

Citation: *R. v. Thorn*, 2021 YKTC 23

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20-00349

Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before His Honour Judge Chisholm

REGINA

v.

HERMAN PETER THORN

Appearances:

Noel Sinclair and Benjamin Eberhard

Norah Mooney

Counsel for the Crown

Counsel for the Defence

**REASONS FOR SENTENCE**

[1] Herman Thorn has pleaded guilty to 22 *Criminal Code* offences. For a number of these offences, the Crown has brought an application with the consent of the Attorney General of Canada to have Mr. Thorn declared a dangerous offender pursuant to the *Criminal Code* (the “Code”).

## Background

[2] On April 22, 2020, the Crown applied, with the consent of the defence, for an assessment report pursuant to 752.1 of the *Code*. The Court ordered an assessment resulting in an assessment and report completed by Dr. Shabehram Lohrasbe, a forensic psychiatrist. A supplemental report by Dr. Lohrasbe was later filed with the Court.

[3] On January 29, 2021 the Crown filed an application seeking to have Mr. Thorn designated either a long-term offender pursuant to s. 753.1, or a dangerous offender pursuant to s. 753(4) and 753(4.1). On March 2, 2021, the Crown filed the consent of the Attorney General of Canada for an application pursuant to s. 753(1) to have Mr. Thorn declared a dangerous offender, and sentenced in accordance with s. 753(4) & (4.1)<sup>1</sup>.

[4] The Crown seeks a declaration that Mr. Thorn is a dangerous offender, and submits that he should receive an indeterminate sentence, or alternatively a determinate sentence followed by a 10-year long term supervision order (s. 753(4)(b)). The Crown contends that Mr. Thorn's criminal antecedents, and predicate offences reveal that the only way to protect the public is by way of a dangerous offender designation.

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<sup>1</sup> The consent of the Attorney General of Canada was initially provided on August 20, 2020, with respect to four predicate offences ((267(b) x 2; 268(1) x 2). The amended consent document filed March 2, 2021, added the s. 270.01 offence.

[5] Alternatively, the Crown contends that a long-term offender designation should be made pursuant to s. 753.1.

[6] The defence submits that a lesser measure than a dangerous offender designation will adequately protect the public. Accordingly, the defence is opposed to a dangerous offender designation and the imposition of an indeterminate sentence, or a long-term supervision order. The defence maintains that a lengthy period of incarceration would be an appropriate penalty.

[7] Alternatively, if the Court finds that a determinate period of imprisonment is insufficient, and the criteria for a long-term offender designation have been met, the defence submits that the Court should impose a long-term offender designation with an appropriate long-term supervision order.

[8] The offender has the support of his First Nation in Saskatchewan, including the development of a release plan to reside in his home community following the completion of a penitentiary sentence. Mr. Thorn has been absent from that community since he was a child.

### **Predicate Offences**

[9] The predicate offences comprise two offences of aggravated assault; and, two offences of assault causing bodily harm that Mr. Thorn committed on January 9, 2020, and an assault causing bodily harm of a peace officer, committed by Mr. Thorn on July 2, 2020.

## **Admissions of Facts**

[10] Crown and defence counsel have filed a series of admissions of fact, which I will summarize. Some of the facts have been included as aggravating circumstances pursuant to s. 725 of the *Code*. All of the offences occurred in Whitehorse, Yukon.

### *Theft (Summary Conviction)*

[11] On October 25, 2019, Mr. Thorn stole meat of a value of \$213.23 from the Real Canadian Superstore. It was not recovered. He was on a probation order at the time.

### *Assault (Indictable)*

[12] On November 8, 2019, in an unprovoked assault, Mr. Thorn approached Darwin Zenkewich and struck him in the face on at least one occasion with a closed fist. The resulting wound to the victim's chin required a small number of stitches to close. Mr. Thorn was in breach of three conditions of a probation order, including having consumed alcohol contrary to an abstention clause. He was released on conditions on November 12, 2019.

### *Theft (Summary Conviction)*

[13] On November 22, 2019, Mr. Thorn stole meat of a value of approximately \$200 from the Real Canadian Superstore. The meat was not recovered.

*Theft & Breach of Probation (Summary Conviction)*

[14] On December 5, 2019, Mr. Thorn stole gloves from the Canadian Tire store. The gloves were not recovered. Mr. Thorn was in breach of a curfew condition of his probation order when subsequently arrested on December 8, 2019. He was again released on conditions on December 23, 2019.

*Theft (Summary Conviction)*

[15] On January 6, 2020, Mr. Thorn stole two pairs of Air Pod Pros from Cell Phone Central. The value of the merchandise was approximately \$600. The items were not recovered. Mr. Thorn was on probation at the time of this offence.

*Assault, Theft & Uttering Threats on January 9, 2020 (Indictable)*

[16] On January 9, 2020, Mr. Thorn assaulted Edward Garvey at a local gas station after approaching the victim and asking him for change. When the victim declined, Mr. Thorn pushed him, and punched him multiple times in the face, chipping one of the victim's teeth. Mr. Thorn threatened the victim throughout the assault, stating that he would wait outside for him and kill him. As a result, the victim gave Mr. Thorn five dollars, which was all the cash in his wallet. Mr. Thorn departed, and was not located by police.

*Assault Causing Bodily Harm x 2; Aggravated Assault x 2; - Predicate Offences Uttering Threats x 2; Resist Arrest; Breach of Probation (Indictable)*

[17] On January 9, 2020, shortly after 3:30 a.m., Mr. Thorn assaulted and uttered

death threats to Gary Hunter, Jolene Papequash, Raven Lennie, and Bachir Ige at the apartment of Gary Hunter.

[18] Mr. Thorn caused bodily harm to Ms. Papequash, consisting of a significantly swollen right cheek and a bloodied mouth.

[19] Mr. Thorn caused bodily harm to Ms. Lennie by breaking her jaw. The injury required surgical intervention.

[20] Mr. Thorn committed an aggravated assault on Mr. Hunter by causing softening/loss of brain tissue, and a thickening of the membrane surrounding the brain (dura); by breaking his cheekbone, and by fracturing his maxillary sinus lateral and frontal walls, extending into the left eye socket. The injuries to Mr. Hunter resulted in extensive facial bleeding. A wound to the left side of the victim's face required stitches.

[21] Mr. Thorn committed an aggravated assault on Mr. Ige, resulting in the victim suffering a severely swollen and bleeding face, deep lacerations and cuts on his nose and lip, and a partly detached lip.

[22] When the police attended at the scene, Mr. Thorn exited the residence by jumping over the outside balcony and running away. Police ran after him. Mr. Thorn resisted arrest by fighting with Cst. Fortin. Mr. Thorn was combative with and threatening to police officers. At the Arrest Processing Unit, he became physically resistant when exiting the police vehicle. While Cst. Geary read him his rights, Mr. Thorn stated, "I will fuck you up". He punched and elbowed the cell door and then

told the constable that he would find him and “poke his eyes out, find out where he lives and kill his family”.

[23] At the scene of the crimes, the police observed blood and blood splatter in various rooms of the residence. Large pieces of thick broken glass were located under Mr. Hunter. The police seized an empty vodka bottle and a bag of suspected cocaine.

[24] At the time of these offences, Mr. Thorn was in a breach of a probation condition to abide by a curfew between the hours of 10:00 p.m. and 7:00 a.m.

*Assault Peace Officer (s. 270(1)(a)) (Indictable)*

[25] On January 9, 2020, an altercation occurred when police officers were attempting to gather evidence from Mr. Thorn after his arrest on the predicate offences. During the incident, Mr. Thorn kned Corrections Officer (“CO”) Stackdale in the knee, causing soft tissue damage around his knee. An attending doctor determined that the victim would have to be off work or on modified duties for at least a week.

