

Citation: *R. v. Lange*, 2015 YKTC 43

Date: 20151127
Docket: 14-00138
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

MARK LEWIS LANGE

Appearances:
Noel Sinclair
Gordon R. Coffin*

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): This case is not about the system failing Mark Lange; rather, it is about how Mark Lange failed himself.

[2] The Crown has fulfilled all the statutory requirements to proceed with the dangerous offender application. Volumes have already been written about this offender by psychiatrists, psychologists, other health professionals, probation officers, corrections personnel, teachers, social workers, and others. We have the benefit of an excellent *Gladue* report from Mr. Mark Stevens.

*Mr. Coffin was counsel of record throughout the proceedings but was discharged by Mr. Lange on the day of judgment. At the request of the Court, Mr. Coffin graciously remained as the judgment was read.

[3] From pages three to five of that report, Mark Stevens talks about the early upbringing of Mr. Lange in some considerable detail.

Life Circumstances

Mark Lewis Lange was born on 3 September 1975 at the Whitehorse General Hospital. His mother is M.H. Both Mark and his mother are citizens of the Na-Cho Nyack Dun First Nation in Mayo. Mark has no idea who his father is, and his mother either won't tell him or doesn't know. "Me and my mother, we don't talk—we don't even like each other," says Mark. "Maybe there's guilt on her part, anger on mine. It's hard to get any truth out of her. I even tried getting her drunk."

Mark is the youngest of four children born to M. The oldest two were raised by his grandparents. He and his second-youngest sibling were both taken into care immediately and later fostered out. "I was taken right from the hospital," says Mark.

Mark knows very little about his mother, other than the fact that she attended residential school and likes to drink. "Mom liked to party," says Mark. "I'm pretty sure she drank [while pregnant] with me."

According to Mark, M. received a quarter million dollar settlement for the time she spent in residential school, but other than that he says he knows next to nothing about her mother. He is frustrated by that. "I just can't get a straight answer out of her," he says.

M. says that she attended the Choutla Residential School in Carcross for eight years. However, she did not want to provide any details. She became quite angry when questioned about her experience at residential school and threatened to hang up the phone.

(Footnote omitted)

[4] During his life, Mr. Lange was forced to deal with a great number of issues, including identity, abandonment, ADHD, unsuitable placements, changes of residents, the breakup of his foster parents' marriage, youth crime, deaths in his immediate family

and of many friends, alcohol and drug addictions, the guilt and shame of having killed a man, and the continuing separation from his daughter.

[5] Mr. Lange is a very talented artist, excelling in carvings and paintings. He is recognized at least nationally, with some international interest being shown as well. Furthermore, Mr. Lange is increasingly over the years well-read and intelligent.

[6] On page 23 of the *Gladue* report, Mr. Stevens wrote:

...Although he loves and respects his foster parents, he says he can't help but wonder what path his life may have taken if he had been raised by his grandparents and if he had been given the opportunity to grow up in his birth-parents' culture.

[7] Mr. Stevens quoted from and referred to the work of Raven Sinclair, "Identity lost and found: Lessons from the sixties scoop," *First Peoples Child & Family Review*.

[8] This identity issue Mr. Lange has wrestled with for a long time and continues to do so. There are *Gladue* factors here but falling short of what we often see in terms of extreme violence and frequent and excessive drinking and poverty. The Langes provided Mark as best they could with a stable upbringing up until the time of their divorce. Nonetheless, we must always bear in mind and not lose sight of the findings of Raven Sinclair, which reveal the significant and ongoing issues of identity experienced widely by Aboriginal children.

[9] The heinous crime with which we are concerned is the merciless, vicious assault causing bodily harm to Dakota McLeod. This occurred in the early morning hours of the June 6, 2014, on the landing and the ramp of the Salvation Army shelter here in

Whitehorse. The victim had been at the door for a short period of time, presumably requesting admittance. The offender came by, turned back, and walked up the steps and joined Dakota McLeod on the landing. The offender lit a cigarette. The two got physically close to one another.

[10] The video, which was somewhat grainy, had no audio. After viewing it in court and then several times since, I conclude that there was absolutely no physical initiation or aggression by the victim. Quite likely something was said which set off the offender.

[11] There were two blows to the head, which connected, and then one that missed. The victim immediately fell on the ramp and went into a protective fetal position. Within approximately three minutes there had been four kicks to the lower body; 16 kicks to the head or upper body, including some really violent stomping; and three more punches to the head.

