclosed a lot more. I -- I don't know, but I'm -- I'm just basing it on, you know, when I met him.
>
> Q M-hm.
>
> A He's got a long way to go.
>
> Q No. And isn't that -- that's what makes it so difficult with him, is such an "if", because we don't know.
>
> A Yeah.

Q Whereas, opposed to normally, you can state right out that okay, we know this about him. Now he just has to come to this healing versus reasoning of it.

A Yeah. Fair enough.

Q Right now, we're not at that stage –

A Correct.

Q -- because we don't know.

A Correct.

[63] Dr. Lohrasbe concluded that Mr. Pelly is a high risk to reoffend violently and would remain so in the foreseeable future. From Dr. Lohrasbe's report and testimony, it is abundantly clear that management of this risk depends overwhelmingly, if not completely, on Mr. Pelly's willingness to engage in significant programming and to be successful with that treatment. This is a long-term proposition and would require a level of commitment that Mr. Pelly has never displayed. He would have to maintain this level of motivation for the rest of his life. During his testimony, Dr. Lohrasbe discussed the future prospects for treatment in the following tentative terms:

Q But he'll always, during that time period, have this other battle that before he learns the skills that he needs to learn in extensive programming, that he'll still have this constant pull on the other side of ending up in seg, for whatever reason, which then basically takes a lot of the programming, because he will not have learned those skills. See the -- the way I'm presenting it, it is a bit of a circle for him, because he chooses to be hard, and have to walk around and be -- that's -- whether he views it that that's -- that's how you survive, everyone doesn't end up in seg.

A Yeah, and I -- I wouldn't expect that he can miraculously turn it around.

Q M-hm.

A What I would hope is that sometime down the road, an assessor looking at his progress over say the two or three years previously, will see that there's been a steady movement in the direction, positive direction that we're talking about. I wouldn't expect that he can turn it on a dime. So, yes, you're rightfully pointing out that -- that -- there's a kind of a circle here, that in order to move a step ahead, you know, he's got to take leaps, but in order to take the leap, he's first got to take a step ahead, so to speak, in terms of trust. But I've seen it happen with many offenders, where they -- it's two steps forward, one step back, but they keep moving in the right direction.

Q But this high intensity programming, it will be a significant chunk of time – or presumably, and we've heard about the you know, 50 odd sessions and presumably he'll always have to back to the real life of the jail at some point.

A Yeah.

Q And then that's where the stressors will be.

A Yeah.

Q And he will not have had a chance to complete the learning of the skills, when these stressors are there.

A Yeah.

Q So, it's going to make it very challenging for him to successfully complete the program --

A Yeah.

Q -- and then get the opportunity to practice those skills, which he must do in the institution, before he can ever be out in the community.

A Yeah. So, you're pointing out to the, sort of, if I can put it this way -- the vicious circle.

[64] With regard to his conclusion that there is a reasonable possibility, that with programming and treatment, Mr. Pelly's risk can be lowered to the point where he can be managed in the community, Dr. Lohrasbe provided a description of the intensive nature of the programming that would be required:

Q Okay. Now, perhaps you can expand upon what you mean by the phrase "reasonable possibility". I have in mind that can mean different things to different people and different parts of the jurisprudence say.

A Okay. There are some offenders where the failure of past attempts at treatment and rehabilitation combined with the individual's clinical presentation, to be in a attitude towards himself and his future -- when put together, makes the likelihood of this person transforming himself in the ways that we hope, towards a -- towards his rehabilitation, so remote, that it seems unreasonable to just put it out there, in the sense of, Well, anything's possible.

Q M-hm.

A With Mr. Pelly, he has not gone through the most intensive programming available through CSC. So, right off the bat, unless there are strong reasons to say otherwise, it would be unreasonable to conclude that such programming – by which I mean the high intensive multi-target, is going to be ineffective. I – I don't see how one could say that. Add on to that, the diagnostic clarifications, I'd like to think, that have come out of this assessment, which implies that there may be more specific treatment interventions that are helpful for him, that have not been tried before. Add on to that, the -- I won't repeat, you know, the anticipated effects of ageing, again potential -- the potential effects of this proceedings, you put that all as a package, and you're relying on any one thing.

Q M-hm.

A When you put that all as a package -- and to me, it translates into a reasonable possibility that although he is at high risk now, as things stand, before having gone through the kinds of programs that I've just listed, it's reasonable to anticipate that after having completed that program, he would be at a point where that risk could be managed in the community.

…

Q M-hm. So, provided Mr. Pelly is likely to make the sustained effort, there is a concrete path forward where we can expect results.

