# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Regina* v. *Hamilton,* 2005YKSC 59 Date: 20051104
Docket No.: S.C. No. 04–01546
Registry: Whitehorse

Between:

**HER MAJESTY THE QUEEN**

And

**MICHAEL DALE HAMILTON**

Before: Mr. Justice L.F. Gower

Appearances:

M. Campbell & J. Van Wart Counsel for Accused
J. Phelps & P. Chisholm Counsel for the Crown

## REASONS FOR SENTENCE

### Introduction

[1] Michael Hamilton was originally charged with having committed first degree murder on Brian Wheldon on June 19, 2004. He waived his right to a preliminary inquiry and indicated on January 18, 2005, that he would be entering a guilty plea to second degree murder, with the Crown's consent. That plea was actually entered on June 13, 2005. A pre-sentence report, psychological report and a psychological risk assessment were ordered by the court. The sentencing hearing took place on October 31 and November 1, 2005. Mr. Hamilton has been in custody on consent since his arrest on June 19, 2004.

[2] The Crown's position is that, pursuant to s.745.4 of the *Criminal Code*, Mr. Hamilton should receive a life sentence and should be ineligible for parole for a period of 15 years. Defence counsel's position is that Mr. Hamilton should be ineligible for parole for the minimum period of 10 years. Regardless of when Mr. Hamilton is released on parole, he will be subject to mandatory supervision for the rest of his life.

**The Facts**

[3] The following recitation of the facts is based upon an Amended Agreed Statement of Facts filed by the parties on August 24, 2005. In some areas I have made further findings and drawn inferences from the agreed facts.

[4] About a month and a half prior to the murder, Mr. Hamilton's then common law spouse and now wife, Diane Jim, was at a tavern in Whitehorse in an impaired condition and called for a taxi. The taxi driver was Mr. Wheldon, whom Ms. Jim apparently knew, as Mr. Wheldon had been a friend of Mr. Hamilton's for many years. According to Ms. Jim, Mr. Wheldon took her to his place and dropped her off, at which time he grabbed her, hugged her and kissed her, stating that he would be back in an hour or so. When Ms. Jim initially reported this incident to the RCMP, she stated that Mr. Wheldon had kissed her and, after he left, she stayed at his residence and watched television. However, according to the Amended Agreed Statement of Facts, Ms. Jim said she waited until Mr. Wheldon was gone and then called Mr. Hamilton to advise him of what had happened. She said that Mr. Hamilton subsequently picked her up in another taxi.

[5] Ms. Jim further advised that Mr. Hamilton was very upset with Mr. Wheldon about what had happened to her. She said there was an interaction between Mr. Wheldon and Mr. Hamilton in May 2004, where Mr. Hamilton approached Mr. Wheldon's taxi van,

talked to Mr. Wheldon, who was seated in the van, and struck him in the face. Mr. Wheldon suffered two black eyes as a result of that assault.

[6] Two weeks prior to the murder, a friend of the deceased, Charlotte Cuthberston, was with Mr. Wheldon as the two of them drove by Mr. Hamilton's residence. Mr. Hamilton was outside and gave them the finger while swearing at them.

[7] Two other witnesses indicated that after the alleged sexual assault on Ms. Jim, Mr. Hamilton had on separate occasions uttered threats to kill Mr. Wheldon to those witnesses (but not to Mr. Wheldon directly).

[8] Mr. Hamilton told the RCMP that earlier on the day of the murder, Mr. Wheldon had been taunting him and Ms. Jim, while driving by honking his horn and waving at them. However, Ms. Jim stated that Mr. Wheldon had apologized to her regarding the kissing incident and she mentioned no such subsequent taunting. Pursuant to s.724(3)(b) of the *Criminal Code*, to the extent that Mr. Hamilton wishes to rely on this alleged taunting as a relevant fact, I am not satisfied that it has been proven on a balance of probabilities.

[9] On June 19, 2004, Mr. Hamilton called Mr. Wheldon to pick him up in his taxi van and they went for a drive to talk. During the conversation, things got heated. Mr. Hamilton told the police that a physical struggle ensued and that he used his knife to stab Mr. Wheldon twice in the neck. He then moved his knife to his left hand and stabbed Mr. Wheldon a third time. He admits forming the specific intent to kill Mr. Wheldon during the stabbing.

[10] At the time of the stabbing, two persons drove by Mr. Wheldon's van on a "quad" all terrain vehicle. One of those witnesses, Mr. Magnuson, saw an assault taking place

inside the van. It appeared that the passenger was behind the driver, leaning over and punching down on the driver. He then saw Mr. Wheldon leave the van, covered in blood. He kept driving because he was scared and drove down the trail 200 yards where he stopped and called 911. He returned to the scene about 2 to 3 minutes later and noted that the van had been driven from where it had been parked and was now across the road. The van was first seen at a stop sign at the intersection of Range Road and the road going to the Mountainview Golf Course. Mr. Sheaves, the passenger on Mr. Magnuson's ATV, saw Mr. Wheldon in the taxi with blood dripping down his face and blood spewing out of his neck. As Mr. Wheldon was getting out of the van, Mr. Hamilton was seen crawling over the driver's seat after him. Mr. Wheldon asked for help as he got out of the van.

[11] The RCMP received the 911 call from Mr. Magnuson at 6:48 p.m.

[12] Mr. Hamilton also admitted to hitting Mr. Wheldon with the van.

[13] The pathologist's evidence is that there were a total of 10 sharp force type injuries consistent with infliction by a knife, to the face, neck, torso and right hand of Mr. Wheldon. The latter may have been sustained when Mr. Wheldon's right arm was held in a defensive position. The pathologist noted two stab wounds to the left side of the jaw and the left side of the neck, which caused significant damage to the left carotid artery and the left jugular vein respectively. The pathologist said that the two major stab wounds were consistent with the assailant having inflicted the wounds while being positioned behind the deceased, as described by Mr. Magnuson and Mr. Sheaves.

[14] The pathologist further observed stretch and friction abrasions at the back of both legs, an injury typical of that sustained when the wheels of a vehicle pass over a body.

The pathologist also noted a severe crush avulsion injury to the back of the torso and rib fractures, consistent with the effects of a vehicle passing over the back of the torso.

[15] The principal cause of death was attributed to the combined effects of the sharp and blunt force trauma.

[16] Another witness, Donna Chambers, was driving down Range Road with her spouse, stopped and noted Mr. Wheldon under the van. Mr. Hamilton came out of the front driver's seat of the van. Ms. Chambers and her spouse asked if Mr. Hamilton had called 911, to which he replied "I have everything under control, it's all ok".

[17] Kirk Campbell, Ms. Chambers' spouse, saw Mr. Wheldon underneath the van, covered in blood. When he stopped to help, Mr. Hamilton got out of the driver's door of the van and said "Don't worry about it man, I got everything under control".

[18] At 6:55 p.m., the RCMP arrived at the scene and requested an ambulance. The RCMP officer noted that Mr. Wheldon's legs were pinned beneath the van. The photographs show that the van had been driven off the edge of the road, such that it was more or less "nosed" into the ditch at a slight angle downwards, with the front passenger corner furthest in. It was agreed at the sentencing hearing that Mr. Wheldon's head and torso was in front of the van and his legs were underneath the van, such that he was more or less perpendicular to the front bumper, as opposed to being parallel to it. The ambulance attendant arrived a few minutes later and observed Mr. Wheldon lying on his back, with the front of the van resting just above his knees. He had a weak, rapid pulse.

[19] At about the same time, the Whitehorse Fire Department arrived at the scene and raised the van enough to allow the ambulance personnel to remove Mr. Wheldon from underneath the van.