[12] The offender sat on the victim for some of the punches and got in his face, probably taunting and yelling at him. There were a couple of instances where the victim showed some signs of life and movement, and appeared to be pleading for the offender to stop. The offender continued and even gave him a parting shot before leaving the area. Before some of the kicks, the offender actually ran at the victim so as to intensify the force. He also pulled up his own pants to enable the kicking to proceed unimpeded. At one point, he raised both of his arms after kicking the victim. As to why, I do not know.

[13] After about three minutes, a Salvation Army employee came out to see what was going on. William Bailey advised the RCMP in his statement that the offender said,

"Somebody beat up this guy." When he realized that Mr. Bailey was not being duped, the offender threatened him. "Sooner or later, you've got to come out and I will get you. You're nothing but dead meat."

[14] The offender acted violently towards the police as he was taken away to the adult processing unit. He was intoxicated by alcohol. The victim, who was also intoxicated, gave neither a statement to the police nor a victim impact statement. We have learned that he suffered a concussion, a swollen right ear, had blood in his tympanic cavity, and a nosebleed. There was a significant bloodstain left on the ramp after the vile attack.

[15] The offender's record was accurately outlined by Crown counsel. Born in 1975, Mr. Lange's record commenced as a youth in 1990 and has continued with no significant gaps all the way through 2014. It comprises 42 convictions, including three weapons offences and six crimes of violence, including: in 1990 - assault with a weapon, a BB gun in which a girl was psychologically but not physically harmed; in 1993 - uttering threats; in 1998 - spousal assault; also in 1998 - assault causing bodily harm; in 2006 - ultimately a manslaughter conviction and sentence; and in 2014 - uttering threats.

[16] As to the 1990 offence, Mr. Lange was upset at words exchanged a few days before, with a girl at school. To put this case in some historical context, I will refer to the psychological report prepared by Steven C. Sigmund of North Vancouver. This was filed with the Territorial Court on August 3, 2000.

The last paragraph:

Mark is an interesting boy. He has, as yet, not developed firmly entrenched anti-social attitudes in spite of his lengthy history of behavioural [sic] difficulties. He has a father who is actively involved with him and who is obviously bonded to him, and this is further seen as a prognostically good indicator for the boy. Mark is bright, creative and basically seems to have good intent. It is hoped that the above interventions will help in remediating many of his difficulties. Father is willing to attend any sessions that may be deemed helpful in helping the boy to redirect his life.

[17] In 1998, there was a spousal assault on Pamela Jim, Mr. Lange's partner, involving at least two chokeholds and taking her to the floor. He actually threw a fish tackle box at her. Some of the lures stuck in her hair. For this, he received a 60 day sentence.

[18] In 1998, the assault causing bodily harm was properly characterized as vigilantism. In the related case of *R. v. Parsons*, [1999] Y.J. No. 3, Judge Lilles stated at paras. 5 and 6:

Mark Lang [sic] pled guilty to the attack and has been sentenced. The apparent motive for the attack was vigilantism. Lang believed that S.S., who had been previously convicted of sexual assault on a youth, had also assaulted his nephew.

The injuries to S.S. were serious, including fractured ribs, stitches to the back of the head and a concussion. He stayed in the hospital for several days and was bruised for approximately six weeks. J.P. described his injuries as consisting of multiple cuts and bruises to his face, and that he was covered with blood. He also had numerous bruises to his back and shoulders. His bruises lasted for three weeks. He was not hospitalized.

[19] To be fair, Mr. Lange was not the only one involved with that. As I recall the facts, there were two others involved.

[20] In December of 2004, Mr. Olson lost his life at the hands of Mr. Boucher and Mr. Lange. His conviction for murder was overturned in *R. v. Lange*, 2011 YKCA 7. An Agreed Statement of Facts was filed in November 2011 when Mr. Lange pled guilty to manslaughter. In *R. v. Lange*, 2012 YKSC 7, Mr. Justice Veale had this to say at paras. 6, 7, and 9:

[6] The Crown and defence have filed a Joint Submission on Sentencing. The submission was based upon Mr. Lange's guilty plea to manslaughter in exchange for a sentence of 10 years, less credit for time served. Dr. Lohrasbe has concluded that Mr. Lange does not present a high risk for violence in the foreseeable future based upon his current presentation and the counselling he has received in federal custody since 2006. Accordingly, the Crown is not applying for a long-term offender designation against Mr. Lange.

