YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *J.C. (Re)*, 2017 NSPC 14

Date: March 24, 2017
Docket: 2862926, 2862928, 2862929, 2862930, 2862931, 2947824, 2947826, 2947827, 2947828, 2947829, 2947832, 2947833, 2947836, 2947846
Registry: Halifax

IN THE MATTER OF an application by the Provincial Director to transfer J.C. to a provincial correctional facility for adults pursuant to section 92(1) of the *Youth Criminal Justice Act*

Judge:	The Honourable Judge Anne S. Derrick
Heard:	October 12, November 18, 29, 2016 and March 6 & 7, 2017
Decision:	March 24, 2017
Charges:	*Criminal Code* sections: 334(b); 344 x 2; 348(1)(b) x 2; 279(2) x 2; 130(1); 145(3); 270(1)(a); 264.1(1)(a) *Youth Criminal Justice Act* sections:137 x 3
Counsel:	Robert Kennedy, for the Crown
	Glenn Anderson, Q.C., for the Provincial Director (November 18 & 29 and March 6 & 7)
	Josh Bearden, for J.C.

By the Court:

Introduction

[1] On April 14, 2016 J.C. was sentenced under section 42(2)(n) of the *Youth Criminal Justice Act* ("*YCJA*") to a 27-month Custody and Supervision Order ("CSO") to be served at the Nova Scotia Youth Facility ("Waterville"). In September 2016, he and several other residents at Waterville were charged with serious offences that include participation in a riot, assault of youth workers, and property damage. J.C. incurred these charges as an adult, having turned 18 in May 2016. He was denied bail and remanded to an adult facility, the Central Nova Scotia Correctional Facility ("CNSCF" or "Burnside"). In January 2017, he was transferred to the Northeast Nova Scotia Correctional Facility ("NNSCF" or "Northeast"). Both Burnside and Northeast are provincial jails for adults on remand or serving custodial sentences of less than two years.

[2] In September 2016 the Provincial Director applied under section 92(1) of the *YCJA* to have J.C. serve the remaining portion of his youth sentence at a provincial correctional facility for adults. J.C. opposes this "transfer" application.

[3] The custodial portion of J.C.'s youth sentence expires on September 24, 2017. The community supervision portion of the sentence ends on July 13, 2018.

Procedural and Evidentiary Issues

[4] The "transfer" hearing has been underway since October 12, 2016. On March 6, 2017 when it continued, the proceedings took a detour to deal with a Notice of Annual Review the Provincial Director had filed on February 10, 2017 under sections 94(1) and 94(2) of the *YCJA*. The Crown argued that the Review was premature – J.C.'s entitlement to an annual, mandatory review of his sentence under section 94(1) of the *YCJA* - did not crystallize until April 14, 2017. In J.C.'s submission the Review was properly before me under section 94(2) which provides that

> When a young person is committed to custody pursuant to youth sentences imposed under paragraph 42(2)(n)…in respect of more than one offence for a total period exceeding one year, the provincial director…shall cause the young person to be brought

> before the youth justice court without delay at the end of one year from the date of the earliest youth sentence imposed…and the youth justice court shall review the youth sentences.

[5] Notwithstanding the Crown's submission, I accepted the Provincial Director's Notice as a valid basis on which to proceed with a review of J.C.'s sentence. The Notice referred a February 5, 2016 conversion (as a result of breaches) of a Deferred Custody and Supervision Order to a Custody and Supervision Order as a "sentence." That is the "earliest sentence" of J.C.'s two sentences identified in the Notice: J.C.'s more recent sentence is the 27-month Custody and Supervision Order of April 14, 2016.

[6] It may be that the Provincial Director's Notice is in error and should not have referred to the February 5, 2016 "sentence" that must have ended many months ago. It may be that on February 10, 2017 the Provincial Director's Notice should have referenced only J.C.'s April 14, 2016 Custody and Supervision Order, the only sentence he is still serving, in which event a sentence review would not be happening now. However, I viewed it as unfair and arguably a matter of issue estoppel for the Provincial Director to retreat from the sentence review he had sought.