*Assault on February 2, 2020 (Summary Conviction)*

[26] On February 2, 2020, Mr. Thorn assaulted Billy Field, an inmate at the Whitehorse Correctional Centre (“WCC”), by punching him approximately three times. The victim sustained injuries from the assault, including a cut above one eye.

*Assault Peace Officer (270(1)(a) x 2) (Summary Conviction)*

[27] On May 6, 2020, CO Skvortsov was on duty in the evening when he observed Mr. Thorn assault another inmate. CO Skvortsov and CO Hitchcock got in between the

two inmates to prevent a continuation of the altercation, and gave loud verbal directions to Mr. Thorn to stop fighting. Mr. Thorn advanced toward CO Skvortsov, and struck him in the face with his elbow. Mr. Thorn next punched CO Hitchcock in the left cheek and jaw, breaking the officer's glasses.

*Assault Peace Officer (270.01) (Indictable) – Predicate offence*

[28] On July 2, 2020, CO Hubbard was working in the unit where Mr. Thorn was mopping the floor. Mr. Thorn indicated that he wanted to put the mop away, so CO Hubbard left his desk to open the janitor's closet door. Mr. Thorn placed the cleaning items in the closet and thanked CO Hubbard for holding the door open.

[29] Mr. Thorn walked to the Programs Room. CO Hubbard entered the room to talk to another inmate. As he did so, Mr. Thorn rushed toward him, and punched him in the face. CO Hubbard took a defensive stance, and backed up while Mr. Thorn continued to strike him in the face and head. CO Hubbard managed to push his personal alarm transmitter as this occurred. However, he was unable to communicate via his radio due to Mr. Thorn's continued assault. He was ultimately able to trip Mr. Thorn and take control of him.

[30] As the victim was bleeding profusely from his face, he sought medical attention. He sustained a one-inch scar to his forehead, scars to his upper and lower lips where his teeth had punctured the lips, and an injury to his meniscus and patell for which he underwent physiotherapy.

## **Victim Impact**

[31] The Crown did not file any victim impact statements. However, in the admissions of fact regarding the assault on CO Hubbard, it is agreed that he underwent treatment for post traumatic stress as a result of the assault.

[32] Also, the assaults on some of the other victims were severe, and undoubtedly painful.

## **Evidence on the Application**

[33] A large body of documents was filed on the application, including the assessment reports prepared by Dr. Lohrasbe, Mr. Thorn's criminal record, sentencing transcripts and decisions involving Mr. Thorn, police occurrence reports, voluminous records from the Correctional Services of Canada (1998-2017), a *Gladue* Report, and a letter from his psychologist.

[34] In terms of the police investigative reports, I appreciate that hearsay evidence that is credible and trustworthy is admissible at a sentencing hearing. I am also aware of the evidentiary frailties inherent in police occurrence reports, as information contained within a synopsis may diverge from the facts proven at trial or admitted on a guilty plea (*R. v. Williams*, 2018 ONCA 437, at para. 55). Accordingly, those records must be treated with caution.

[35] As in *Williams*, I admit the police occurrence reports; however, I do not accept that the entire contents are proved beyond a reasonable doubt. I will consider the reports in light of other evidence led at this hearing.

### **Criminal History of Mr. Thorn**

[36] Mr. Thorn has an unenviable criminal record. His adult record includes numerous convictions, including many for violent offences. It commences in 1988 with two common assault convictions for which he received jail terms of 30 days and three months respectively.

[37] Also in 1988, Mr. Thorn was convicted of an assault causing bodily harm on an ex-girlfriend with whom he had been in a short relationship until one-month prior to the offence. The prolonged assault occurred in the victim's home and was serious in nature. The victim sustained substantial swelling and bruising to her facial area. Mr. Thorn had been consuming alcohol at the time of this assault. He completed a four-week alcohol treatment program prior to sentencing. The Court sentenced him to two years imprisonment plus a three-year probationary term.

[38] In 1991, Mr. Thorn received a six-month jail sentence for an assault causing bodily harm, consecutive to an 18-month jail term for a prison breach. The assault consisted of Mr. Thorn throwing the victim down a set of stairs in front of a police station, and kicking him twice in the head. The bodily harm comprised a cut over the victim's left eye and a gash on his forehead. Those injuries required sutures.

[39] On March 8, 1994, Mr. Thorn was convicted of possession of a weapon for a purpose dangerous to the public peace. He entered a house in which his stepmother resided, while brandishing a knife. He followed a male who was in the residence around the house while holding the knife. He was somewhat agitated. The people in the house spoke to him, asking him for the knife. He became angry, and told them that

if anyone reported what had occurred he would come back and finish what he started. He was on parole at the time. The Court sentenced him to nine months in custody plus two years' probation.

[40] The above-noted offences all occurred in Saskatchewan.

[41] On October 17, 1994, Mr. Thorn was sentenced in Edmonton to a 15-month global jail sentence for three offences. The Court sentenced him to two consecutive six-month jail terms for two assaults, and three months' jail consecutive for possession of a weapon for a purpose dangerous to the public peace.

[42] On August 30, 1996, Mr. Thorn was sentenced in Edmonton to six months' jail concurrent on charges of assault peace officer, uttering threats to a peace officer, and possession of a weapon for a purpose dangerous to the public peace. The Court also sentenced him to two months' jail consecutive for an assault of three peace officers.

[43] On June 18, 1997, Mr. Thorn was sentenced in Edmonton to 60 days' jail for an assault. Although a transcript of the court proceeding was not produced, the police alleged that he ran after and grabbed the arm of an eight-year-old boy, asking him his name. Mr. Thorn released the boy before he was able to respond.<sup>2</sup>

[44] On March 23, 1998, Mr. Thorn was convicted of and sentenced for manslaughter and three counts of aggravated assault. The Court sentenced him to nine years' imprisonment for the manslaughter, 56 months consecutive for aggravated assault, and

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<sup>2</sup> This incident is also briefly outlined in the *Gladue* Report which states that the boy was nine years old.

two three-year terms of imprisonment for aggravated assault concurrent, for a global sentence of 13 years and 8 months' incarceration.

[45] The convictions are the result of events that occurred on August 30, 1997, in Edmonton. The deceased was Mr. Thorn's cousin, Joseph Alvin Thorn. The police occurrence reports detail Mr. Thorn wielding a knife during the incident. Mr. Thorn advised Dr. Lohrasbe that "He was Alvin, my cousin...he was quite a bit older than me...I think he had anger with my brother...maybe he fought with my brother?...so maybe I wanted revenge?...they said I cut his jugular". The police general occurrence report indicated that the victim died in hospital as the result of knife wounds. The occurrence report also indicated that the other three victims received knife wounds.

[46] Mr. Thorn also stated to Dr. Lohrasbe that "I don't remember much...but his sister's statement was that I got angry...so something must have caused me to have a grudge...I call them by angry tantrums...it's hard for me to shut it out and I stay angry for a long time...I couldn't shut it down".

[47] Mr. Thorn was initially charged with attempted murder of Mary Thorn (his aunt) and John Thorn (his brother), and ultimately pleaded guilty to aggravated assault in regards to both. He also pleaded guilty to aggravated assault in relation to his uncle, Joseph Thorn. In the *Gladue* Report, it is reported that Mr. Thorn does not actually remember what precipitated the violence, but he stated "...my auntie and uncle, who are Alvin's parents, and my older brother John...I think they were trying to pull me off".<sup>3</sup>

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<sup>3</sup> Although Mr. Thorn advised Dr. Lohrasbe that he did not know what precipitated the violence, he advised the author of the pre-sentence report that the deceased had reminded Mr. Thorn that he sexually abused him when they were children.