[7] As with Mr. Boucher, it is proposed that Mr. Lange receive enhanced 2-to-1 credit for the twenty months of remand custody he served before his first sentencing on August 31, 2006, and enhanced 1.5-to-1 credit for the eight months he was on remand between the Court of Appeal decision and this disposition. This amounts to 52 months of credit for remand time. This is to be added to the time Mr. Lange served in the federal penitentiary; a period of approximately four years and nine months. The result is credit for nine years and one month. Under the agreement in place at the time of his guilty plea, Mr. Lange would have had 11 months remaining on his 10 year custodial sentence. However, in an attempt to provide controls and supports to Mr. Lange in the community, Crown and defence are now presenting a slightly different joint position of a sentence of nine years and four months. Under this joint submission, Mr. Lange would spend three additional months in the Whitehorse Correctional Centre and then be released subject to a probation term of 15 months. This proposal also seeks a lifetime firearm prohibition under s. 109 of the

Criminal Code and DNA order pursuant to s. 487.051 of the *Criminal Code*.

...

MARK LANGE

[9] Mr. Lange is 36 years old. His unenviable criminal record starts in 1990, when, as a 14-year-old, he was convicted of assault with a weapon. Fortunately, the weapon was only a BB gun. In the same year, he had three break and enter convictions. He then had a string of possession of stolen property offences, as well as a single conviction for theft under \$1000, and convictions for uttering threats and possession of a prohibited weapon. All of these offences occurred while he was still a youth. His first entries as an adult were convictions in 1995 for impaired driving and failing to comply with probation. In 1997, he broke into an apartment, and, in 1998, he was convicted of possession of a stolen credit card. Also in 1998, he was convicted of a serious assault causing bodily harm, committed while he was not under the influence of alcohol or drugs and, in the same year, he was as well convicted of assaulting his girlfriend. In 2000, he registers convictions for possessing a prohibited firearm with ammunition, failing to comply with an undertaking and failing to attend court. The weapons offence was with respect to a homemade zip gun. In 2002, Mr. Lange was convicted of trafficking in cocaine and possession of property obtained by crime. In 2003 and 2004, just prior to the homicide of Mr. Olson, he was convicted of further theft offences.

[21] In para. 10 of that decision, Veale J. notes that Mr. Lange "describes his adoptive parents as good people and very strict. But he was rebellious, antisocial and did a lot of fighting to prove himself."

[22] In para. 21, Veale J. outlined that Mr. Lange apologized, taking full responsibility for his part in Mr. Olson's death, and indicated that "he has been woken up with the mental, spiritual and emotional understanding that he received from the Elders." He claimed to have kept the Victim Impact Statement from the deceased's sister as a

reminder of the damage he inflicted, particularly when he was feeling sorry for himself or angry.

[23] Mr. Justice Veale agreed with the joint submission of nine years and four months, less the nine years and one month of credit, leaving three months in custody at the Whitehorse Correctional Centre, to be followed by 15 months of probation.

[24] As to 2014, the uttering threats charge, we have in the materials the words from Mr. Lange electronically conveyed to Amber Blanchard, "I am going to kill you and your whole goof family." Amber Blanchard is a young woman, according to Mr. Lange, who was an artist but drank heavily. She dated Mr. Lange from September 2012 to December 2013. Writing back:

Ms. Blanchard: I'm keeping this for the cops.

Mr. Lange: You will still be dead.

Ms. Blanchard: Calling right now.

Mr. Lange: Goof Jake is first.

[25] On February 14, 2014, Mr. Lange was sentenced to 75 days in jail and 9 months probation. See the decision of Cozens J., *R. v. Lange*, 2014 YKTC 63.

[26] Despite having been convicted of a homicide and sentenced to nine years and four months, Mr. Lange continued to threaten to kill people. Even after being released, he proceeded to commit the predicate offence in a depraved, ferocious manner. This was an unrelenting attack on Dakota McLeod.

[27] I am very grateful for the good work by Charlene Bradford, a registered psychologist. As I mentioned at the outset, we deliberately adjourned the hearing so that we could hear from her at the request of the defence. She confirmed, on page two of her Report, that Mark Lange meets the criteria outlined in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*, for attention deficit/hyperactivity disorder, predominantly hyperactive-impulsive type with mild severity. On the Wechsler Adult Intelligence Scale, his standard score is 109, ranging perhaps from 104 to 114. She has several recommendations to assist in emotional regulation.