[20] I pause here to address a submission made by Defence counsel. He acknowledged that Mr. Hamilton did initially run over Mr. Wheldon with the van and that this was likely the cause of the injuries noted by the pathologist. However, Defence counsel submitted that there was no evidence that Mr. Hamilton then backed up the van, such that the front wheels (or a front wheel) ran over Mr. Wheldon a second time. Crown counsel submitted that this was an irresistible inference, as Mr. Wheldon initially must have been run over while he was face down on the ground, whereas when he was found by the police and the ambulance attendant, he was face up and pinned underneath the front of the van. Defence counsel countered that there was an alternative explanation which is that, after initially being run over by the front wheels (or wheel) of the van, Mr. Wheldon may have managed to move himself from under the van to end up in the position he was found by the police and the ambulance attendant.

[21] However, given that Mr. Wheldon was pinned under the front bumper of the van, and could not be moved without the assistance of the Fire Department to raise the van, I am not able to conclude that Mr. Wheldon could have moved himself into that position under his own power. Rather, I agree with the Crown that it seems the only possible explanation for Mr. Wheldon ending up on his back, pinned under the front of the van, is that Mr. Hamilton must have moved the van after initially running him over. Whether the front wheels (or wheel) of the van travelled over Mr. Wheldon a second time I am unable to say.

[22] When the police arrived, the van was still running. The police later noted that while the van was stuck in the ditch, there had been attempts to move it, in both forward and reverse gears, leaving a spray of gravel in both directions, which was clearly evident

in one of the photographs. There was blood staining the driver's door, the driver's front wheel well, the front grill on the passengers' side, the passenger door and the running boards.

[23] As I understood him, Defence counsel seemed to argue that there is no way of knowing ***when*** the attempt to move the van forward and backwards was made relative to the injuries sustained by Mr. Wheldon. Again, I am unable to accept that submission. Logically, on the facts before me, the van must have become stuck at or about the time that Mr. Wheldon ended up pinned under the front of the van, since neither the van nor Mr. Wheldon could be moved without assistance when they were found by the police and the ambulance attendant. Thus, I am able to infer beyond a reasonable doubt that Mr. Hamilton must have attempted to move the van backward ***and forward*** while Mr. Wheldon was pinned beneath it.

[24] Mr. Hamilton subsequently performed a re-enactment of the incident in which he maintained to the RCMP that Mr. Wheldon had jumped in front of the van, that Mr. Hamilton got out of the van, but forgot to put it in park and that the van continued to push Mr. Wheldon into the ditch. However, Mr. Hamilton had earlier given a different (unspecified) version as to how he had struck Mr. Wheldon with the van. This re-enactment is also inconsistent with the evidence of Ms. Chambers and Mr. Campbell that when they arrived at the scene and noted Mr. Wheldon under the van, Mr. Hamilton came out of the front driver's door. Once again, to the extent that the Defence wishes to rely on Mr. Hamilton's explanation to the RCMP during the re-enactment, pursuant to s.724(3)(b), I find that those facts have not been proven on a balance of probabilities. Rather, I agree with the Crown's suggestion that I should infer that Mr. Hamilton is

simply not credible on this point and I note that Defence counsel did not take issue with that submission.

[25] Two other witnesses were driving by the area on their dirt bikes. One of them, Mr. Swayze, saw the van in the ditch and a lady running toward the front of the van, where Mr. Wheldon was laying on the ground. Mr. Hamilton came running from the front of the van and started to yell at Mr. Swayze to give him a ride, which Mr. Swayze refused. Mr. Hamilton then said he just killed someone and tried to jump on the back of the dirt bike. Mr. Swayze told Mr. Hamilton to get off and Mr. Hamilton threatened him with bodily harm if he did not give him a ride. Mr. Hamilton does not recall threatening Mr. Swayze, but is not in a position to refute that he did. The other witness, Mr. Gattie, was also on a dirt bike an unspecified distance away from Mr. Swayze. He did not overhear any threats by Mr. Hamilton to Mr. Swayze. However, based on the information provided, I am satisfied beyond a reasonable doubt that Mr. Hamilton did threaten Mr. Swayze with bodily harm if he did not give him a ride.

[26] The police began arriving at the scene while Mr. Hamilton was talking to Mr. Swayze. Mr. Hamilton threw his knife away and ran from the scene. About half and hour later, the police noted Mr. Hamilton with his back to them standing at the tree line on top of an embankment about 200 metres away from the scene. He was not wearing a shirt and his shoes and socks were wet. When the officers called for him to approach them, Mr. Hamilton said that he was looking for his dog. He had dried blood on his face, but there was no other sign of any injury to him, except a fresh laceration to the outside of his right index finger. He misidentified himself as Michael Sam. He was detained and later arrested.

[27] Mr. Wheldon was pronounced dead at the Whitehorse General Hospital at 7:31 p.m.

[28] During the subsequent re-enactment, Mr. Hamilton told the police that he flicked the knife in the bush and ran off down a small dirt road. He took the RCMP to an old abandoned car just off the dirt road, where he had hidden his clothing in the front seat. About an hour later, the police dog located a buck knife lying in tall grass approximately 50 yards from the scene. Mr. Hamilton later identified the knife as the one he used to stab Mr. Wheldon.

**The Offender**

[29] Mr. Hamilton was 23 years old at the time of the offence. He is now 25. He was born in Campbell River, British Columbia, and is the fourth of five children. He has three brothers and one sister. Mr. Hamilton has never known who his father was. The file information is contradictory about whether he died prior to Mr. Hamilton's birth or whether he was incarcerated in a federal penitentiary at one point while Mr. Hamilton was a child.

[30] Mr. Hamilton's mother, Laura Hamilton, has been noted in the background material as having had mental health problems and providing chaotic, occasionally abusive and inconsistent parenting. Dr. Boer, the forensic psychologist who prepared the risk assessment dated August 21, 2005, mentioned examples in which Ms. Hamilton was abusive both psychologically (for example, by manipulation) and physically (for example, by threatening to run him over with her car) toward Mr. Hamilton. His response to this abuse was negative and his reactions to her behaviour ranged from crying and being upset to also using manipulation and intimidation tactics. Dr. Boer

further noted that Mr. Hamilton has consequently learned similar tactics to abuse those around him, including, paradoxically, his mother.

[31] From an early age, Mr. Hamilton has been involved with various agencies, social workers, child care workers, special education teachers and psychologists.

[32] Mr. Hamilton was a problematic student in school. There is evidence of him being a severe disciplinary problem and being suspended from school as early as age seven. By that age, he was already swearing and using abusive language towards his teachers.

[33] As a result of his mother being hospitalized for psychiatric treatment, Mr. Hamilton was placed into several foster homes, where he became aggressive and violent, occasionally making threats of physical harm and death towards his foster parents. He also attempted to extort money from his foster parents, began stealing and going AWOL.

[34] When Mr. Hamilton was about 11 years of age, his mother moved to the Yukon to live with her new common law partner, Dale Sam. His absenteeism and non-compliance at school continued into grade seven. At age 13 he began attending an alternative school known as the Pass Program, but was expelled for not doing his work. It was also about that time that he began his involvement with the youth criminal justice system.

[35] Dr. Boer noted that Mr. Hamilton's problems with pathological lying began early and he continued to manipulate, be non-compliant and aggressive. His mother involved Yukon Family and Children Services because of his ongoing behaviour problems. At one point he was noted to be "getting into trouble for several knife possession incidences". An early psychological assessment by Steve Sigmund indicated that Mr. Hamilton had a lengthy history of having a short attention span, being easily

frustrated and bored, having thrill seeking orientation, and having problems with anger management and impulsivity.

[36] He quit school in grade eleven and began doing some drywall and painting work for a contractor from 1991 to 1995. He has also worked briefly doing renovations and kitchen work, and most recently as a groundskeeper and maintenance man for the trailer park where he was residing at the time of his arrest. He has also periodically been the recipient of social assistance.

[37] Mr. Hamilton has a criminal record of 12 offences. Most were committed when Mr. Hamilton was a youth. He only has four convictions as an adult. The majority of the offences are property or process related. However, he does have a conviction for assault (apparently upon his mother) from 1998 and an assault on a police officer from 1999. He was sentenced to varying but short terms of incarceration for eight of the offences on his record. Although his last convictions were entered in 2002, counsel agree that they stem from offences committed in 1999.