[48] The criminal record of Mr. Thorn reveals that he was paroled on November 16, 2004, but recommitted to custody on September 8, 2005, due to a parole violation. Correctional Services Canada (“CSC”) records (Exhibit 14B, Tab 3) indicate that his supervision on parole was transferred to Fort Smith, Northwest Territories (“NWT”), in June 2005, but that his release was suspended in July 2005, due to a breach of his conditions. According to the records, his wife, Connie Thorn, contacted the parole office to indicate that Mr. Thorn had withdrawn a large sum of money from her bank account, and disappeared. Mr. Thorn subsequently turned himself into the parole office in Prince Albert, and admitted to having breached his conditions by consuming drugs and alcohol. The Parole Board of Canada revoked his full parole release in September 2005.

[49] The CSC records indicate that in February 2008, Mr. Thorn was granted day parole. In July 2008, he was returned to federal custody after breaching the condition of his release to abstain from intoxicants. In August 2010, the Parole Board directed day parole, which was converted to statutory release in October 2010.

[50] According to the records, in December 2010, police located Mr. Thorn in an intoxicated state and in possession of drug paraphernalia. The Parole Board revoked his release in January 2011. His criminal record states that he was recommitted on January 12, 2011, for violating his statutory release. In March 2011, the records indicate that he was found bringing drugs into the penitentiary while returning from an escorted temporary absence.

[51] Mr. Thorn was given statutory release from the Saskatchewan Penitentiary on July 25, 2011. He moved to Fort Smith, NWT and resided with his family. In August and September 2011, the CSC casework records indicate that Mr. Thorn was attending scheduled appointments, doing a residential school workshop, and reportedly adjusting well to being back with his wife and children (Exhibit 14B, Tab 13). On October 22, 2011, his statutory release was suspended, and a warrant of apprehension issued, as a result of an alleged assault on his wife (Exhibit 14B, Tab 18, 19, and 22). Mr. Thorn admitted to drinking alcohol the night before his wife returned from a trip to Yellowknife. His warrant expiry date was November 25, 2011 (Exhibit 14B, Tab 23). Although the CSC records state that he was convicted on December 6, 2011 of an assault on his wife, this does not form part of his criminal record, nor was I provided with any official court records in this regard. As a result, I find that the Crown has not proved this offence beyond a reasonable doubt.

[52] On June 2, 2012, Mr. Thorn was charged with aggravated assault and assaulting a peace officer in Fort Smith.

[53] On January 21, 2013, he pleaded guilty to these offences. The sentencing proceeded by way of joint submission. The sentencing judge imposed a five-year term of imprisonment for the aggravated assault, and six-months consecutive for the assault peace officer.

[54] The agreed statement of facts indicate that Jason Saliga, the victim, dropped by the residence of a friend after having consumed some alcohol in the early morning hours of June 2, 2012. Within minutes of his arrival, he heard a ruckus upstairs and

went to investigate. When he entered the living room, Mr. Thorn jumped up from the couch and advanced toward the victim, yelling something unintelligible. The victim had met Mr. Thorn previously, and subsequently greeted him when they saw each other around town. There was no animosity between them. However, on this occasion, Mr. Thorn was out of control. He had a blank look in his eyes.

[55] When Mr. Thorn reached the victim, he pushed him backward, telling him to back off, and asking him what his problem was. After Mr. Thorn pushed him a second time, he bit the victim's face, severing a piece of the victim's left nostril. The victim attempted to defend himself by striking Mr. Thorn. In response, Mr. Thorn bit the victim's hand, breaking the skin at the bottom of his pinky finger. Ultimately, the victim was able to push Mr. Thorn down; however, Mr. Thorn got up again and started striking him. When the victim was able to get some distance between him and Mr. Thorn, he left the house.

[56] Mr. Thorn followed him outside, and tried to hit him, as the victim moved quickly in the direction of a friend's house. The victim fended Mr. Thorn off by ducking and pushing him away.

[57] The RCMP happened to be in the area for another investigation. After being alerted by Justin Abraham, one of the officers observed the victim walking rapidly towards him, with Mr. Thorn about 10-15 feet behind. Mr. Abraham asked the police for assistance, explaining that Mr. Thorn was trying to fight with him and the victim, and that he had bit off part of the victim's nose.

[58] The police officers described Mr. Thorn being in a trance like state. One officer arrested him and was standing directly behind him when Mr. Thorn became increasingly

agitated. He started twisting around, at which time the police ended up taking Mr. Thorn to the ground. While on the ground, he initially wrapped his legs around the officer's legs, and ultimately kicked the officer in the left elbow and left shoulder.

[59] The judge who sentenced him for these offences on January 21, 2013 noted that, while awaiting court proceedings in custody, Mr. Thorn had used his time productively, particularly with respect to his alcohol addiction, by taking a leadership role with Alcoholics Anonymous within the correctional setting.

[60] Mr. Thorn experienced some problems while incarcerated during this sentence, including allegations of assaulting other inmates. Accordingly, he was subject to two periods of segregation in 2016. He successfully completed a two-month Aboriginal Healing Program on December 23, 2016. He was described as a “respectful and helpful participant”, and the program report describes his having “improved his ability to develop a self management and Healing plan” (Exhibit 14B, Tab 52).

[61] He allegedly committed an assault on another inmate on March 29, 2017, by punching him in the face and breaking his jaw.

[62] Mr. Thorn was released on his warrant expiry date of November 27, 2017.

[63] On February 5, 2018, Mr. Thorn assaulted his wife, his daughter, resisted arrest, and breached two conditions of his recognizance. Police officers attended a 911 call in Whitehorse that Mr. Thorn was assaulting his wife, Connie Thorn. Upon arrival, police noted Mr. Thorn's daughter on an upper balcony of the apartment complex. She was in an agitated state and yelled that “they” were downstairs and that the door was locked.

The police found that the door was locked. They announced their presence, but had to force their way into the apartment when nobody answered the door. When entering, they observed Connie Thorne, who was naked, run from a back room into an adjacent bedroom. The police subsequently learned that she climbed out the window of that room, even though the temperature was minus 30 degrees Celsius.

[64] The attending officers observed Mr. Thorn standing in the hallway. When police advised him that he was under arrest, he retreated to a bedroom and placed a mattress between him and the officers. He turned off the light in the bedroom, and refused to communicate with police until he was told that they would employ a Taser. Upon entering this room, from which Connie Thorn had initially run out, police observed a kitchen knife in an open container.

[65] Connie Thorn appeared to be in shock, and had bruising to her face. At the preliminary inquiry, she testified that she and Mr. Thorn had been drinking Listerine that night. In the course of an argument that ensued, he punched her twice, and choked her by placing his hands around her neck. He also assaulted his daughter by kicking at her while she and Connie Thorn called police. His daughter said that she had heard shouting and screaming coming from the room where her parents were. She went to the room three times to check on them. On the third occasion, she saw her father straddling her mother, and choking her. As she attempted to get her mother away from Mr. Thorn, he punched Connie Thorn twice, and held a knife to her head.

[66] On August 5, 2018, while on remand, Mr. Thorn assaulted CO Grant Fowler. As the officer was bending over to complete a pat down search of Mr. Thorn outside of his

cell, Mr. Thorn drove his left elbow into CO Fowler's face, striking him in the right eye socket. Mr. Thorn had to be restrained by other correctional officers. CO Fowler's eye was blackened by the assault.

[67] On September 21, 2018, Mr. Thorn assaulted CO Pearson. Another correctional officer had instructed Mr. Thorn to return to his cell. As Mr. Thorn was doing so, he asked CO Pearson what he was looking at. The officer replied "nothing". Mr. Thorn advanced on him, and threw a swinging punch at CO Pearson that caused a minor injury, resulting in swelling on the left side of his forehead.

[68] On April 5, 2019, the Court accepted a joint submission for a global sentence of 27 months' imprisonment, including two-year terms of incarceration for the assault charges. The sentence included a three-year probationary period. Mr. Thorn had already served, on remand, the equivalent of 21 months' incarceration.

[69] Mr. Thorn's criminal record details other criminal convictions that I have not referred to, as, in my view, they are not especially relevant to this application.