Some of Mark's greatest challenges are in emotional regulation, which is key to thinking and performing at our best. Before Mark will be able to learn strategies to support his other executive functioning difficulties, he will need skills for regulating his emotions.

- Continue counselling to support in resolving past experiences.
 - Counsel[ing] should also focus on pragmatic behavioural skills building, organizational and planning skills, self-management strategies, and social skills.
- Consider discussing options, benefits, and side effects of stimulant medication with a medical health professional (e.g. doctor or psychiatrist).
- Learn calming strategies. Use them multiple times throughout the day. These may include any of the following:
 - Deep breathing
 - Progressive muscle relaxation – a script can be found at
 - Mindfulness – podcasts and recordings can be found at
- Prepare and practice a self-soothing script for when you become angry or frustrated. For example, “I am frustrated. It is okay to be frustrated. I can breathe deeply and think of a solution.” This script can be

repeated many times when needed. Once you are calm, you will likely need assistance in learning how to work through the situation and to debrief it properly.

- To increase you[r] ability to restrain yourself, practice delaying a response. For example, when playing a card game, purposefully pause before playing your turn or when completing a school task, purposefully pause before writing down your answer. Take a deep breath and then respond.
- Use self-talk to support inhibition. For example, before taking any action, tell yourself to “breathe.”

[28] Dr. Lohrasbe is an experienced and highly regarded forensic psychiatrist who is very thorough, analytical, and insightful in his extremely well-written reports. One such report was written for Judge Veale in January of 2012. The Report was focused on a risk assessment.

At page 5:

When he looks back at the changes he has made over the years of his incarceration, he believes that "I don't feel sorry for myself anymore. I used to feel that the world owed me something but the world owes me nothing. In the past I let my own bullshit get in the way. I'm tired of drinking and I'm tired of doing time. In [sic] know that people have no reason to trust me yet, I haven't proved myself out there. But I'm self aware and I make mental notes. I am very aware that I can never drink again. I know I can't control my drinking once I start. If I drink again I may as well be dead". He believes that a major breakthrough was when he "learned that I can feel good within myself, not needing alcohol or drugs or others".

And then at page 15:

Mr. Lange is aware that he will face challenges when he is released into the community but expresses confidence in his ability to adapt to living an alcohol and drug free life in the community. He believes that his interest in art is an anchor for his self-esteem, provides him structure and routine, and hopes that his artwork will also provide him with a substantial income.

Mr. Lange has not made detailed release plans as he is awaiting sentencing and unsure as to when he will actually get the opportunity to reintegrate into the community. ...

And then at page 16:

A review of Mr. Lange's history readily indicates that he was strongly established in a culture of social deviance and was steeped in substance abuse. The factors that drove his criminality and violence were apparent and open to intervention through widely available treatment programs. A range of appropriate treatment interventions were successfully delivered to him during his current incarceration. My clinical evaluation strongly indicates that Mr. Lange has taken advantage of the programs that were available to him within the correctional system. He does not currently present with overt features of antisocial personality disorder. He has been alcohol and drug free for seven years. Hence the primary factors driving his criminality and violence have largely abated. He is insightful and motivated to remain crime-free. Although he has yet to be put to the test within the community, the structures (internal and external) are in place for a successful transition to a lawful lifestyle. *In my view he can no longer be regarded as a high risk for violent acts in the foreseeable future. If released on parole, he can readily be monitored and supervised in the community.* (emphasis added)

[29] A little over three years later, on March 31, 2015, Dr. Lohrasbe wrote a psychiatric assessment for me for the present dangerous offender application. In addition, he testified by video link from Vancouver on August 26, 2015. Risk assessments, of course, are not an exact science. Dr. Lohrasbe, himself, was surprised how things turned out after his positive January 2012 Report.

[30] Let me highlight some of the more important parts of Dr. Lohrasbe's Report and testimony before I set out his actual summary.

Page 6:

He made those threats on social media at a time "*when I was pretty loaded and drunk. After I did that I thought, oh shit, the police are going to come*". He was arrested and later pled guilty. He thought that he was sentenced to 60 days, and estimated that he spent a total of roughly 90 days between January and March 2014 at WCC. While at WCC he remained entirely sober. However, "*the day I got out, I went to a friend's home, and there was a bottle of vodka there. Within an hour of being released, I was already drinking*". He then continued to consume alcohol heavily more days than not until his arrest.