[7] Consequently, on March 6 and 7, 2017 I proceeded on the basis that I had two proceedings before me - the continuation of the Provincial Director's "transfer" application and a section 94 sentence review.

[8] The section 94 sentence review afforded J.C. the opportunity, which he took, to renew his request that I order a section 34 psychological assessment. I am now going to address that request. After that, I will go on to discuss the section 94 sentence review and finally, the Provincial Director's "transfer" application under section 92(1).

The Section 34 Assessment Request - Jurisdiction

[9] Up until he was remanded to the CNSCF in September 2016, J.C. had either been in custody at Waterville or under court-imposed conditions in the community since he was 13 years old. His sentencings, breach hearings and bail hearings, etc. had all been before the regular Youth Justice Court. I have not dealt with J.C. previously.

[10] A section 34 assessment was prepared when J.C. was approximately 14. I was not provided with a copy of this assessment which would now be outdated.

[11] In November 2016 when the "transfer" hearing was under way, J.C., who is African-Nova Scotian, asked me to order a section 34 assessment with a cultural component, that is, an assessment addressing racial and cultural factors that may have had an impact on J.C.'s behaviour in Waterville and the community. I concluded I had no jurisdiction to order a section 34 assessment for a "transfer" application. Section 34 of the *YCJA* contemplates a medical or psychological assessment for certain enumerated purposes that do not include a section 92(1) application. It is arguable Parliament should have recognized that a section 34 assessment might be relevant to a "transfer" application but it didn't.

[12] However, a youth justice court may order a section 34 assessment for a sentence review. (*section 34(2)(c), YCJA*) A cultural analysis would be a relevant component of a section 34 assessment prepared in relation to an African Nova Scotian young person.

The Section 34 Assessment Request - History

[13] Following my decision that I lacked jurisdiction to order a section 34 assessment for a "transfer" hearing, Mr. Bearden asked for an adjournment of the proceedings to enable him to explore other options. He went back to Judge Beach who sentenced J.C. in April 2016 and had ordered a post-sentence section 34 assessment "for the service providers." The assessment was to have been prepared for a sentence review Judge Beach scheduled for October 14, 2016. The October sentence review was proposed by J.C.'s lawyer (not Mr. Bearden) as an incentive: "a little extra push to add to his rehabilitation."

[14] The section 34 assessment was started but never completed. IWK Forensic Services who prepare the assessments stopped work on J.C.'s once he was charged as an adult with the riot offences. The IWK advised Mr. Bearden in December 2016 that it had not been able to find out if the assessment was still required. (*Exhibit 2, section 94 sentence review, Letter to Mr. Bearden dated December 13, 2016*)

[15] It was this stalled section 34 assessment that Mr. Bearden sought to revive by returning to Judge Beach.

[16] Judge Beach responded to Mr. Bearden's request by noting there had been "intervening factors" since April 14, 2016: J.C. had turned 18, acquired adult charges and been remanded to an adult facility. She said she would not be reviewing J.C.'s April 14 youth sentence and therefore did not require the assessment. She concluded by stating: "There is no purpose for it. Therefore, I am not going to order it to be completed even though I am told there is an initial assessment." (*Recording of Youth Justice Court proceedings on January 4, 2017*)

[17] On January 13, 2017 at a pre-hearing conference before me Mr. Bearden advised that Nova Scotia Legal Aid had declined to pay for a cultural assessment for J.C.

[18] On March 6 and 7, Mr. Bearden renewed his request for a section 34 assessment, this time pursuant to section 34(2)(c) of the *YCJA* in the context of the section 94 sentence review. It was Mr. Bearden's submission that J.C. should have the benefit of a section 34 assessment with a racial and cultural analysis, to be considered in the review of his April 14, 2016 Custody and Supervision Order.

[19] Mr. Bearden has argued the cultural assessment would have other useful purposes, and I will come back to this submission shortly.

Assessing the Relevance of a Cultural Assessment to J.C.'s Sentence Review

[20] The issue I must now address is what use can be made of a section 34 assessment in J.C.'s sentence review? I will review the evidence advanced by Mr. Bearden in support of the relevance of a cultural assessment and examine section 94 of the *YCJA*, the provision that governs sentence reviews.