[38] He reported to Dr. Boer that he and Diane Jim have been in a relationship for the last 5 years. It is the only serious long term relationship Mr. Hamilton has been involved in. Ms. Jim has two children from a previous relationship (ages 9 and 7) and she and Mr. Hamilton have a daughter, who is now 3½ years old. Mr. Hamilton says that Ms. Jim is very supportive of him and that their relationship has been a significant stabilizing factor in his life. The couple were married in a ceremony at the Whitehorse Correctional Centre on July 24, 2005. Mr. Hamilton reports that Ms. Jim has committed to moving with the children to be near the federal penitentiary where he is ultimately placed as a result of this sentence.

[39] Mr. Hamilton has a long history of drug and alcohol use and abuse. He first started using marijuana and alcohol when he was only 11 or 12. He admits experimenting with magic mushrooms and LSD at age 17. He then smoked crack cocaine and heroine between the ages of 17 and 19. At one point he was consuming between $200-$250 worth of cocaine a day. He says that he quit doing those drugs in 1999, but that his drinking continued. He began to abuse valium. For a while he supported himself by selling marijuana, cocaine and heroine. He acknowledges having been violent in previous offences while under the influence of drugs. More recently, he admitted that he and Ms. Jim only drank “to get a buzz” about twice a month. However, he claimed to be intoxicated by alcohol and valium at the time of the murder.

[40] Mr. Hamilton seems to have little insight into the addictive side of his personality, as he has said inconsistent things about his drug and alcohol use. Paradoxically, he acknowledged to Dr. Brodie, who prepared the psychological assessment dated April 14, 2005, that most of the offences on his criminal record were committed when he was intoxicated (or was stealing to obtain money for alcohol or drugs), yet he denied being an alcoholic stating “I used to be an alcoholic, but I cut down a lot.” Further, he admits that at one point he was “hooked” on valium, yet at another point he said he was “never an addict, except on crack”. He also said “I’ve always been the type of person I’ve never depended on it (drugs)”. And he told Ms. Geddes, the probation officer who prepared the pre-sentence report, that he has had problems with alcohol “at times”, but feels confident that he has it “under control”.

[41] In this same vein, he has been inconsistent with the authorities and the psychologists about his desire for additions treatment or counselling. He told

Ms. Geddes that he could have attended Alcoholics Anonymous at the Correctional Centre, but has not. He further told Ms. Geddes that he was advised he could obtain individual addictions counselling from Alcohol and Drug Services, but was “turned down” for that. However, when Alcohol and Drug Services was contacted about this, they said that they had never received a request from Mr. Hamilton, or Correctional Centre staff, to provide him with such counselling.

[42] Mr. Hamilton also told Dr. Boer on June 1, 2005, that he was “currently” attending Narcotics Anonymous and Alcoholics Anonymous at the Whitehorse Correctional Centre. Dr. Boer’s interview pre-dated the pre-sentence report and the information provided by Mr. Hamilton on this point is obviously inconsistent. At the sentencing hearing, Defence counsel mistakenly submitted that Mr. Hamilton had been attending AA and NA at the jail whenever possible. Defence counsel then clarified that he was relying upon Dr. Boer’s report for that submission. In fact, Defence counsel said that he was informed by Mr. Hamilton that AA had not been offered at the jail “for the bulk of 2005”, implying that Mr. Hamilton did attend some AA meetings upon his admission to the jail in 2004. However, that information was contradicted by the Chair of the Corrections Committee for Alcoholics Anonymous in Whitehorse, who gave evidence that he personally was convening meetings at the jail more or less on a weekly basis from about the time that Mr. Hamilton was incarcerated until June of 2005 (over the summer of 2005 the AA group had a problem recruiting volunteers to convene meetings, so the meetings were not held as regularly as before). This witness had no knowledge of Mr. Hamilton whatsoever and obviously had never seen him at an AA meeting in the Correctional Centre.

[43] Also, the Manager of Security at the Correctional Centre testified that he had never received any request from Mr. Hamilton to attend AA or NA meetings. Thus, the information Mr. Hamilton provided to Dr. Boer was obviously false, at least with respect to attending AA meetings.

[44] Both psychologists and Ms. Geddes recommend that Mr. Hamilton participate in alcohol and drug rehabilitation programming and counselling.

[45] Mr. Hamilton says that he is a member of the North Island Metis Nation on Vancouver Island. He told Dr. Boer that he is "¼ native from (his) mom's side", but was very vague about whether he follows any native traditions or aboriginal cultural teachings. He did, however, express some interest in attending aboriginal-based programming at the federal penitentiary.

[46] Ms. Geddes noted in the pre-sentence report that Mr. Hamilton is fairly satisfied with himself and in many areas it is other people's behaviour that causes him stress. Dr. Boer described him as somewhat of an "over-confident braggart", who has the capability to either engage in a pro-social career or a criminal career. He has been assessed as being of low average to average intelligence. According to Dr. Brodie, Mr. Hamilton was misdiagnosed as a child with Attention Deficit Hyperactivity Disorder. Rather, Dr. Brodie noted that Mr. Hamilton's previous problems with behavioural restraint and poor attention were most likely due to his dysfunctional family situation and his exposure to family violence and physical abuse. That resulted in Mr. Hamilton beginning to develop a severe conduct order, which has now evolved into what Dr. Brodie describes as a "deep seated antisocial personality disorder". There is no indication of Mr. Hamilton suffering from any learning disability or neurological problems.

[47] Dr. Brodie was of the view that appropriate anti-depressant medication and supportive treatment to assist Mr. Hamilton with stabilizing his sleep cycle and overall feelings of emotional distress would likely be beneficial in helping him to focus on making positive changes in his attitudes and behaviour during his upcoming incarceration. Nevertheless, Dr. Brodie also said that Mr. Hamilton has little or no intrinsic motivation to seek meaningful changes in his personality and it is doubtful that he will engage in or follow through with any counselling or treatment programs designed to assist in that regard. In the psychological assessment dated April 14, 2005 Dr. Brodie said,

> "Given the previously documented history of long-standing preoccupation with violence and his propensity to use violence for personal gain or control of social situations/relationships, it is most likely that Michael is displaying a firmly established personality disorder (anti-social subtype) that is almost certainly resistant to change and which will continue to result in future problems with impulse or anger control".

Nevertheless, he concluded by saying:

> "While it is dubious that Michael will be genuinely motivated to participate in psychological counselling treatment on a long-term basis, it would remain appropriate to provide access to directed counselling in the area of anger and stress management as well as basic life skills training, with a view toward providing him with some pragmatic coping strategies to hopefully reduce his reliance on the use of violence, threats and intimidation as preferred social interaction styles in conflictual situations."

[48] Dr. Boer noted that despite being incarcerated for over one year, Mr. Hamilton has "not participated in any meaningful programming or self-improvement" since his arrest. That is an overstatement, as it does not acknowledge Mr. Hamilton's counselling with the Correctional Centre Chaplin, Larry Kwiat, which I will return to shortly. In any

event, Dr. Boer found Mr. Hamilton's attitude towards correctional programs "very poor" in that he had a long history of behavioural infractions at the Whitehorse Correctional Centre. Indeed, this was borne out by a report from Kyle Keenan, Mr. Hamilton's case manager at the Correctional Centre, which included a list of dozens of entries in a "Violations Summary" for Mr. Hamilton. While many of these entries are admittedly for relatively minor matters, some are quite significant. They include arguments with other inmates, inappropriate touching during visitation, threats, possession of narcotics, use of force, being loud and obnoxious, and confronting guards. Mr. Keenan described Mr. Hamilton as being a "problematic high maintenance inmate", whose overall behaviour was considered "very poor". Further, Mr. Keenan noted that as a result of Mr. Hamilton's remand status and his poor institutional behaviour, he has not participated in any programming at the correctional centre. Once again, this does not account for the regular meetings with the Chaplain.