Page 7:

... He acknowledges that he has no recollection of Mr. McLeod saying anything at all but he cannot come up with any other rationale for his prolonged assault on Mr. McLeod; "*I'm trying to make sense of that attack on him... I undid all the work I did over years in 30 seconds.*"

Page 8:

... What we do know is that consumption of alcohol on that day and building up to that day was obviously a major factor in unleashing his anger.

Page 12:

This risk factor is present and very relevant to Mr. Lange's risk for violence. While intoxication with alcohol is not the direct cause of violence, it is correlative and facilitative to violence.

Page 13:

This risk factor [traumatic experiences] is partially present. Although he was raised by attentive and caring adoptive parents, and did not suffer typical forms of abuse, he reports internal experiences related to being abandoned and feeling alienated. Additionally, in response to some of his own behaviours, he was placed in a setting for an extended period where, from his perspective, he was traumatized. At the present time however those early experiences appear to be of a relatively minor relevance to this risk for violence.

...

This risk factor can be inferred to be present from his actions and is of high relevance to Mr. Lange's risk for violence.

Page 16:

This risk factor [with stress or coping] is present and relevant. Mr. Lange's behaviour has demonstrated that his capacities for coping with stress in the community are limited.

Page 20:

... It is a lamentable fact that such relapses occur with some frequency ('old habits die hard'). In my opinion, given his strengths but acknowledging the long road he has ahead of him, it is still reasonable to hypothesize that with further treatment interventions, and further growth on his part, his risk could be reduced to levels that can be managed in the community in the foreseeable future.

...

He is mindful that he had been given the opportunity to redeem himself and has failed. ... If he engages in the treatment programs that will be offered to him and learns that he benefits through cooperation and compliance, he may gradually come to see that 'the system' shares with him the goal of keeping him out of jails and prisons. It is then that the combination of ageing, maturity, 'burnout', and close monitoring of his commitment to abstinence may be sufficient for safe risk management in the community.

[31] In his *viva voce* testimony, he shared other insights.

- Mr. Lange controlled his anger for a long time in the penitentiary through the use of learned skills.
- His thinking is clearly compromised by drinking.
- His talents and intelligence is a two-edged sword. While he can learn the skills, he can also con his supervisors.

- When Mr. Lange started drinking, he thought he could keep a lid on it but, in reality, his anger was being unleashed.
- Any aspect of FASD is a red herring.
- With the alcohol abuse disorder, it has a negative impact on his social interactions and he becomes more comfortable with anger and violence.
- Rates of violence go down when men are in their 40s and 50s, and beyond.
- Mr. Lange must clearly understand what he stands to lose and always keep that in mind.
- With long-time institutionalization, the prisoner's independence and empathy are decreased and the rehabilitation is undermined.
- In time, he does need to go to a halfway house, preferably well away from the Yukon.
- Mark Lange can never have a drink again and his motivation must be more than just a fear of more imprisonment.

[32] I will now read the recommendations found at page 21 and note how these are vastly different than the ones just three years before.

- A. Mr. Lange will pose a high risk for violence.
- B. Further engagement in therapeutic programs available within the penitentiary system are likely to be of assistance in reducing risk. The goal would be to get him to the point where managing his risk in the community can reasonably be envisioned.
- C. Before risk management in the community can be contemplated, Mr. Lange will need to have a track record of cooperation, honesty, and disclosure.
- D. To manage his risk in the community, his supervisors would need to have a high level of confidence that Mr. Lange is genuine and steadfast in his commitment to total abstinence from alcohol and all intoxicants.
- E. Such preconditions to safe management in the community, while challenging, are not outside the realm of reasonable possibility.
- F. When Mr. Lange is released into the community, the lengthier the period of parole, the greater the chances of preventing further violence, through a combination of monitoring, supervision, therapy, and victim safety planning.

Assessments of risk, treatability, and risk management in the community are not fixed. All the issues identified in the above report would need to be revisited from time to time, as the assessment and management of risk will evolve, depending on changing circumstances.

[33] The day before we heard from Dr. Lohrasbe, Grant Anderson, a 15-year employee with Correctional Service of Canada (“CSC”), now a Community Program Manager with them, gave evidence by video link as well. He explained in detail about the intake process, the types of institutions in the Pacific Region, Aboriginal programming, temporary absences, and parole.