Lana MacLean's Evidence

[21] Lana MacLean is a registered social worker (B.S.W., M.S.W.) called by Mr. Bearden to testify as an expert. Her qualifications (*Exhibit 3, section 94 sentence review*) were not disputed by the Crown. She was qualified to give opinion evidence "both as a clinical social worker and as an expert in racial and cultural factors specific to African-Nova Scotian individuals."

[22] Ms. MacLean prepared a report in the form of a letter (*Exhibit 4, section 94 sentence review, letter to Joshua Bearden dated February 9, 2017*) in which she

expressed her opinion that, "The Court would benefit from an informed update assessment which would take into consideration [J.C.]'s trauma history, his psycho social racial and developmental history." (*Exhibit 4, page 3*) Ms. MacLean described the relevance of a cultural assessment as follows:

> …In meeting [J.C.] he presents initially as guarded and defensive, this adaptive emotional defence is often used by young Black men who have been exposed to various micro-racial aggression, systemic racism and identity development…via street culture as a source of protection. Assessors and those employed within the justice system may not have the cultural competency skills or capacity to assess the motivation behind the presenting behaviour.
>
> In closing, what is clear to this writer remains that [J.C.] has had several early childhood adversities that have impacted on his life to date and have led him into ongoing conflict with the law. The system has become [J.C.]'s surrogate parent over the past five years yet there has (sic) been no updated assessments to explore what would be in the best interest of [J.C.] or the public. The only option that has been presented continues to be incarceration. (*Exhibit 4, section 94 sentence review*)

[23] In her testimony, Ms. MacLean said a cultural assessment could provide insights into what services J.C. would require "from a cultural perspective" if he remained in custody, and what resources might be available to support his reintegration into the community. She testified that "an informed cultural impact assessment would inform the treating team about what might meet his cultural needs."

Section 94 of the YCJA

[24] The ultimate issue I have to decide on a sentence review is whether to confirm J.C.'s April 14, 2016 sentence (*section 94(19)(a)*) or release him from custody under conditional supervision. (*section 94(19)(b)*) Those are my only two options.

[25] J.C. is not expecting that I will be ordering his release from custody. Practically speaking, even if I made such an order under section 94(19), J.C. is not going anywhere as he has been denied bail as an adult and remanded to an adult facility on the September 2016 riot charges. Mr. Bearden acknowledges that even if J.C. had sought an early release from his youth sentence, he is not going to be released from custody as long as he remains bail-denied on his adult charges.

[26] The judicial exercise of discretion under section 94(19), that is, a judge's determination of which option – confirmation of the sentence or release into the community – must be structured by the considerations, found in section 94(6), that ground the sentence review. As Mr. Kennedy pointed out, these considerations have the unifying theme of a material change in circumstances since the sentence was imposed. The language of the provisions contemplate that the court will have evidence of something having occurred to justify the review - for example, that sufficient progress has been made by the young person to justify a change in the youth sentence (section 94(6)(a)); that the circumstances that led to the youth sentence have changed materially (section 94(6)(b)); that new services or programs are available that were not available at the time of the youth sentence (section 94(6)(c)); or that the opportunities for rehabilitation are now greater in the community (section 94(6)(d)).

[27] Mr. Bearden has not sought J.C.'s early release. What he wants on J.C.'s behalf is for me to order a culturally nuanced section 34 assessment. He has asked that I postpone my determination of J.C.'s sentence review until that assessment has been prepared.

[28] In Mr. Bearden's submission, there are benefits to a section 34 assessment even if J.C.'s sentence is confirmed under section 94(19)(a). He says having a section 34 assessment could benefit J.C. in custody and in the context of his eventual release and reintegration. A section 34 assessment could enable J.C. to re-apply for NIRCS funding which he has been denied. (*Exhibit 1, section 94 sentence review*) J.C. could use the section 34 assessment in a bail review on the adult charges. Finally, Mr. Bearden argues that a section 34 assessment with a cultural component will assist the court in making a properly informed decision under section 94(19).