### **Evidence of Kandace Goldstone, and Affidavit Evidence of Erin Jamieson**

[70] Ms. Goldstone is a regional program manager at CSC, Pacific Region. She testified to offender intake, and programming, as described in the Affidavit of Erin Jamieson, parole officer, and as updated in Ms. Goldstone's Affidavit. She explained that the intake assessment process occurs over a 70 to 90-day period, and informs security classification, and the level and intensity of programming for each offender. Additionally, Indigenous offenders meet with an elder who prepares an elder review.

The assessment process results in an individual Correctional Plan outlining treatment and correctional interventions throughout the sentence.

[71] Ms. Goldstone testified that the CSC employs an integrated program model to address risk factors linked to offending behaviour, with a goal of teaching offenders how to use skills learned in programming in challenging or stressful situations. The integrated program model includes a culturally based Indigenous stream designed to meet the unique needs of Indigenous offenders. CSC programs address five primary areas, four of which are relevant to Mr. Thorn: general criminality, violence, family violence, and substance abuse.

[72] Offenders who have been designated by the court as dangerous offenders have access to the same correctional programming as non-designated offenders. CSC prioritizes programming for offenders based on their date of day parole eligibility.

[73] Ms. Goldstone also explained that an offender on parole or a long-term supervision order (“LTSO”) is expected to participate in community maintenance programming offered by CSC through community parole offices. This programming includes Indigenous specific community maintenance programming.

[74] An offender on a LTSO, or on parole, is also monitored in the community by either an LTSO supervisor or a parole officer, and may be subject to release conditions, including reporting and residency requirements. The level of reporting is dependant on how well the individual is meeting behavioural expectations. Residency requirements may involve living at a community correctional facility, also known as a half-way house, or at a community residential facility operated by a third party organization.

Ms. Goldstone testified that the most northerly community residential facility in British Columbia is in Prince George. It is an Indigenous specific work camp that has been designated as a community residential facility.

[75] The Affidavit of Erin Jamieson describes the process of dealing with parole, and LTSO breaches. In both situations, CSC may suspend an offender's release, when there is a breach of conditions or an increase in risk, by issuing a warrant of suspension, apprehension, and recommitment. In the case of a LTSO, the offender can be held in custody up to a maximum of 90 days. During that time, the Parole Board can recommend the institution of a breach charge pursuant to s. 753.1 of the *Code*.

### ***Gladue Report***

[76] A comprehensive *Gladue* Report was prepared at the request of Mr. Thorn, and his counsel. Mr. Thorn was raised on the Pasqua First Nation (Treaty 4) Reserve. He is 51 years of age.

[77] His father and mother are both of Saulteaux ancestry. His father grew up on the Pasqua First Nation reserve, and his mother was originally from Lestock, a community north of Fort Qu'Appelle. Mr. Thorn's parents both attended residential school. His parents struggled in their parental role. They lacked communication and parental skills, and both used alcohol to excess. Mr. Thorn's father physically disciplined the children, and the physical violence was, at times, extreme. Mr. Thorn and his siblings could go to their paternal grandparents, who lived nearby, when there was difficulty at home.

[78] Mr. Thorn suffered from a speech impediment that caused him problems. He learned how to deal with problems at school through violence, and acting out.

[79] Although he spent some time on the land with his father, the violence at home continued. In one alcohol fueled episode, when Mr. Thorn was 10 years old, his father beat Mr. Thorn's mother to death. Mr. Thorn went to stay with his grandparents, while his siblings went to stay with other relatives. His father received a penitentiary sentence. At the age of 12, Mr. Thorn was sent to the same residential school that his father had attended.

[80] When Mr. Thorn was 15 years old, he moved to Regina to live with his father who had just been released from the penitentiary. Although Mr. Thorn had already been experimenting with alcohol and drugs, this activity increased. He dropped out of school, and began to become involved in crime. His criminal record shows that his first convictions were two break and enters when he was 16 years old.

[81] As Mr. Thorn indicated to the author of the *Gladue* Report:

I've got a bunch of theft unders on the charges I'm dealing with now. It seems like I've done that my whole life. I got into drugs and drinking quite heavily when I was stealing (p. 12).

[82] In 1995, Mr. Thorn met his wife, Connie, who is originally from Fort Smith, NWT. She also came from a family negatively affected by residential schools, and had a difficult upbringing.

[83] While serving a prison sentence, Mr. Thorn learned that Connie was pregnant with their daughter who was born in 1997. When out of jail, Mr. Thorn struggled with his

new parental responsibilities, and his desire to go drinking. In the late summer of that year, as outlined above, he was arrested for violent offences against family members and was ultimately convicted of manslaughter and three aggravated assault charges.

[84] While still in federal custody, Mr. Thorn and Connie were married in 2003. Mr. Thorn indicated that around this time, he was granted day parole, and that he worked in Prince Albert, while also doing school upgrading. Connie Thorn became pregnant and their son was born in 2005. However, Mr. Thorn relapsed, and his full parole was suspended.

[85] Mr. Thorn and Connie Thorn lived together in Fort Smith (while he was on parole), before Mr. Thorn again ended up in the penitentiary as a result of another aggravated assault.

[86] Upon his release in 2017, he moved to Whitehorse to join Connie Thorn and his daughter. His son was in care. When not in prison in Whitehorse, Mr. Thorn was effectively homeless<sup>4</sup>.

[87] Mr. Thorn indicated in the report that he has pursued his Christian beliefs, from which he draws strength. He has been meeting with Herman Ens, and describes Mr. Ens as a mentor for him regarding his faith. Mr. Ens has seen some positive changes in Mr. Thorn while he has been most recently incarcerated, including a reduction in confrontation with guards and other inmates. While Mr. Thorn pays a good

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<sup>4</sup> The Agreed Statement of Facts for the February 5, 2018 assaults suggest that he was staying in Connie Thorn's apartment.

deal of attention to his faith when in custody, Mr. Ens would like to see him do the same when in the community. In terms of Mr. Thorn being in the community, Mr. Ens stated:

His hope and plans when in jail seem to disappear when out. I do think that's part of the cycle. He has not done well in trying to seek out supports that are potentially out there that could increase his resilience and the positive direction of being out (p. 25).

[88] In addition to significant childhood trauma, Mr. Thorn has experienced much loss as an adult. His father was killed by a drunk driver in 1997. His older brother, Rusty, died of a drug overdose in 1989. His oldest brother, John, died after banging his head during an epileptic episode, while coming off drugs. His only remaining brother is presently incarcerated in a federal penitentiary.

[89] Connie Thorn pleaded guilty to manslaughter in January 2021.<sup>5</sup> Prior to her sentencing, she and Mr. Thorn were seeing each other at the correctional centre. Ms. Thorn indicates that she believes that there is a future together for her and Mr. Thorn.

[90] Mr. Thorn would like to return to his home community in Saskatchewan when his sentence for the matters before the Court ends. He has contacted the community justice coordinator for the Pasqua First Nation. She is related to Mr. Thorn, and is aware of his background. She is willing to support Mr. Thorn, and offer community resources to him. As a part of his reintegration, she would be willing to assist him in re-connecting with his extended family.

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<sup>5</sup> Ms. Thorn was sentenced to a five-year term of imprisonment on May 13, 2021.

**Norris Pasqua**

[91] Norris Pasqua testified by telephone. She is the community Justice coordinator for the Pasqua First Nation in Saskatchewan. Prior to that, she was an Aboriginal court worker for approximately 13 years. Although related to Mr. Thorn, she did not know him until they began communicating in the summer of 2020. She is aware of his life history, including his criminal record.

[92] Ms. Pasqua is supportive of Mr. Thorn ultimately reintegrating into the Pasqua First Nation. She outlined in her testimony some of the resources available on the First Nation, including a 52-week domestic violence program; a 12-week outpatient treatment program; addictions counselling; summer talking circles, as well as a healing hospital; a healing centre in nearby Fort Qu'Appelle; treatment centres in nearby communities; access to elders; and, housing.