[34] As a dangerous offender, a person could participate in the Aboriginal stream of programming both at the high and moderate intensity levels, and could begin this

programming and finish it prior to parole eligibility. Dangerous offenders can end up in medium or minimum security, and it is possible that Mr. Lange could pursue his artwork with some restrictions. Both escorted and unescorted temporary absences are available to dangerous offenders. Dangerous offenders have been released to a bush camp 80 kilometres east of Prince George. There is a seven-year period for full parole eligibility and day parole after four years. People serving indeterminate sentences are not forgotten about and left to die.

[35] Grant Anderson does not track it, but he, himself, has not heard of indeterminate dangerous offenders being released on full parole, not that it does not exist, but he is not aware of it in his capacity working with CSC.

[36] As to federal services here in the Yukon, there is a parole officer and the Adult Rehabilitation Centre, and I believe also that the federal government does contract out various services. When Mr. Lange was released from the Whitehorse Correctional Centre following the manslaughter sentence, he was taken under the wing of a very caring and qualified man by the name of Larry Kwiat, a former teacher, minister, chaplain, martial arts instructor, facilitator of mindfulness meditative classes, and a self-professed computer geek. He knew Helen and Don Lange, who regularly attended the Lutheran Church years ago. Mark came along with them as a young boy.

[37] Larry Kwiat's house rules were simple: no overnight guests; no alcohol; and keep your room clean. For about a year or so there was stability, but he knew trouble was brewing when he found out, in October 2013, about the troubles that Mr. Lange was having with Amber Blanchard.

[38] A better place for a long-term criminal being released would be hard to find than that of Mr. Kwiat. He believed that Mr. Lange was honest when he expressed the desire to straighten out, but knew of his weakness and told us clearly that Mr. Lange needs to live in an environment with no clubs, bars, taverns, et cetera, within walking distance.

[39] Mr. Lange, as I and many others have stated, is intelligent, thoughtful, and articulate. He, to a degree, understands his weaknesses: "Intellectually, I am brilliant but I can go off like a seven-year-old." This offender still feels guilt and shame about the Olson killing.

[40] Upon release from the Whitehorse Correctional Centre on the manslaughter sentence, things were going well living with Mr. Kwiat -- selling his art, paying all his bills -- but he started feeling like he was doing time out there at the Kwiat property. Being lonely and desiring female company are things he cannot be faulted for, but choosing a much younger woman who was a pretty heavy drinker and constantly hounding him was a huge mistake and indicative of his not having a solid plan in place.

[41] Mark Lange concludes now that he hates alcohol and that it has caused nothing but pain for him. He has nothing bad to say about the federal penitentiaries and was well behaved there. He regularly had meaningful visits with the Elders, did a lot of sweats, and was involved in an effective Pathways program. His time at the Whitehorse Correctional Centre has not been nearly as smooth.

[42] It is unfortunate that in the first months of freedom when things were going well that he was dismissed from helping out at the school's art department because of a

concern about his criminal past and being with young children. That could have been handled better.

[43] Also, a major concern was the Maintenance Enforcement Program laying a retroactive order on him for a huge amount, as I recall perhaps \$30,000 to \$40,000, for the child support that he was not paying when he was serving his time.

[44] Dr. Lohrasbe indicated things will always come at us from left field, as these two things did. With Mr. Lange's extensive programming while in jail, he should have better dealt with the stressors by seeking help. An example of this was not looking into AA. As he said, "There's a lot of help out there but I have trouble asking for it."

[45] In regard to the predicate offence, Mr. Lange says that it was "gut wrenching and devastating" but he does not remember it, other than seeing the video.

[46] His goal is to have a wife, a child, and a dog. He is very much concerned about his daughter and very much wants to have a real relationship with her.

[47] Based on the analysis of the criminal record and the facts of the predicate offence, the psychiatric assessment report, the other reports and the *viva voce* testimony, the Court has no hesitation whatsoever in declaring Mr. Lange a dangerous offender under subsections 753(1)(a)(i) and 753(1)(a)(ii) of the *Code*.

[48] As to s. 753(4.1), further guidance is received from a number of cases: *R. v. Paxton*, 2013 ABQB 750; *R. v. Bitternose*, 2013 ABCA 220; and *R. v. Smarch*, 2014 YKTC 51 from here in the Yukon.