A Yes.

[65] In commenting on the risk assessment conducted on Mr. Pelly, Dr. Lohrasbe opined as follows in his assessment report: “The risk assessment outlined above suggests that the prognosis is poor, as indeed it is unless Mr. Pelly makes a heartfelt and sustained commitment to change, and takes full advantage of the programs that he will be offered” (at 29).

[66] The further evidence provided by correctional officials demonstrated a dismal outlook for Mr. Pelly’s future engagement in programming and control in the community.

[67] At this point, it is informative to return to the words used by the sentencing judge to describe her view of Mr. Pelly’s treatment prospects while undertaking her analysis of this factor in the designation stage. The following portions of the *Sentencing Decision* illustrate her conclusions regarding this issue:

> [33] Although Mr. Pelly has historically and currently been unable to trust others, there is nothing in the evidence that categorically speaks to him being unable to develop the minimal level of trust necessary to move forward toward a life without violence. Indeed, the evidence supports a finding that he is not incapable of treatment or untreatable. He simply faces a daunting task that will require a huge degree of sustained motivation for the balance of his life. And, the effort required by Mr. Pelly is magnified because he suffers from mental illness related to anxiety, depression, brain damage or cognitive disability and personality disorder. Perhaps even more challenging is the reality that he has never been able to remain free of substance abuse or reactive violent behaviour while incarcerated, let alone while in the community.
>
> [34] It is unnecessary at this stage to refer to all of the very significant and challenging changes that Mr. Pelly will have to learn how to make if he wants to reduce his current risk level in the future. To date, the only progress Mr. Pelly has made towards change is disavowing his gang membership. This is commendable, but the evidence is unambiguously clear that Mr. Pelly will continue to be a threat to other persons unless he remains entirely free from all alcohol and drugs. Since he was 10 or 11 years old his life has been hijacked by these addictions. In my view, the sheer magnitude of all that Mr. Pelly must accomplish to effect meaningful and lasting change satisfies me beyond a reasonable doubt that there is a likelihood that he will continue to be a threat to the public in the future.

[68] On the basis of all of this, I cannot conclude that there is a reasonable expectation that a penalty less than an indeterminate sentence would provide adequate protection to the community from the risk posed by Mr. Pelly. In my view, the evidence was strongly to the contrary. While Dr. Lohrasbe opined there was a reasonable possibility that Mr. Pelly’s risk can be lowered to the point where he can be managed in the community, this opinion was highly dependent on factors that the evidence established were unlikely to occur. Mr. Pelly must immediately commit to *total* abstinence and to the programming and lifestyle choices that will support such a dramatic change. Additionally, he must fully engage in other intensive programming and be successful in such

treatment. Even if Mr. Pelly can successfully commit to these necessary requirements, Dr. Lohrasbe described the significant obstacles and lengthy and intensive nature of the programming required to lower the risk to an acceptable level. Mr. Pelly's steadfast and repeated refusals to even begin to engage in such programming in the past, his demonstrated inability to comply with the most stringent form of conditions while on statutory release on five occasions, and the significant obstacles he faces with regard to the success of lengthy treatment lead inexorably to the conclusion that there is no reasonable expectation that a lesser sentence will provide adequate protection to the public. His verbal commitment to now engage in the programming and the other positive factors described above are insufficient to overcome this hurdle.

[69] The evidence was overwhelming that there was no reasonable expectation that anything less than an indeterminate sentence could adequately protect the public from the future threat of serious personal injury posed by Mr. Pelly.

[70] In my view, based on the above analysis, the only appropriate sentence is a sentence of indeterminate incarceration pursuant to s. 753(4)(a) of the *Criminal Code*. There is not a reasonable expectation that a lesser sentence would provide adequate protection to the public.

[71] As a final observation, I note that an indeterminate sentence is not a life sentence without parole. There are mechanisms available that can result in Mr. Pelly's return to the community once his risk can be managed. Dr. Lohrasbe recommended a lengthy opportunity in which to gauge Mr. Pelly's progress in order to assist in the management of that risk. In addition to the primary purpose of adequately protecting the public, this is precisely what an indeterminate sentence will accomplish.

VI. CONCLUSION

[72] The appeal is allowed. The sentence imposed by the sentencing judge is set aside and an indeterminate sentence pursuant to s. 753(4)(a) of the *Criminal Code* is substituted. The ancillary orders pursuant to s. 109, s. 487.051 and s. 760 shall remain in place.

"Tholl J.A."

Tholl J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Barrington-Foote J.A."

Barrington-Foote J.A.