[93] Ms. Pasqua is a member of the Justice Committee which meets periodically with the Fort Qu'Appelle RCMP, probation officers, and parole officers. The Justice Committee makes recommendations to Chief and Council regarding members who wish to return to the First Nation. She has participated in formulating release plans for members of the community who have sought to return to the Pasqua First Nation while on statutory release.

**Evidence of Dr. Lohrasbe***a. Introduction*

[94] Dr. Shabehram Lohrasbe gave expert opinion evidence in this hearing. He is a forensic psychiatrist who was qualified to provide opinion evidence concerning the risk assessment, treatability, and risk management of serious violent offenders in the context of dangerous and long-term offender applications. He has practiced principally medicolegal psychiatry for more than 35 years, and is a recognized expert in this field. He has assessed several thousand individuals in this capacity, and has testified on hundreds of occasions, primarily in Western and Northern Canada, including in more than 160 dangerous and long-term offender hearings.

[95] Dr. Lohrasbe conducted a psychiatric assessment of Mr. Thorn pursuant to a court order. His written assessment is based on two video-conference interviews on May 21 and June 11, 2020; an interview with Mr. Thorn's therapist, psychologist Svenja Weber; an interview with his substance abuse counsellor, Lyall Herrington; and, documentation made available to him by Court Services.

[96] The documentation provided by Court Services included CSC records post-2013, including a correctional plan, criminal profiles, treatment and programming reports, as well as psychological and mental health screening assessments. It also included file information regarding the case at bar, police occurrence reports regarding the 1997 Edmonton offences, a remand report from WCC, and a preliminary assessment report from the North Slave Correctional Centre.

[97] Dr. Lohrasbe also reviewed Mr. Thorn's criminal record; an Agreed Statement of Facts regarding his April 5, 2019 convictions; proceedings at sentence and reasons for sentence regarding his January 21, 2013 convictions; proceedings at sentence and reasons for sentence regarding convictions in 1988, 1991, and 1994; and, conviction records of the Provincial Court of Alberta.

[98] Dr. Lohrasbe prepared an initial report dated June 28, 2020, and a supplemental report dated November 30, 2020.

*b. Interviews of Mr. Thorn*

[99] Dr. Lohrasbe indicated in his report that Mr. Thorn was attentive, cooperative, and responsive in the interviews. Although he did not demonstrate any cognitive deficits, he did have difficulty with effective communication, and "in articulating his thoughts or emotions". He struggled to describe events and displayed a tendency to respond to questions with justifications. The explanation or justifications amounted to recurring phrases and concepts. Mr. Thorn accepted that he has anger management issues, and appeared to be searching for an explanation for these problems. He presented as a psychologically naïve offender searching for the cause and the solution of his chronic violence.

[100] Dr. Lohrasbe reported that Mr. Thorn did not display any outward negative emotions when speaking of the significant trauma in his life. His description of inflicting severe violence on others was also generally muted. Dr. Lohrasbe opined that this emotional distance may be a major factor in Mr. Thorn's problems with "effective

interpersonal functioning”. His institutionalization combined with his developmental trauma have resulted in “an oddly immature quality to his interpersonal demeanour”.

[101] Mr. Thorn explained to Dr. Lohrasbe that he has completed numerous programs during his many years in custody, but he was unable to describe their content or goals, or any behavioural changes that resulted from his participation in the programs. He has taken high intensity violence offender programs while serving federal sentences.

*c. Interviews of Individuals working with Mr. Thorn*

[102] Dr. Lohrasbe spoke to Svenja Weber, psychologist, who has been working with Mr. Thorn since April 2018, when he initiated contact with her through his WCC case worker. She has seen Mr. Thorn on approximately 40 occasions, both in and out of custody. She advised that Mr. Thorn’s problems stem from his dysfunctional childhood involving multiple traumas, and an absence of healthy attachments. Traumatic occurrences have been part of Mr. Thorn’s adult life, as well. She spoke of his institutionalization, and few healthy relationships. He lacks a strong social network.

[103] Ms. Weber described Mr. Thorn as “very childlike”. He does not plan for the future, even when it comes to accommodations, and as a result, ends up living in high risk situations. He is triggered by touch or threat, and responds by acting out. He has expressed remorse and empathy for his actions, despite some antisocial features that he displays.

[104] Ms. Weber has worked with Mr. Thorn therapeutically, and expresses empathy towards him. She indicated that he is “like a wounded soul” who “can be very gentle

and kind, but when he feels trapped, he reacts badly and resorts to violence". She emphasized that he needs structure, as well as treatment for substances and trauma. He needs a reintegration plan when released.

[105] Dr. Lohrasbe spoke with Lyall Herrington, substance abuse counsellor, who has been working with Mr. Thorn since an earlier period of incarceration at WCC. Although they met quite frequently in the past, Covid-related restrictions have resulted in infrequent contact. Mr. Herrington described Mr. Thorn as being motivated and sincere in his commitment to counselling. He believes that "the only sensible approach for Mr. Thorn [is] to commit to abstinence indefinitely".

[106] Mr. Herrington also understands that dealing with Mr. Thorn's serious anger issues simultaneously is imperative for effective abstinence from substances. Additionally, Mr. Herrington suggests that Mr. Thorn requires communication skills in order to resolve his frustrations verbally, as opposed to physically. Abstinence based treatment would be beneficial to Mr. Thorn.

*d. Opinion Regarding Psychiatric Dysfunctions*

[107] Dr. Lohrasbe discussed in his report the negative impact of childhood trauma, which exists in a higher proportion of the prison population than in the rest of society. It has direct and indirect links to many personality and behavioural issues, including the absence of skills of self-awareness and self-control. Mr. Thorn's upbringing was marked by trauma. As noted in the report, not one of his immediate family members died a natural death. His only remaining sibling is incarcerated and has been designated a long-term offender. Although Dr. Lohrasbe acknowledged that he does

not have special training in “*Gladue* issues”, he opined that Mr. Thorn’s parents’ exposure to the residential school system resulted in Mr. Thorn being raised in a setting that “left him disadvantaged from his early years”.

[108] Dr. Lohrasbe concluded that there are two diagnoses that apply to Mr. Thorn, antisocial personality disorder and substance use disorder. The diagnosis of antisocial personality disorder reflects his history of involvement with the criminal justice system, as he has displayed characteristics of irresponsibility, irritability, aggression, recklessness, and impulsivity.

[109] Mr. Thorn’s substance use disorder does not cause him to be violent, but there is a correlation between this diagnosis and interpersonal violence. For Mr. Thorn, his use of substances is an acute risk factor, as many of his violent crimes involved some form of intoxication, including the predicate offences. Intoxication disinhibits emotions, such as anger, and this disinhibition is more pronounced in individuals who are deficient in self-regulation.

*e. Risk Assessment Process*

[110] Dr. Lohrasbe does not rely on a single assessment instrument. He explained that actuarial instruments can be inflexible, especially when dealing with offenders whose backgrounds are quite different from those who make up the database for most instruments. That being said, the most recent development in risk assessment methods allow for a comprehensive, flexible, and nuanced approach to risk assessment.

[111] Dr. Lohrasbe indicated that aside from the methods and instruments of risk assessment, when dealing with interpersonal violence, it is important to consider the specifics of prior violence. Offence based considerations, comprised of the facts of prior acts of violence, are the core of risk assessment. In situations where there have been prior repetitive acts of violence, involving multiple victims, over an extended period of time, “prior violence foreshadows future violence”, unless clear reasons exist to overrule this assumption.

[112] Another consideration is the severity of the violence, which may be looked at in terms of the physical injuries, whether it was restrained or unrestrained, the duration of the episodes, the use of weapons, and the use of threats.