[49] Mr. Smarch was declared a dangerous offender by Judge Cozens on November 25, 2014, on the basis of s. 753(1)(b) of the *Criminal Code of Canada*. He was sentenced under 753(4)(c) to 16 months less 14.5 months for pre-trial custody. An objective analysis of the severity of the sexual assault would clearly reveal that it pales in comparison to the violent assault committed by Mr. Lange.

[50] From the Court of Appeal of Yukon, we have *R. v. Smarch*, 2015 YKCA 13, dated July 14, 2015, which upheld Judge Cozens' judgment. Key portions are paragraphs 46 and 47:

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

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

see *R. v. Ominayak*, 2012 ABCA 337 at para. 41; and *R. v. Standingwater*, 2013 SKCA 78 at para. 49; *contra R. v. Shanoss*, 2013 BCSC 2335 at para. 165.

[51] In *Paxton*, S.L. Martin J., canvassed numerous authorities. Mr. Paxton had a less serious adult record of violence than Mr. Lange, although the predicate offences were considerably more heinous.

[52] At para. 468 of *Paxton* it was stated:

As I read his conclusion, Dr. Tano was in essence saying that any risk-based determination of Mr. Paxton would need to be made some time in the future after he engaged in treatment. In *R. v. Bitternose*, 2013 ABCA 220 at para 37, the Court of Appeal stated that subsection 753(4.1) says "is satisfied" and "is a reasonable expectation", using the present tense." A mere hope for the future would not be reasonable. What is required to rebut the presumption of an indeterminate sentence is "actual evidence to prove a certain conclusion." Given that even Dr. Nesca could not say how long it would take before there would be change, there is no evidence, let alone sufficient evidence, to satisfy the Court on this point.

[53] The final sentence is equally applicable here by inserting Dr. Lohrasbe for Dr. Nesca.

[54] In para. 504 S.L. Martin J., discussed an important Saskatchewan case:

The Saskatchewan Queen's Bench in *R. v. Côté*, 2012 SKQB 508, has provided a thorough analysis of the difference between the two standards. The Court noted that the change in the language from "reasonable possibility" to "reasonable expectation" indicated a conscious change by Parliament in the standard to be applied: at para 7. Indeed, the Court found that the standard is now higher but was not one that fell short of a level of certainty called for by a probability: *ibid* at para 23. The assessment of a reasonable expectation is then a product of balancing success of

treatment against risk of offender recidivism. Since the objective of the section is to adequately protect the public against a serious personal injury offence, the risk(s) must be assessed both as to the probability of coming to pass and the likely severity if it comes to pass. Further, reasonable expectation must weigh not only the current risks related to the offender but also the expectations for the success of the measures that might ameliorate the risks of the offenders' recidivism: *ibid* at para 23.

[55] While in the federal system on the homicide charge, Mr. Lange had the benefit of extensive programming, including considerable involvement with First Nations Elders. He was sober throughout and gained considerable insight into his issues and what he was all about. This offender could not have been released to a better caregiver and setting. Yet he did not succeed very long and unleashed his uncontrollable anger in such a cruel way on the present victim despite what could be viewed as a serious warning to him for the sentence on the 2014 threats charge. The warning was totally ignored.

[56] In my opinion, there is clearly not “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”(s. 753 (4.1)).

[57] The principles surrounding the sentencing of Aboriginal offenders set out by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, apply in the context of dangerous offender sentencing, though their application may be more limited.

[58] Paragraphs 136 and 137 of *R. v. Smarch*, 2014 YKTC 51 decision set out the principles regarding aboriginal offenders being designated dangerous offenders.

136 As stated in *R. v. Shanoss*, 2013 BCSC 2335:

[156] The dangerous offender designation constitutes a sentence and must therefore, also be governed by the general principles of sentencing found in ss. 718, 718.1, and 718.2 of the *Code*: *R. v. Johnson*, 2003 SCC 46. I note, in particular, that the mandate to consider the special status of the accused as an Aboriginal offender in s. 718.2(e) applies equally to a dangerous offender application. (see also *R. v. Carter*, 2014 SKPC 150 at paras. 257-259).