[49] The primary focus of Dr. Boer's report was to undertake a risk assessment of Mr. Hamilton. He administered three separate risk management assessment tests upon Mr. Hamilton. The Psychopathy Checklist – Revised (PCL-R) placed him at the low end of the high risk range for both general and violent recidivism. While Dr. Boer noted that this test showed that Mr. Hamilton was more likely to do a new non-violent offence, rather than a new violent one, he also said that this test is not the best predictor for assessing the risk of future violence from a statistical point of view. The Violence Risk Appraisal Guide (VRAG) indicates that Mr. Hamilton is a "high risk for future violent recidivism". The Historical–Clinical–Risk–20 (HCR20) indicated that Mr. Hamilton is a "high risk for violence" and that he has a serious problem with impulsivity.

[50] Dr. Boer also referred to previous risk assessments done by the probation officers. A Level of Service Inventory – Revised (LSI–R) in 2004 placed Mr. Hamilton in the "moderate-high" category for general recidivism. That same test done by Ms. Geddes in 2005 indicated that Mr. Hamilton was a "moderate" risk for general recidivism. However, Dr. Boer has noted that the LSI-R is a statistical instrument that does not account for sudden increases in risk levels due to extraordinary crimes committed by ordinary criminals.

[51] In summary, Dr. Boer has rated Mr. Hamilton as a "high risk offender in terms of future violence or general recidivism". He said that, as of now, Mr. Hamilton's theoretical manageability in the community, when he eventually obtains parole, is "poor". However, with appropriate programming, Dr. Boer felt that Mr. Hamilton's level of manageability could improve over time and that Mr. Hamilton has the intellectual capacity to understand and do well in programs, providing he takes advantage of those opportunities.

[52] Mr. Hamilton has been meeting on more or less a weekly basis with the Correctional Centre Chaplain, Larry Kwiat, since his arrest. Initially, the meetings were one to one counselling, but eventually they evolved into a number of pre-marital sessions in anticipation of Mr. Hamilton's marriage to Ms. Jim. The individual sessions initially focused on Mr. Hamilton's feelings of guilt and frustration and then graduated towards topics of anger management and substance abuse. Although Mr. Kwiat acknowledged the value of the AA and NA recovery programs "to an extent", he did not recommend either to Mr. Hamilton, nor did he recall Mr. Hamilton expressing a desire to participate in those programs. Nevertheless, Mr. Kwiat continues to be of the view that

Mr. Hamilton will definitely benefit from further work on his substance abuse issues. He provided a letter to the Court which indicates that some of these counselling sessions dealt with Mr. Hamilton's "deep sense of guilt, remorse and a frustration over not being able to do as much as his heart desired toward reconciliation". Mr. Kwiat was also noted in the pre-sentence report as having identified a "long standing anger problem" with Mr. Hamilton, which he has been attempting to address through meditation and breathing techniques.

[53] The Manager of Security at the Correctional Centre, testified that Mr. Hamilton's remand status was reduced to a "medium security" level from approximately August 2004 to January 27, 2005. Over that period, as I understand the memo from Cathrine McCormick, the Correctional Centre Program Facilitator, Mr. Hamilton should have had full access to all academic, vocational and educational programs. However, it appears that he did not pursue any such programming and limited himself to weekly meetings with Mr. Kwiat. Once again, this is disturbingly consistent with the conclusions of the psychologists that Mr. Hamilton's attitude towards correctional programs is very poor. Indeed, Dr. Brodie said in his supplementary single page opinion, which followed his review of 13 background documents on Mr. Hamilton previously unavailable to him:

> "My review of these additional documents strongly reinforces my clinical opinion that he has a deeply ingrained antisocial personality disorder that is likely to be extremely resistant to treatment or correction regardless of the interventions used."

[54] It is therefore with significant skepticism that I noted Mr. Hamilton's purported interest to complete his GED while in the penitentiary and eventually pursue his interest in mechanics and auto body work. I am similarly cautious about his statement to the

Court that he “will dedicate whatever time is required to taking programming and education toward my healing.”

[55] As for Mr. Hamilton’s professed remorse, it is noted in the pre-sentence report that his conversations with Mr. Kwiat were mainly focused on his relationship with Ms. Jim and not about the victim or any residual feelings from the offence. Dr. Brodie notes that Mr. Hamilton admitted to depressed moods and feelings of self-reproach for having killed Mr. Wheldon, stating “Maybe God can forgive me for it but I don’t know if I can forgive myself”. Mr. Hamilton also told Dr. Boer that the offence was “very life-altering – I took someone’s life and I had no right to do that – I also took him away from his daughter and friends and I lost a friend that I knew for 12 or 13 years – my personal cab driver – someone I could BS or chat with.” He also said that he wished to God it had not happened as he knows Mr. Wheldon’s daughter and said he would like to say that he is sorry to her and make amends. However, when Mr. Hamilton was interviewed by Dr. Boer, while he admitted to killing Mr. Wheldon, he also claimed that it was partially accidental and partially Mr. Wheldon’s fault. It was Dr. Boer’s subjective impression that although Mr. Hamilton voiced regret for the offence, he appeared to feel that the victim deserved retribution for the alleged sexual assault on Diane Jim.

[56] It is also very interesting that these statements of remorse by Mr. Hamilton followed immediately on what is clearly a fictional account of the murder to Dr. Boer, presumably designed to minimize his responsibility:

> “…I told him that if he didn’t leave us alone, I’d get all the girls he’s violated to testify against him. … Brian got physical with me and he took the CB (radio) cord and was trying to choke me out and I really blacked out – so lots of it …is vague – all I remember is grabbing my knife – I always carried a knife – and I turned around and remember hitting his chest once and

> once in the shoulder. He hadn't let go and I lunged again – he was on top of me – I came to and I was trying to get him to the hospital and he ran across the street and I drove the van to get him into the van and drove over him by mistake. I was trying to stop him from bleeding but I panicked and ran. …"

What is most interesting about this version is that it was relayed to Dr. Boer on June 1, 2005, only days before Crown and Defence counsel filed the initial Agreed Statement of Facts on June 13th, which did not suggest at any point that Mr. Hamilton was acting in self-defence.

[57] Similarly, Mr. Hamilton reported to Dr. Brodie that after he arranged to meet with Mr. Wheldon, he told him that he should leave Ms. Jim alone or else Mr. Hamilton would convince other women, whom Mr. Hamilton believed had been similarly molested, to report Mr. Wheldon to the police. Dr. Brodie then records the following:

> "Michael asserted that at that point in time Brian "freaked out" and attacked him, overpowering him and getting on top of him and was choking him. He admitted that at that time he took his knife and stabbed Brian in self-defence."

[58] Not only are those self-defence versions inconsistent with Mr. Hamilton's admission that he specifically intended to kill Mr. Wheldon at the time of the stabbing, they are also inconsistent with the evidence of the eye witnesses who observed Mr. Hamilton striking down on Mr. Wheldon from behind. And, lest there be any doubt about this, the photograph of the interior of the van shows that Mr. Hamilton would had to have moved a step or two forward from the passenger seat behind the driver's seat to get close enough to strike Mr. Wheldon. That further indicates the intentionality of his actions.

[59] At the sentencing hearing, Mr. Hamilton read to the Court his letter of October 21, 2005, in which he said “I find myself deep in a sense of guilt and remorse…I have a hard time living with the guilt. My actions were wrong.” These statements together with the statements he made to the psychologists, Ms. Geddes and Mr. Kwiat, and the early guilty plea, are some evidence of genuine remorse by Mr. Hamilton.

[60] However, in his statement to the Court, Mr. Hamilton once again referred to the “mitigating factors” in his mind. Even giving Mr. Hamilton the benefit of the doubt by trying to read those words in context, I nevertheless find them quite disturbing. I assume Mr. Hamilton is once again referring to the alleged sexual assault by Mr. Wheldon upon Ms. Jim about a month and a half prior to the murder. This theme of Mr. Hamilton saying “yes, I’m guilty but…” recurs in the pre-sentence report and in his interviews with the psychologists. In my view, it is something that Mr. Hamilton is ultimately going to have to eradicate from his mind altogether in order for him to take full responsibility for the offence.