[113] In addition to this clinical case formulation, Dr. Lohrasbe supplemented his assessment with the HCR-20 methodology. The HCR-20 takes its name from the three scales it employs: historical, clinical (present), and risk management, as well as the 20 items employed. This structured professional judgment assessment ensures that the assessor considers all risk factors found in the literature, even though each risk factor that is present and relevant may not be given the same weight by the clinician. Considering each relevant risk factor for violence that emerges from the entire assessment, Dr. Lohrasbe adds a clinical analysis to come up with a clinical judgment of the offender’s risk for future violence.

*f. Conclusion with Respect to Risk of Future Violence*

[114] Dr. Lohrasbe concluded that Mr. Thorn is at high risk to commit acts of violence, and that the impact on a future victim could be severe. He noted that historical

documentation that he had access to was extensive, and additionally, he had the perspectives of Mr. Thorn's therapist, Ms. Weber, and his substance use counsellor, Mr. Herrington.

[115] Also, in the case of Mr. Thorn, the factors relevant to risk assessment have been consistently addressed in the past. Over the years, people have identified similar factors over and over again. This raises Dr. Lohrasbe's confidence that the relevant risk factors that have been identified are entrenched in Mr. Thorn.

[116] Dr. Lohrasbe considered the wide range of programming that Mr. Thorn has taken over the last 30 years. Considering the failure of programming and treatment efforts to curb either his substance abuse or his violent behaviour, Dr. Lohrasbe is unable to identify any present reasons to conclude that Mr. Thorn's treatability going forward will be substantially better than in the past. He has been unable to date to implement self-regulation, composed of self-awareness and self-control, as a fundamental life skill. According to Dr. Lohrasbe, his habit of placing responsibility on others is disconcerting, as it suggests that he is evading taking full responsibility for his actions.

[117] For Mr. Thorn, and other offenders, institutionalization leads to a feeling of dehumanization, which, in turn, causes the offender to dehumanize those in authority. This is reflected in occurrence reports regarding incidents involving Mr. Thorn and correctional officers. Long periods of custody also take decision-making out of the hands of offenders. This, in turn, negatively impacts the development of adult-level social and adaptational skills. Considering Mr. Thorn's age, Dr. Lohrasbe is of the view

that overcoming this situation will be challenging for him, and will require sustained motivation and hard work.

[118] Dr. Lohrasbe opined that although Mr. Thorn may be treatable, it cannot be assumed that he is treatable. In conclusion, his “prospects for effective risk reduction through treatment are poor”. Nonetheless, all appropriate programs should be made available to him.

[119] Dr. Lohrasbe also indicated that aging is a relevant risk consideration, as it generally results in a decrease in violence. However, there are exceptions, and the fact that Mr. Thorn was 50 years of age at the time of the predicate offences means that caution is necessary in assuming that he will follow the normal course. That said, Dr. Lohrasbe believes it is more likely than not that his risk will decrease over the coming years.

[120] Dr. Lohrasbe explained that preliminary indications are that there is a substantial reduction of serious offences subsequently committed by long-term and dangerous offenders. However, it cannot be assumed that this potentially mitigating factor will apply to Mr. Thorn. For example, he had been forewarned of possible dangerous offender proceedings prior to his 2013 sentencing for aggravated assault that resulted in a federal term of incarceration.

[121] Additionally, Dr. Lohrasbe has taken into account Mr. Thorn’s Indigenous identity which may be an anchor towards rehabilitation. Mr. Thorn has been exposed to Indigenous cultural practices during periods of incarceration, and has also been

exposed to, and is interested in, Christian traditions. At the same time, it cannot be assumed that spiritual and cultural practices will reduce his risk.

[122] Finally, Dr. Lohrasbe noted that a critical part of risk management for any offender is their attitude towards the criminal justice system. For Mr. Thorn, a comprehensive risk management plan can be instituted once he approaches release into the community. However, before such risk management can be considered, Mr. Thorn “will have to demonstrate consistent self-control and willingness to work ‘within the system’”.

## **Legal Framework**

[123] In the case at bar, the applicable provisions to the sentencing proceedings are as follows:

### **PART XXIV**

#### **Dangerous Offenders**

...

Application for finding that an offender is a dangerous offender

...

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

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
  - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he

or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

- (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

...

**[Sentence for dangerous offender]**

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

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

**[Sentence of indeterminate detention]**

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

[If offender not found to be dangerous offender]

(5) If the Court does not find an offender to be a dangerous offender,

- (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
- (b) the court may impose sentence for the offence for which the offender has been convicted.

...

**[Application for finding that an offender is a long-term offender]**

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

...

**[Substantial risk]**

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

...

- (b) the offender
  - (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

...

**[Sentence for long-term offender]**

- (3) If the court finds an offender to be a long-term offender, it shall
- (a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and
  - (b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

...

**[If offender not found to be long-term offender]**

- (6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

**Analysis**

[124] The dangerous offender process is a two stage process, which includes the “designation stage” and the “penalty stage” (*R. v. Boutilier*, 2017 SCC 64).

[125] The primary rationale for the dangerous offender regime is public protection. The regime targets “a very small group of offenders whose personal characteristics in particular circumstances militates in favour of preventive incarceration” (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 339; *R. v. Neve*, 1999 ABCA 206, at para. 55; *R. v. Dadmand*, 2018 BCSC 729, at paras. 47-48).

[126] The Court in *Boutilier* reiterated, at para. 53, that as dangerous offender proceedings are sentencing proceedings, a judge in such a hearing “...must apply the sentencing principles and mandatory guidelines outlined in s. 718 to s. 718.2”.

[127] The principles set out *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, are applicable to dangerous and long-term offender proceedings. In

R. v. Awasis, 2020 BCCA 23 (leave to appeal ref'd [2020] S.C.C.A. No. 225), at para. 122, the Court of Appeal spoke of the duty to consider *Gladue* factors in any sentencing involving an Indigenous offender, including dangerous and long-term offender proceedings. Even though the application of *Gladue* factors may be limited in proceedings where public protection is the primary objective, "rehabilitation remains an important sentencing prospect for dangerous offenders, as the question of whether a sentence less than an indeterminate period is appropriate will depend on the offender's prospects for addressing the issues that contribute to his or her risk" (*Awasis*, at para. 123, 125; *R. v. Ladue*, 2011 BCCA 101, at para. 53).

[128] The Court of Appeal in *Awasis* stated at para. 127:

...*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. ...

### *Designation Stage*

[129] At the designation stage, the Crown has the burden of proving beyond a reasonable doubt all required elements, before the court is able to make a determination that the offender is a dangerous offender.

[130] In *Boutilier*, at para. 46, the Supreme Court of Canada outlined the test for a finding of dangerousness:

In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A

prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects. ...

[131] In *R. v. J.J.P.*, 2020 YKCA 13, the Court of Appeal stated:

64 *Boutilier* establishes that an offender cannot be designated as a dangerous offender unless the sentencing judge concludes that he or she is a future "threat" having conducted a prospective assessment of risk: at para. 23. Thus, it is clear from *Boutilier* that sentencing judges must consider an offender's treatment prospects at the designation stage and do so on applications premised on s. 753(1)(a) and s. 753(1)(b): *Boutilier* at paras. 36, 38; *R. v. Skookum*, 2018 YKCA 2 at para. 57.

...

66 In *Boutilier*, Justice Côté, writing for the majority, explained that "'intractable' conduct" means "behaviour that the offender is unable to surmount": at para. 27. It is significant for the purposes of this appeal that the analysis focuses on the intractability of conduct, not on the intractability of a diagnosed psychiatric disorder. I agree with the submission made by counsel for J.J.P. on appeal that the requirement of intractability ensures that only a very small group of offenders will meet the criteria for designation. In this way, the requirement of intractability is linked with the constitutionality of the legislative scheme: *Boutilier* at para. 46.