137 In *Shanoss*, the Court discussed the countervailing views regarding the application of s. 718.2(e) in regard to the particular attention that is to be paid to the circumstances of Aboriginal offenders when sentencing them:

[162] It is apparent from the reasoning in *Ipeelee* [*R. v. Ipeelee*, 2012 SCC 13] that regardless of how violent and serious the offences committed by the accused, the provisions of s. 718.2(e) apply: per Lebel J. at paras. 84-87. The Crown concedes that this provision applies to dangerous offender applications; however, it argues that the Aboriginal background of the accused is secondary to the need to protect the public, which is the primary factor in dangerous offender applications. This view was adopted in *R. v. Ominayak*, 2012 ABCA 337, at para. 41:

[41] ...We acknowledge that in *Ipeelee*, at para. 84, the Supreme Court commented that there has been undue emphasis placed upon its observation in *Gladue*, [1999] 1 S.C.R. 688 that sentences for Aboriginals and non-Aboriginals will be close to one another, or the same, in cases of the more violent and serious offences. *Ipeelee*, however, involved the application of principles governing the sentencing of Aboriginal offenders for breaches of long-term supervision orders. As the Court noted at para. 50, "rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime". Here the appellant was found to be a dangerous offender. The protection of the community is the paramount consideration,

whatever the race or ethnicity of the offender. There is no automatic sentencing discount. In such circumstances, merely because the offender is of Aboriginal descent.

[163] A more limited application of the *Gladue* factors in dangerous offender proceedings was recognized by the Saskatchewan Court of Appeal in *R. v. Standingwater*, 2013 SKCA at para. 49, due to the primary focus on protection of the public. However, Caldwell J.A. also articulated a practical application of the *Gladue* factors to dangerous offender proceedings. The sentencing judge should look to whether there are Aboriginal-focused programs and supervision models that will reduce the risk to re-offend posed by the Aboriginal offender. If these programs do exist, then it enhances the possibility of eventual control of the risk in the community in satisfaction of the test in s. 753(4.1).

[164] In my view, it would be an error to limit the application of the *Gladue* factors in a dangerous offender proceeding in order to prioritize protection of the public as a sentencing objective. The unique circumstances of the Aboriginal offender must be given careful consideration in every sentencing. The fundamental principles of sentencing in s. 718.1 and s. 718.2 apply with equal force to a dangerous offender proceeding. The moral blameworthiness of the offender is a fundamental consideration and the Aboriginal heritage of an offender often has a direct and substantial impact on their moral culpability for the offence. A person who grows up in a culture of alcohol and drug abuse is less blameworthy than a person who commits a crime despite a positive childhood and upbringing. Further, the systemic underlying criminogenic factors affecting an Aboriginal offender may respond better to Aboriginal-focused rehabilitation and restorative justice models. Re-acquainting the Aboriginal offender with his culture may reduce his risk to re-offend far more successfully than more generalized treatment programs. As Caldwell J.A. says in *Standingwater*, the existence of Aboriginal-focused treatment may give the sentencing judge confidence that a lesser sentence than a dangerous offender designation will adequately protect the public.

[59] The decision of Judge Cozens, which was unanimously upheld by the Court of Appeal, is very helpful in terms of the understanding of how the legislation works. He also referred to *R. v. Osborne*, 2014 MBCA 73.

[60] In the present case, Mr. Lange has had the benefit of prolonged and helpful programming in the federal penitentiaries for about seven years, time in which he was sober and was able to connect in a significant way with his First Nation roots. He was gradually introduced to the outside world by a qualified and caring man, Mr. Kwiat, who was a family friend over the years. Insofar as he was set up for success on release, Mr. Lange chose to delude himself into thinking he could have one drink, then maybe a few, and soon many. His learned skills were deliberately and foolishly tossed aside and his uncontrolled anger took over.

[61] This case is not about an individual simply slipping off the bandwagon once and committing a crime of violence. A long-time criminal already convicted of a homicide threatened to cause death to Amber Blanchard and her family. He served his time for that and while on probation, not to consume alcohol, he consumed alcohol frequently and indeed very shortly after being released from the Whitehorse Correctional Centre. He then proceeded to commit this serious personal injury offence upon a stranger in a monstrous, depraved, and cruel and heartless manner.

[62] I am in no way satisfied that there is a reasonable expectation that a lesser measure under s. 753(4)(b) or (c) will adequately protect the public against the

commission by the offender of murder or a serious personal injury offence. Thus, Mark Lewis Lange is hereby sentenced to detention in a penitentiary for an indeterminate period.

LUTHER T.C.J.