[61] It must not be forgotten that when Ms. Jim initially reported the incident with Mr. Wheldon to the RCMP in June 2004 she stated that Mr. Wheldon had “kissed” her. In a later statement to the RCMP, this apparently changed to her alleging that Mr. Wheldon “grabbed her, hugged her and kissed her”. There is no suggestion that Mr. Wheldon was ever charged or convicted for that conduct and he must be presumed innocent of it. Regardless of what actually happened, which we do not know, even taking it at its worst, Mr. Hamilton’s prolonged and angry response was grossly misguided and disproportionate. First, he assaulted Mr. Wheldon by striking him in the face and causing him two black eyes. Second, he continued to exhibit aggressive

behaviour by giving Mr. Wheldon the finger and swearing at him as Mr. Wheldon drove by Mr. Hamilton's residence on another occasion. Third, he uttered threats to kill Mr. Wheldon to two other witnesses on separate occasions. Fourth, he called Mr. Wheldon on the day of the murder to confront him ***yet again*** about the incident. This grossly disproportionate reaction is also disturbingly consistent with Mr. Hamilton having a long-standing anger control problem, as well as an impulse control problem. I say all this to simply underscore that even if Ms. Jim's complaint about Mr. Wheldon was true, it cannot be in any way taken as a "mitigating factor" in Mr. Hamilton's murder of Mr. Wheldon. Further, contrary to what Mr. Hamilton apparently told Dr. Boer, Mr. Wheldon's death was in no way partially accidental or partially the victim's fault.

**Mitigating Circumstances**

[62] It is mitigating that Mr. Hamilton was only 23 years old at the time of the offence and is now just over 25. He still has most of his life ahead of him. The psychologists say that he is treatable and can choose to change his behaviour. If he does so, then eventually he will be paroled. He may be further assisted in that regard with the medical interventions and treatment suggested by Dr. Brodie. Finally, in his statement to the Court, Mr. Hamilton clearly expresses his desire to change his ways and successfully reintegrate with his family and society.

[63] Mr. Hamilton is by all accounts a good father, a good husband and a hard and reliable worker. A total of six letters of reference were filed in his support, including one from his wife, Ms. Jim. I accept Defence counsel's submission that Mr. Hamilton's relationship with Ms. Jim may be the best thing that has ever happened to him. It does appear that, prior to this murder, Mr. Hamilton's criminal activities ceased in about 1999,

which was at or just before the time that he began his relationship with Ms. Jim. But for this murder, I accept that the relationship has been a wonderful stabilizing influence on Mr. Hamilton, despite his extremely troubled and chaotic background.

[64] However, even here I am concerned that Ms. Jim, perhaps despite her best intentions, may unwittingly be contributing to the minimization which Mr. Hamilton seems prone to in addressing his responsibility for Mr. Wheldon's death. In her letter of support dated March 16, 2005, Ms. Jim says as follows:

> "I cannot see Mike doing anything deliberately nor intentionally. We all make mistakes in our lives and we do learn from them. Yes, I do see that Mike is very sorry for what he has done…He would not do anything that he did not want to do. Don't judge him because of his past history or the person who he is…"

While I do not expect Ms. Jim to be articulate about the legal aspects of Mr. Hamilton's offence, in her letter, which is almost 3 pages long, this is the ***only*** reference to the underlying offence. She does not seem to acknowledge that Mr. Hamilton ***intentionally*** killed Mr. Wheldon.

[65] As I have noted above, I also accept that Mr. Hamilton is remorseful to a point, but that he is in significant danger of holding on to the idea that Mr. Wheldon's alleged impropriety with Ms. Jim is somehow a mitigating factor.

[66] Trying to give Mr. Hamilton the benefit of the doubt, I further find it somewhat mitigating that he is willing to undertake programming during his incarceration. However, even here Mr. Hamilton has contradicted himself. He told Ms. Geddes in the pre-sentence report that he is going to take addictions programming, but in the same breath, he said that he has that "under control". Dr. Brodie noted that while Mr. Hamilton says he is open and willing to engaging in psychological counselling or psychiatric

therapy, that is logically inconsistent with his otherwise abject denial of having any problems or perceiving a need for making changes in his life. Dr. Brodie skeptically concluded that, while Mr. Hamilton might express a willingness to engage in counselling or treatment if he perceives that as being beneficial for his legal case, it is most likely that he lacks any true motivation to pursue such self-exploration.

[67] Mr. Hamilton also cooperated to some extent with the police during their investigation. When he was initially apprehended, he tried to say that he was looking for his dog. He also gave them a false name. Later he told the police that he flicked a knife in the bush and ran off down a small dirt road. Shortly after that, the police, with the assistance of a police dog, located a buck knife lying in tall grass about 50 yards from the scene. It is not entirely clear whether the police were significantly assisted by Mr. Hamilton's information about the knife, but again I will give him the benefit of the doubt in that regard. Mr. Hamilton also took the police to the location where he had hidden his clothing in the front seat of an old abandoned car just off the dirt road.

[68] On the other hand, the extent of Mr. Hamilton's cooperation must be contrasted with his re-enactment of the incident. Here, he maintained that Mr. Wheldon had jumped in front of the van and that he got out of the van, but forgot to put the van in park and the van continued to push Mr. Wheldon into the ditch. He had previously given a different version to the police as to how he had stuck Mr. Wheldon with the van. As I said earlier, this explanation is internally inconsistent with what Mr. Hamilton previously told the police, it is inconsistent with being seen getting out of the driver's seat when the van was already in the ditch, and it is also inconsistent with the other forensic evidence.

I therefore conclude that although Mr. Hamilton did cooperate to some extent with the police, he also tried to mislead them.

[69] The most significant mitigating circumstance in this case is the early guilty plea. On January 11, 2005, Mr. Hamilton consented to being committed for trial and waived his right to a preliminary inquiry. On January 18, 2005, Mr. Hamilton indicated through his counsel that a guilty plea would be entered to second degree murder. That guilty plea was formally entered before me on June 13, 2005. At that time an initial Agreed Statement of Facts was filed with the Court and a subsequent Amended Agreed Statement of Facts was filed August 24, 2005. There would have been no need for the Crown to call any evidence at the sentencing hearing, but for my request that they do so after an issue arose about Mr. Hamilton's access to the Alcoholics Anonymous program.

**Aggravating Circumstances**

[70] It is aggravating that Mr. Hamilton has a previous criminal record which includes two convictions for violence.

[71] When the first witnesses stopped and saw Mr. Wheldon under the van, Mr. Hamilton came out of the front driver's seat and tried to convince them that he had everything under control and that he did not need any assistance. While Mr. Hamilton did not actively prevent a later witness from providing assistance to Mr. Wheldon, his initial attempt to turn away an offer of help was both misleading and caused delay at a point when every moment was critical for Mr. Wheldon. That is clearly an aggravating circumstance.

[72] It is further aggravating that Mr. Hamilton fled the scene. And just prior to that he threatened a passerby on an ATV with bodily harm if he did not give him a ride.

[73] I also find it aggravating that Mr. Hamilton committed this offence while still stuck in his anger towards Mr. Wheldon for the perceived impropriety upon Ms. Jim. The Crown characterized this as being within a context of “retribution”. While I do not consider this as retribution in the sense that the murder was planned and deliberate, I am unable to accept Defence counsel’s plea for “compassion” towards Mr. Hamilton for acting in a “misguided” fashion, prompted by his perception that his wife had been sexually abused by Mr. Wheldon. As I said earlier, there is absolutely nothing “mitigating” in Mr. Hamilton’s explanation. His angry and prolonged responses to the alleged impropriety were not only inappropriate but disproportionate. If it were not for Mr. Hamilton’s long standing problem with anger control and impulsivity, he would likely not have confronted Mr. Wheldon on the evening of the murder for the second time about the incident with Ms. Jim. However, he intentionally put himself in that position for the express purpose of continuing the confrontation. His anger obviously overcame him yet again, only this time he lashed out with a knife instead of his fist.