[132] If it is determined that the statutory criteria in s. 753(1)(a) have been met, the court must make a dangerous offender designation, and then determine the least restrictive sentence required to protect the public.

[133] If the court is not satisfied that the statutory criteria have been met, s. 753(5) permits the court to treat the application as a long-term offender application pursuant to s. 753.1, or to impose a conventional sentence.

### *Penalty Stage*

[134] At the penalty stage, the court must determine whether there is a reasonable expectation that a sentence less severe than an indeterminate sentence will adequately protect the public. Section 753(4.1) operates in a way to provide guidance to the sentencing judge in exercising their discretion to impose a penalty listed in s. 753(4) (*Boutilier*, at para. 69).

[135] The Court in *Boutilier*, at para. 70, also endorsed the following framework for a court's use of discretion under s. 753(4.1):

... 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.

[136] In the case at bar, at the designation stage, the Crown has proved beyond a reasonable doubt that the predicate offences are "serious personal injury offences" as set out in s. 752(a). The serious personal injury offences are the January 9, 2020 offences (two aggravated assaults; and, two assaults causing bodily harm), and the July 2, 2020 assault peace officer which resulted in bodily harm to the victim. These are

indictable offences in which violence was used against another person and for which the offender may receive a sentence of 10 years' imprisonment or more.

[137] Secondly, it must be proved that Mr. Thorn constitutes a threat of the kind specified in s. 753; specifically, a threat to the life, safety, or physical or mental well-being of other persons. There must be proof that the past conduct of the offender meets one of the thresholds under s. 753(1)(a), which in this case is (a)(i) or a(ii). The elements that must be proven to establish the prescribed patterns are under (a)(i):

1. A pattern of repetitive behaviour;
2. The predicate offence must form part of that pattern;
3. That pattern must show a failure by the offender to restrain his or her behaviour in the past; and
4. That pattern must show a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his or her behaviour in the future.

[138] Under s. 753(a)(ii), the required elements are:

1. A pattern of persistent aggressive behaviour;
2. The predicate offence must form part of that pattern; and
3. That pattern must show a substantial degree of indifference by the offender respecting the reasonably foreseeable consequences of his or

her behaviour (See *Neve*, at paras. 107-108; and, *R. v. Pike*, 2010 BCCA 401 at para. 26).

[139] Repetitive behaviour (s. 753(a)(i)) and persistent aggressive behaviour (s. 753(a)(ii)) can be established in two different ways. As set out in *Neve* at para. 111:

...The first is where there are similarities in terms of the kind of offences; the second where the offences themselves are not similar in kind, but in result, in terms of the degree of violence or aggression inflicted on the victims. Either will do. Thus, the mere fact that an offender commits a variety of crimes does not mean that no pattern exists. There is no requirement that the past criminal actions all be of the same or similar form, order or arrangement; though if this has occurred, it may well suffice.

[140] The offences that Mr. Thorn has committed since the age of 18 undoubtedly form a pattern of both repetitive behaviour and persistent aggressive behaviour. Although the victims are varied (ex-girlfriend; spouse; child; strangers; relatives; peace officers), the number of offences of assaultive behaviour is substantial. This includes common assaults, spousal assaults, assaults causing bodily harm, aggravated assaults, and a conviction for manslaughter. Additionally, he has been convicted twice of possession of a weapon for a purpose dangerous to the public peace.

[141] The predicate offences in this sentencing proceeding clearly form a part of this pattern of repetitive behaviour. Mr. Thorn has been unable to restrain his behaviour in the past, and the pattern demonstrates a likelihood of death, injury, or severe psychological damage to other persons through failure to restrain his behaviour in the future. As explained by Dr. Lohrasbe in his testimony, Mr. Thorn demonstrated reactive violence in the predicate offences of January 9, 2020. Reactive violence does not mean that Mr. Thorn was actually under threat, but that he was reacting to emotional arousal,

whether in the form of frustration or feeling threatened. Dr. Lohrasbe also described Mr. Thorn's proactive violence which has occurred in an institutional setting in retaliation to perceived wrongs. These types of violence have been a hallmark of Mr. Thorn's adult life. His violence in the community over decades has been both spontaneous and serious.

[142] Additionally his pattern of persistent aggressive behaviour demonstrates a substantial degree of indifference by Mr. Thorn respecting the reasonably foreseeable consequences of his behaviour.

#### *Prospective Assessment of Risk*

[143] Although the dangerous offender regime has been altered over the years, "[a] prospective assessment of risk has always been part of s. 753(1)" (*Boutilier*, at para. 23). After considering the prospective assessment of risk, Mr. Thorn can only be designated a dangerous offender if I conclude that he is a future threat.

[144] In *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 338, the Supreme Court of Canada listed four criteria from the language of s. 753(1): (1) the legislation only applies to persons convicted of and being sentenced for a "serious personal injury offence"; (2) the predicate offence is part of a broader pattern of violence; (3) there is a likelihood of harmful recidivism; and (4) the violent conduct is intractable. As stated in *Boutilier*, at para. 26, it is the last three criteria which "...are part of the assessment of the "threat" posed by the offender", and, "[t]he last two of these are future-oriented". In *Lyons*, Justice La Forest found that "the court must be satisfied that the pattern of conduct is substantially or pathologically intractable" (p. 338).

[145] The defence contends that Mr. Thorn has been making efforts to reduce his risk of violence, that he has the support of his First Nation for his future release from custody, that he has done well at the correctional centre for months, and that his risk will be reduced as he ages. In sum, it is argued that I cannot conclude that his violent conduct is intractable, or that he is very likely to continue his pattern of conduct.

[146] The risk assessment conducted by Dr. Lohrasbe found that presently, and in the foreseeable future, Mr. Thorn is at high risk to commit acts of violence, and that the impact on a future victim could be severe. Mr. Thorn is no longer a young man, and his violent behaviour is deeply entrenched.

[147] Mr. Thorn has participated in various forms of programs and treatments over the last 30 plus years. This included a broad range of programs targeting violence and substance abuse. He has made efforts to make positive changes while incarcerated, however, he has been unable to incorporate what he has learned into his day to day life. Although his psychologist is of the view that anti-depressant medication and psychotherapy have benefited Mr. Thorn while on remand, “as he has been able to incorporate his anger management skills more effectively”, Ms. Weber is not the first professional who has been optimistic about his progress. In 2016, Mr. Thorn participated in a two-month Aboriginal Healing program. The program supervisor, Francyne Dion, wrote in her final report that:

Mr. Thorn’s behaviour and attitude reflect that he is taking effective action towards change. He demonstrated a willingness to learn the tools necessary for personal change and has made good progress towards establishing positive goals, and making positive changes in his life...Mr. Thorn has made good progress thus far. He was able to recognize that

his behaviour impacted his family and himself, but also the community as a whole...

[148] Approximately a year after this positive report, and only a few months after his release from a significant penitentiary term, Mr. Thorn committed serious offences of family violence.

[149] Dr. Lohrasbe noted that Mr. Thorn's substance use in the community is likely the most important factor in terms of imminence of violence by him, and that the diversity of his violent offences, over decades, highlights his very established and entrenched pattern of violence.

[150] Of course, it cannot be said that Mr. Thorn is untreatable. However, Dr. Lohrasbe is unable to identify any reasons to "conclude that future treatment efforts are going to be more effective" than in the past. Dr. Lohrasbe is of the view that the prospects for effective risk reduction for Mr. Thorn through treatment are poor. Additionally, although it is more likely than not that Mr. Thorn's risk will decline as he ages, there is reason to be cautious with this assumption. Dr. Lohrasbe testified that lowering of risk with age normally commences much earlier than at age 50, which is the age at which Mr. Thorn committed the predicate offences.

[151] Mr. Thorn has proposed developing a release plan to move to the Pasqua First Nation. As indicated, he has the support of the First Nation justice coordinator. Dr. Lohrasbe testified that this could be positive, if support people would assist him with stable housing, and aid him in a commitment to abstinence from alcohol and drugs.

[152] At the same time, I must also consider that in 2011 he moved to the small northern community of Fort Smith, NWT, to reside with his family. His wife is originally from Fort Smith. Although he reported well for a period of time, he relapsed, drank alcohol, and allegedly assaulted his wife. As a result, his statutory release was suspended.

[153] Mr. Thorn returned to Fort Smith in 2012 to be with his family. According to CSC records, approximately a week prior to committing an aggravated assault and assault peace officer, he had obtained employment as a groundskeeper. Despite living with his family and securing employment, he again relapsed into substance use.

[154] The proposed, but undeveloped release plan to the Pasqua First Nation does not give me confidence that Mr. Thorn's risk factors will be capable of being managed in the community. To date, he has been unable to achieve consistent self-control, or to maintain a pro-social lifestyle for any length of time. I agree with Dr. Lohrasbe's assessment that Mr. Thorn has a long road before him before being considered for risk management in the community.

[155] Mr. Thorn's background is most unfortunate, and the trauma he has experienced has negatively impacted him. However, despite programming and treatment, he continues to offend violently. Although he may be remorseful for his crimes, he is unable to deeply reflect upon the harm he has caused, and fully accept responsibility. In spite of agreeing to specific facts in sentencing hearings, he still places responsibility on others. He has been incapable of accepting full responsibility for his actions. His 2013 aggravated assault conviction in Fort Smith is an example of this. The Court

accepted the agreed statement of facts which clearly described Mr. Thorn's attack on the unsuspecting victim. Yet, Mr. Thorn has since constructed a narrative that the victim, and perhaps others, started an altercation with him. As stated by Dr. Lohrasbe, "[s]incerely taking full responsibility is the marker of a commitment to change".

[156] I do not find any evidence to indicate that Mr. Thorn's prospects for treatment are compelling. I find that he is intractable. The evidence before me leads me to the conclusion, beyond a reasonable doubt, that Mr. Thorn should be designated a dangerous offender.

#### *Appropriate Sentence*

[157] I must impose an indeterminate sentence in a penitentiary unless I am satisfied by the evidence at this hearing that there is reasonable expectation that a lesser measure under s. 753(4)(b) or (c) will adequately protect the public against a serious personal injury offence.

[158] The nature, severity, and frequency of Mr. Thorn's assaultive behaviour makes the protection of the public the paramount consideration in this proceeding. Yet, I am mindful of and take into account the factors set out in s. 718.2(e) of the *Code*, while also considering the decisions in *Gladue* and *Ipelee*. The *Gladue* factors in the case at bar are substantial. As already noted, Mr. Thorn experienced a very traumatic childhood which has influenced his life.

[159] That being said, Mr. Thorn's record is comprised of very serious assaultive behaviour. One of the facets of Mr. Thorn's violence that was considered by

Dr. Lohrasbe is the prolonged nature of his assaults. Dr. Lohrasbe classified this type of assault as unusual. Additionally, he has committed a number of serious assaults involving multiple victims, including the manslaughter and three aggravated assaults convictions involving members of his immediate and extended family; the 2012 aggravated assault on Jason Saliga, and the assault peace officer; the assaults in 2018 involving his wife and daughter; and, the predicate offences from January 2020 which involved four victims.

[160] Mr. Thorn has a repeated pattern of being incarcerated, taking programming, being released into the community, and being unable to manage his substance use. This inevitably leads to further violence. Even after being made aware of the Crown's intention to bring a dangerous offender application in 2013, and, having been ultimately able to avoid such a proceeding, he was still unable to control his substance use and resulting violent offending in 2018, and again in 2019 and 2020.

[161] I find that imposing a determinate sentence for each of the predicate offences would be wholly inadequate to meet the public protection concerns.

[162] I have also given consideration to a penitentiary term followed by a LTSO. I appreciate that the LTSO regime involves closer monitoring of dangerous offenders than those on parole. The rehabilitation of Mr. Thorn remains an important sentencing principle due to his unique circumstances as an Indigenous offender. I accept that his moral blameworthiness is less because of these unique and troubling circumstances.

[163] In this regard, I have considered Mr. Thorn's desire to return to his First Nation in Saskatchewan, and the support being offered. However, based on all the evidence that

is before me, I have serious concerns about his capacity to change in that setting, even if motivated to do so. Mr. Thorn has indicated a desire to do residential treatment programming as part of a release plan. Although I appreciate that the treatment being suggested would be outside of a correctional setting, Mr. Thorn has completed Indigenous based programming in the past, including an Aboriginal Offender Substance Abuse program in 2014, and an Aboriginal Healing program in 2016, but such programming has been insufficient to alter his entrenched ways. I find that there are no Indigenous based treatment programs proposed that would adequately address Mr. Thorn's risk in the community.

[164] In the final analysis, Mr. Thorn's repeated history of violent offending, coupled with his inability to address the entrenched issues that contribute to this offending, lead me to the conclusion that an LTSO is insufficient to protect the public.

[165] As such, having considered all of the evidence, I am not satisfied that some measure less than an indeterminate sentence would adequately protect the public. Accordingly, I sentence Mr. Thorn pursuant to ss. 754(4)(a) and 753(4.1) to detention in a penitentiary for an indeterminate period with respect to the five predicate offences.

[166] I also make the following ancillary orders:

1. An order pursuant to s. 760 of the *Code* that a copy of the reports and transcripts of the testimony given by Dr. Lohrasbe, along with the Reasons for Sentence, be forwarded to the Correctional Service of Canada for information;

2. Pursuant to s. 743.21 of the *Code*, prohibiting Mr. Thorn from having any contact or communication, directly, or indirectly with Jolene Papequash, Raven Lennie, Gary Hunter, Bachir Ige, and Kenneth Hubbard;
3. An order pursuant to ss. 109(1)(a) and 109(3) of the *Code* prohibiting Mr. Thorn from possessing any firearm, crossbow, prohibited weapon, restricted weapon, device ammunition, prohibited ammunition and explosive substance, for life; and
4. An order pursuant to s. 487.051 of the *Code* authorizing the taking of sufficient samples of bodily substances from Mr. Thorn as reasonably required for the purpose of forensic DNA analyses and recording.

[167] I waive payment of the victim surcharges.

### **Sentences for Offences not included in the Dangerous Offender Designations**

[168] In terms of the other offences for which convictions have been registered, I am not going to address the issue of remand credit calculation, except to find that in all the circumstances, 1.5:1 is appropriate. I impose the following sentences, taking into account Mr. Thorn's remand time, which I calculate as 819 days, and the principle of totality. These matters are served concurrently to each other, and concurrently to the indeterminate sentences.

- s. 334(b) on October 25, 2019 – 15 days' jail time served;
- s. 266 on November 8, 2019 – 2 months' jail time served;
- s. 334(1)(b) on November 22, 2019 – 15 days' jail time served;

- s. 334(b) on December 5, 2019 – 15 days’ jail time served;
- s. 733.1 on December 8, 2019 – 15 days’ jail time served;
- s. 334(b) on January 6, 2020 – 15 days’ jail time served;
- ss. 266, 334(b) and 264.1 on January 9, 2020 – 2 months’ jail on each charge time served;
- the two s. 264.1 charges; the s. 129(a), and s. 733.1 charges from January 9, 2020 – 2 years’ incarceration on each charge time served;
- s. 270(1)(a) charge from January 9, 2020 – 3 months’ jail time served;
- s. 266 charge from February 2, 2020 - 3 months’ jail time served;
- the two s. 270(1)(a) charges from May 6, 2020 - 6 months’ jail time served.

[169] I waive the victim surcharges with respect to these offences.

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CHISHOLM T.C.J.