[74] I find it aggravating that there was more than a single strike by Mr. Hamilton. He admits stabbing Mr. Wheldon three times and the forensic evidence indicates a total of 10 injuries caused by the knife to Mr. Wheldon’s face, neck and torso, including a likely defensive wound to Mr. Wheldon’s right hand. That suggests that the attack was more than merely momentary.

[75] I find it aggravating that Mr. Hamilton attempted to minimize his responsibility for Mr. Wheldon’s murder. He initially did so in the re-enactment for the RCMP. He continued to do so by falsely suggesting to the psychologists that he acted in self-defence. He also attempted to minimize his responsibility by exaggerating the extent to

which he was intoxicated at the time of the offence. He told Dr. Boer that he consumed eight litres of cider and 20 mls of valium prior to the murder. He told Dr. Brodie that, in addition to that, he also consumed half a 26 oz bottle of hard alcohol. However, Mr. Hamilton had a blood alcohol level of only 110 mgs percent about two hours after the murder. That simply does not match Mr. Hamilton's statements and I find that he has attempted to excuse or explain his behaviour by creating the impression that he was much more intoxicated than he actually was.

[76] The most significant aggravating factor in this case is that Mr. Hamilton pursued Mr. Wheldon with the van, hitting him and running over him with the front wheels (or a wheel) at least once. Mr. Hamilton's explanation – that Mr. Wheldon jumped in front of the van and that Mr. Hamilton got out of the van, but forgot to put it in park, such that it continued to push Mr. Wheldon into the ditch – is simply not credible.

[77] Mr. Hamilton told Dr. Boer that he was trying to get Mr. Wheldon to the hospital and that when Mr. Wheldon ran across the street, Mr. Hamilton drove the van to get him into the van and drove over him by mistake. I also find that explanation to be incredible. If Mr. Hamilton indeed intended to provide assistance to Mr. Wheldon, there was no need to drive the van towards him. He was already bleeding profusely and Mr. Hamilton could easily have overtaken him and tried to place him in the van. It also makes no sense that Mr. Hamilton would have driven the van into the ditch where it would likely become stuck, if his intention was to drive Mr. Wheldon to the hospital.

[78] Based on the admitted facts, the physical evidence and the photographs, I find that Mr. Hamilton pursued Mr. Wheldon with the van and was reckless as to whether or not he caused him further bodily harm by hitting Mr. Wheldon with the van and running

over him with at least one of the front wheels of the van. At that point, Mr. Wheldon would have to have been face down on the ground in order for the injuries to be sustained to the back of his legs and torso.

[79] However, when Mr. Wheldon was found by the police and the ambulance attendant he was face up, lying on his back, partially pinned underneath the front of the van with his head and torso in front of the van and his legs underneath. The front of the van was resting just above his knees. The Whitehorse Fire Department had to raise the van to allow the ambulance personnel to remove Mr. Wheldon from underneath it. As I concluded in discussing the facts, the only way that Mr. Wheldon could have changed positions from being face down to being face up was if Mr. Hamilton continued to move the van after he initially ran Mr. Wheldon over. I find that Mr. Hamilton was reckless in doing so.

[80] Finally, with Mr. Wheldon positioned as he was underneath the front of the van, I find that it was reckless for Mr. Hamilton to have attempted to move the van forward with enough force to leave a significant spray of gravel behind the rear passenger wheel, as shown in the photograph.

[81] While the Crown conceded that they could not prove beyond a reasonable doubt that Mr. Hamilton intended to “finish off” Mr. Wheldon by running him over with the van, I find that Mr. Hamilton was reckless in the extreme in hitting Mr. Wheldon with the van and operating it as he did in those circumstances.

**The Law**

[82] Crown and Defence counsel referred to a total of 14 cases as sentencing precedents. These were helpfully summarized by Defence counsel in a table setting out

the circumstances and the outcomes in each case. The citations of these cases are attached to these Reasons as Appendix “A”.

[83] The leading case on parole ineligibility is *R. v. Shropshire* from the Supreme Court of Canada in 1995. In that case, Iacobucci, J. delivered the judgment of the Court and noted that the relevant section in the *Criminal Code*, s.744 (now s.745.4), sets out the factors to be considered in fixing an extended period of parole ineligibility:

1. the character of the offender;
2. the nature of the offence; and
3. the circumstances surrounding the commission of the offence.

[84] The Court further held that “denunciation” can form part of the analysis, as it falls within the criteria of the “nature of the offence”. Similarly, an assessment of “future dangerousness”, falls within the rubric of the “character of the offender”. “Deterrence” was also noted to be a relevant criteria in increasing the period of parole ineligibility. Indeed, the Court held (at para. 23) that (now) s.745.4 must be concerned with crime prevention, deterrence, retribution and rehabilitation. Most importantly, *Shropshire* held (at para. 26) that “unusual circumstances”, such as brutality, torture or a bad record, are ***not*** required for a Court to exercise its discretionary power under what is now s.745.4. Nor, said Iacobucci, J. (at para. 33) “is there any burden on the Crown to demonstrate that the period should be more than the minimum”.

[85] In *R.* v. *Allen,* the Newfoundland and Labrador Supreme Court cited an earlier decision of that court, *R.* v. *Doyle,* where Green, C.J. referred to *Shropshire* and said [at para. 20 of *Allen*]:

> “The Court also affirmed that the determination of whether there should be an enhanced period of parole ineligibility must be considered in the context of all the objectives and

> principles generally applied in Canadian sentencing law…Thus, the factors listed in s.745.4, namely "the character of the offender, the nature of the offence and the circumstances surrounding its commission" should be filtered through s.718's stated objectives of denunciation, deterrence, incapacitation, rehabilitation, reparation and responsibility, as well as the principles in s.718.1 and 718.2, to determine whether an extension of parole ineligibility promotes the general sentencing policies of the Code."

I accept that as a correct statement of the law.

[86] In *R.* v. *Cerra,* Donald, J.A., speaking for the British Columbia Court of Appeal in 2004, said at para. 17:

> "…I have discerned a pattern from decisions of this Court suggesting, in broad terms, the following: parole eligibility greater than 10 years is justified when there is some particularly aggravating feature; for a penalty greater than 15 years, egregious circumstances of a higher order of moral culpability are present. …"

[87] Later, after reviewing a number of sentencing authorities, Donald, J.A. continued at para. 26:

> "… I think it can be said that there are two broad groupings, from 12 to 15 years and from 15 to 20 years, the latter relating to cases of the highest order of moral culpability or dangerousness."

[88] Defence counsel relies on four cases where the period of parole ineligibility was fixed at the minimum of 10 years. Those cases are *Allen, Rodrigue, Daunt, and Trochym*.

[89] *Allen*, referred to above, was decided in 2004. The deceased was stabbed 20 times, and was cut on the face. However, the Court held that the prime offender was one John Cousins, who was described as a psychopath who killed impulsively and without apparent motive. There was evidence that Mr. Cousins had murdered another

victim, while acting alone. The Court concluded that the jury may have found Mr. Allen guilty on the basis of his having aided or abetted Mr. Cousins. The jury made no recommendation for parole ineligibility for Mr. Allen. Allen was 28 years old at the time of the offence and 38 years old at the time of sentencing. He had a relatively minor record of some five offences over a period of 15 years, but with no previous physical violence. There was also no evidence of any capacity for dangerousness. Allen was noted to be “very cooperative” during the investigation. I find this case distinguishable from Mr. Hamilton’s for those reasons.

[90] In *Rodrigue*, the jury convicted the 36 year old offender of second degree murder, after the Crown rejected an offer to plead guilty to manslaughter. I was the presiding judge. Ms. Rodrigue stabbed the 64 year old male victim twice in his home. The two had been friends for several years and the deceased had regularly provided assistance to the offender by providing transportation, loaning a vehicle and making loans in small amounts of money. The offender was an admitted alcoholic and drug addict. The Crown’s theory was that the offender was beginning an extended binge of alcohol, marijuana and crack cocaine consumption and that she was desperate for money to purchase more drugs. The Crown suggested that when the deceased refused to give her any money, she killed him. There was also evidence of post-offence conduct, but it was as consistent with manslaughter as it was with murder.

[91] Ms. Rodrigue testified that the deceased had non-consensual sexual intercourse with her just prior to the killing and that she became enraged at him when he subsequently failed to accept responsibility for raping her. The Crown’s theory was that there was no such sexual intercourse, but if there was it was consensual. There was

also evidence that the accused was significantly intoxicated by alcohol and drugs prior to the killing. However, the jury must have rejected the defences of intoxication and provocation in order to have found the offender guilty of murder.

[92] The jury recommended the minimum period of 10 years for parole ineligibility. The Crown did not seek more than that minimum period. Thus, there was no need to make specific findings of fact beyond taking into account the three factors in s.745.4 of the *Criminal Code*. I sentenced the offender to life imprisonment without eligibility for parole for a period of 10 years. Since there were no specific findings of fact and there were differing theories put to the jury, it is not possible to imply the precise basis upon which the jury convicted. For these reasons the case is of limited precedential value in sentencing Mr. Hamilton.

[93] *Daunt* was a case where the offender testified he was acting in self-defence or provocation. He was convicted of second degree murder. The jury made no recommendation as to the period of parole ineligibility and, as with *Rodrigue*, the Crown did not seek more than the minimum of 10 years. Therefore the judge was not required to make findings of fact and imposed life imprisonment with the minimum 10 year period for parole ineligibility.

[94] Defence counsel sought to introduce a copy of the judge's Charge to the jury in *Daunt*, so that I would have a better understanding of the evidence and the Crown's theory which was before the jury in that case. Crown objected to the Charge being entered on the basis that it would still be next to impossible to imply what findings of fact were made by the jury, regardless of the content of the Charge. I admitted the Charge as an exhibit for identification at the sentencing hearing and reserved my decision on its

admissibility. I have decided to admit the Charge and hereby direct that it be entered as a full exhibit at this sentencing hearing.

[95] It is apparent from the Charge that there was a history of animosity and conflict between Mr. Daunt and the deceased. The deceased had a wide spread reputation for violence and eccentric behaviour. There was evidence before the jury that the deceased had threatened Mr. Daunt and that when Daunt was told of this he became very fearful. There was also evidence that Mr. Daunt had asked a third party to kill the deceased on his behalf, which request was refused. At that point Daunt was heard to say that he would kill the deceased himself.

[96] On the day of the killing, the deceased drove to Mr. Daunt's mining claim and the two got into a disagreement. Daunt testified that he thought the deceased had a gun with him in his truck. He said he fired a warning shot and then recalled the deceased's vehicle coming towards him trying to run him over. He fired a couple more shots. It was later determined there was no gun in the deceased's vehicle and there was no evidence that the deceased threatened to shoot or kill Mr. Daunt at the scene. There was evidence that Daunt was genuinely fearful of the deceased.

[97] The Crown's theory was that Mr. Daunt shot and killed the deceased because he was angry with him and not because he was afraid for his life. That anger was motivated by his belief that the deceased and Mr. Daunt's father were forming a business relationship which jeopardized Mr. Daunt's business interests. The Crown also said that Mr. Daunt shot the deceased when he felt taunted by him.

[98] I have gone through the evidence and the Crown's theory at some length in an attempt to be fair to Mr. Hamilton and his counsel. While there may be some limited

parallels between the *Daunt* case and the history of conflict between Mr. Hamilton and Mr. Wheldon, that is about as far as it goes. There were no findings of fact made by the sentencing judge and it is not easily discernable why the jury convicted Mr. Daunt. They obviously rejected the defences of self-defence and provocation, but beyond that it would be dangerous to speculate how they reached their verdict. Also, the Crown did not seek more than the minimum 10 year period in *Daunt*. As with *Rodrigue*, I conclude that this case is of limited precedential value.

[99] The *Trochym* case involved an offender who stabbed and slashed the throat of his girlfriend. There was evidence that the offender was motivated by jealousy and obsession. The Crown's theory was that the offender murdered the deceased in a rage in response to her decision to leave the relationship.

[100] An unusual feature of *Trochym* is the delay between the offence and the final appeal. The offence occurred in 1992 and the trial took place in 1995, with the jury returning a verdict of guilty to second degree murder. The offender was then released on bail pending his appeal in 1999. However, there was a long delay in the progress of the appeal, which the Ontario Court of Appeal described as "unconscionable" and principally the result of persistent problems with a court reporter who took six years to prepare the transcripts of the trial proceedings. The appeal was finally heard in 2004, by which time the appellant had been on release for about five years.

[101] The trial judge sentenced the offender to life imprisonment with the minimum 10 year parole ineligibility. On appeal, the Crown submitted that this period should have been in the 12 to 15 year range. The Court of Appeal disagreed, giving "substantial deference" to the trial judge, who had seen the accused and heard all the evidence. The

Court further noted that the trial judge gave detailed reasons for his sentence, in which he carefully considered all the relevant factors. Lastly, six members of the jury made no recommendation concerning parole ineligibility and six recommended the minimum period of 10 years. The trial judge took that recommendation into account, which he was entitled to do.

[102] Given this combination of circumstances, I find that the *Trochym* case is also distinguishable and of limited assistance.

[103] In *Cerra,* Donald, J.A. speaking for the British Columbia Court of Appeal, said at para. 17:

> "It has often been said that sentencing is an individualized process and comparisons with other cases are difficult. But difficult as they may be, comparisons must be made …"

Of course, *Cerra* was an appellate decision and, as I have previously indicated, Donald, J.A. went on to discern a pattern from his comparison of a number of sentencing precedents.

[104] In *Hoang*, Saunders J.A., speaking for a different panel of the British Columbia Court of Appeal said, at para. 16:

> "Each case is unique, and it is most difficult to compare offences, offenders or circumstances in a meaningful way."

[105] I have certainly considered the cases filed by counsel. However, I do not propose to go through a laborious cross-comparison of the facts in each case with those before me.

[106] I agree with Defence counsel that Mr. Hamilton's situation does not involve the aggravating circumstances referred to in s.718.2(a) of the *Criminal Code*. Although, I

have to say that, while this was not clearly a breach of trust situation, there was a trust component to it insofar as there was a friendship between Mr. Hamilton and Mr. Wheldon. But for that friendship, Mr. Wheldon would likely not have met Mr. Hamilton with his taxi that evening.

[107] I also recognize that, as Lambert, J.A., said in dissent in the *Paterson* case at para. 30:

> "… just about every second degree murder case is brutal and vicious. And in most of them death is more likely to be lingering and painful than it is to be instantaneous."

This comment was in the context of Lambert, J.A.'s review of sentencing cases in British Columbia, where he noted that the average period of parole ineligibility had risen from 12.9 years before the *Shropshire* case, to 15.2 years after *Shropshire*. Lambert, J.A. did not think that this form of "bracket creep" for the acceptable range was intended by the Supreme Court of Canada when it said in *Shropshire* that "as a general rule, the period of parole ineligibility shall be 10 years."

[108] I agree as well that Mr. Hamilton's case is not as overtly brutal as some of the others before me. For example, in *Cerra*, the offender did not kill the victim in a sudden burst of anger or on an impulse. Rather, he drove the victim to a secluded place, beat her and then drowned her in the course of a drawn out episode. He had the opportunity to discontinue his attack, but chose not to.

[109] In *Van Osselaer*, the offender went to the home of his landlady for the purpose of obtaining money to buy drugs. He stabbed and slashed her to death with a kitchen knife. The murder was described as having been carried out in a "cold and callous fashion on an elderly, defenceless woman in her own home".

[110] In *Rushton*, the offender murdered his estranged wife, which was a mandatory aggravating factor the Court had to take into account under s.718.2(a)(ii). The offender stabbed the deceased 20 times. He was aware that the couple's young daughter was in the residence and there was a strong likelihood that she had observed some part of the death of her mother. Further, Mr. Rushton denied access to third parties who attended at the residence and might have provided assistance to the deceased, when it was unlikely that he would known she was beyond help.

[111] In *Atwal*, the offender stabbed his teenage daughter 17 times, while she was seated in the front passenger seat of his car with her seat belt still secured around her. His motive seems to have been that he disagreed with certain lifestyle choices that his daughter was making, which conflicted with his cultural conservatism. After the stabbing, he drove around with her for two and a half hours before taking her to the hospital. He disposed of the knife and presented himself at the hospital as a grieving father whose daughter had inflicted the wounds on herself.

[112] However, in *Cerra, Van Osselaer, Rushton* and *Atwal*, the periods of parole ineligibility were all in excess of 15 years. Here, the Crown is asking the period be set at 15 years.

**Section 745.4 Analysis**

[113] I find that the aggravating circumstances in this case involve the character of the offender, the nature of the offence and the circumstances surrounding its commission. Taken together, they justify elevating Mr. Hamilton from the minimum period of 10 years. The most significant aggravating circumstance is Mr. Hamilton's reckless disregard for Mr. Wheldon's well-being in hitting him with the van after stabbing him, running him over

at least once with the wheels (or a wheel) of the van. Then, moving the van again, while Mr. Wheldon was likely underneath. And finally, by accelerating the motor in a forward gear with enough force to cause a noticeable spray of gravel behind the rear passenger tire, while Mr. Wheldon was obviously pinned underneath the front of the van in the ditch.

[114] I am also very disturbed by Mr. Hamilton's repeated attempts to minimize his involvement and responsibility for Mr. Wheldon's death by providing inaccurate and fictional accounts of his actions and those of Mr. Wheldon, so as to make him appear less blameworthy or indeed, innocent altogether. This prevarication by Mr. Hamilton continued even after he had presumably instructed his counsel, on or before his indication of a guilty plea to second degree murder on January 18, 2005, that he admitted the essential elements to second degree murder.

[115] I am very concerned about Mr. Hamilton's deep seated anti-social personality disorder, and his associated problems of anger control and impulsivity. No doubt this disorder contributed to his prevarication about the circumstances of the offence. He is clearly a high risk for future violent recidivism and will therefore be a danger to society when he is eventually released on parole, unless he makes a good faith effort to take advantage of the therapeutic programming which will be available to him in the penitentiary system.

[116] Defence counsel suggests that I should not presume that Mr. Hamilton will not take advantage of those programs. I simply do not know whether he will or he will not and I do not have to speculate. That is a matter for the parole board. Rather, I am required to have regard to the character of the offender as one of the factors in s.745.4.

That in turn requires that I take into account his prospects for rehabilitation. As the offender is before me today, I find those prospects to be poor. He may change his attitude in the future, but to the extent that his past performance can be looked to as a predictor of his future behaviour, the prospects are bleak. In the period of over 16 months while Mr. Hamilton has been incarcerated, he has not taken any therapeutic, educational or vocational programming of any kind, with the exception of his weekly meetings with Mr. Kwiat. While I commend him for attending those meetings and while I am sure that Mr. Kwiat has done everything that he can to assist Mr. Hamilton with his various challenges, there is much more that Mr. Hamilton could have done. There was a significant period of about six months while Mr. Hamilton was on medium security status, during which I presume he would have had access to virtually all programming available at the Whitehorse Correctional Centre.

[117] Further, even while under maximum security status, he could have attended Alcoholic Anonymous and Narcotics Anonymous, knowing that he suffers from addictions in those areas, but did not. Nor did he attempt to pursue any individualized counselling with Alcohol and Drug Services. Rather, it seems he was content to rely on his meetings with Mr. Kwiat, who has an interest in the area of addictions, but is not a qualified counsellor in that area. To make matters worse, it appears as though Mr. Hamilton may have lied to Dr. Boer in suggesting that he was attending AA and NA at the Correctional Centre for a period of time, when in fact he had not. Worse still, he seemed to suggest through his counsel, that he attended AA initially upon his admission to the Correctional Centre in 2004, but that he did not attend “for the bulk of 2005” because meetings were not then being held at the Correctional Centre. That is clearly

false. I take this to be another symptom of Mr. Hamilton's antisocial personality disorder. He seems to have had continuing difficulty being genuine and truthful throughout the investigation of this offence and even into these sentencing proceedings. Thus, I am not left with a great deal of confidence when I hear Mr. Hamilton say that he will dedicate whatever time is required to taking programming and education towards his healing.

[118] The aggravating circumstances, standing alone, would justify a period of parole ineligibility of 15 years.

[119] However, despite all of his challenges, to his very great credit, Mr. Hamilton has been consistent in at least one respect and that is with his instructions to his counsel to plead guilty to second degree murder. I find it to be a significant mitigating circumstance that he did this very early on and waived his right to a preliminary inquiry. That saved the state significant time and resources and made it unnecessary for witnesses to be put through the difficulty of testifying about such an unpleasant matter. I find the guilty plea in this case is particularly mitigating in comparison with the other cases before me. In only two of those cases, *Shropshire* and *Rushton*, were guilty pleas entered. In all the others, despite what appeared to be often overwhelmingly strong cases for the Crown, the accused pursued their rights to a trial by jury.

[120] I also find it mitigating that Mr. Hamilton has made a wise and beneficial choice in his relationship with Ms. Jim. Hopefully, Ms. Jim will not undermine the strength of her support by assisting Mr. Hamilton in continuing to minimize his responsibility for Mr. Wheldon's murder. Assuming the relationship continues, I expect that Ms. Jim will be a strong source of support for Mr. Hamilton and will motivate him to obtain parole at the first opportunity, in order that he may be rejoined with his family.

[121] I have also not lost sight of the other mitigating factors, including the fact that Mr. Hamilton is still a relatively young man at the age of 25, and even after his release on parole, he will still have the bulk of his life ahead of him.

**Conclusion**

[122] Mr. Hamilton please stand. Taking into account your character, the nature of the offence and the circumstances surrounding its commission, I sentence you to life imprisonment, without eligibility for parole until you have served at least 13 years of the sentence.

[123] Pursuant to s.109(2) of the *Criminal Code*, I further order that you will be prohibited from possessing any firearm for a period of 10 years from your release from imprisonment. You will also be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[124] You will also provide a sample of one or more bodily substances for the purposes of forensic DNA analysis pursuant to s.487.051 of the *Criminal Code*.

[125] The victim surcharge is waived.

GOWER, J.

## Appendix "A"

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|---|---|
| 1 | *R.* v. *Schropshire,* (1995), 102 C.C.C. (3d) 234 (S.C.C.) |
| 2 | *R.* v. *Allen,* [2004] N.J. No. 240 (S.C.T.D.) |
| 3. | *R.* v. *Rodrigue,* 25 October, 2005, (Yukon Supreme Court, 04–01540) |
| 4. | *R.* v. *Daunt*, 26 May, 2005, (Yukon Supreme Court, 03–01510) |
| 5. | *R.* v. *Trochym*, (2004), 186 C.C.C. (3d) 417 (O.C.A.) |
| 6. | *R.* v. *Paterson*, [2001] B.C.J. No. 26 (C.A.) |
| 7. | *R.* v. *Rushton*, [1999] Y.J. No. 62 (S.C.) |
| 8. | *R.* v. *Rushton*, [2000] Y.J. No. 103 (C.A.) |
| 9. | *R.* v. *Van Osselaer* (2004) 181 C.C.C. (3d) 322 (B.C.C.A.) |
| 10. | *R.* v. *Cerra*, [2004] B.C.J. No. 2453 (C.A.) |
| 11. | *R.* v. *Atwal,* [2005] B.C.J. No. 1512 (B.C.S.C.) (Q.L.) |
| 12. | *R.* v. *J.T.G.*, [2001] B.C.J. No. 1982 (C.A.) |
| 13. | *R.* v. *Frechette*, [2000] B.C.J. No. 2874 (S.C.) |
| 14. | *R.* v. *Hoang* (2002), 167 C.C.C. (3d) 218 (B.C.C.A.) |
| 15. | *R.* v. *Young*, [2003] B.C.J. No. 2683 (S.C.) |