[29] Mr. Kennedy states simply that Mr. Bearden is extending the purpose of a section 34 assessment well beyond its statutory borders under the *YCJA*. None of the purposes contemplated by Mr. Bearden are found in section 34(2). As the custodial portion of J.C.'s youth sentence expires in September 2017, there is a very small window in which he could obtain any benefit, while in custody on his youth sentence, from an assessment that will take some time – it is not clear how much – to complete. There is no evidence that a culturally-informed section 34 assessment will identify new services or programs or greater opportunities for rehabilitation in the community. There was also no evidence presented that the NIRCS denial can be re-visited.

J.C.'s Sentence Review and the Request for a Section 34 Assessment

[30] The cruel truth about J.C.'s sentence review is that he is timing-out of the youth criminal justice system. This is the last stop on J.C.'s youth criminal justice journey that started when he was 13 years old. A lot has happened on that journey, including J.C.'s accumulation of over 80 convictions. For reasons unknown to me, something that didn't happen in the last four years was an updated section 34 assessment.

[31] A section 34 assessment was not requested for J.C.'s last sentencing, the sentencing of April 14, 2016. That is not surprising. J.C. was sentenced at that time on the basis of a joint recommendation. A section 34 assessment must have been viewed by Crown and Defence as unnecessary. Its preparation would certainly have delayed the sentencing. J.C. had been in custody since his arrest for the offences committed on January 11, 2016. (*Exhibit 1, section 92 application, JEIN Report*)

[32] J.C. would have had a sentence review with a section 34 assessment in October 2016 but for the fact that he got charged with the riot offences. The IWK pushed pause on the preparation of the section 34 assessment and J.C. and Mr. Bearden focused on the Provincial Director's section 92 application. That application came about directly as a result of the riot charges and the fact that J.C. had turned 18.

[33] J.C.'s sentence review and the request for a section 34 assessment occur in the context of his current circumstances and the options available to me under section 94(19) of the *YCJA*. I have mentioned this context earlier but will repeat it: J.C. is

charged with very serious offences as an adult and has been remanded to an adult facility. Before this, J.C. had a long history of being unsuccessful on conditions in the community. He breached conditions and committed new offences. The last time he was in the community he committed the very serious offences that netted him a 27-month Custody and Supervision Order. There is no alternative on the sentence review in J.C.'s case other than confirming his youth sentence.

[34] I have considered what even a robust and comprehensive assessment of the racially and culturally conditioned factors underpinning J.C.'s youth criminal justice history could contribute to this sentence review where my options are restricted by section 94(19). Notwithstanding the value, described by Ms. MacLean in her report, of "greater insights" into J.C.'s "core values and how they are transmitted in terms of race and cultural identity development" (*Exhibit 4, page 3*), greater insights into J.C.'s navigation of the past six years as a young African Nova Scotian teen in the community and in the youth criminal justice system would not cause me to reach any conclusion other than that J.C.'s sentence should be confirmed.

[35] Section 94(9) of the *YCJA* requires me to have, before I review J.C.'s sentence, a progress report prepared by the Provincial Director on J.C.'s "performance…since the youth sentence took effect". The reports that have been filed for the Provincial Director's "transfer" application satisfy this requirement. I will be discussing this evidence, which I have considered in my assessment of J.C.'s sentence review. I have read nothing that supports any other disposition under section 94(19) than to confirm J.C.'s sentence.

[36] Mr. Bearden made several points in support of my ordering a section 34 assessment that I will address in conclusion on the section 34 assessment issue. He noted that a section 34 assessment was ordered by Judge Beach for the intended October 2016 sentence review and argued, "The Court obviously thought it was the right decision then." As the record indicates, Judge Beach expressly stated that she was ordering the section 34 assessment "for the service providers." She did not indicate she thought it would be of assistance to her. I do not expect she was thinking in April 2016, having just sentenced J.C. on a joint recommendation to a 27 month CSO, that in October 2016 she would be giving any consideration to releasing J.C. into the community. Application of the accountability principle alone would have driven the result of confirming J.C.'s sentence. (*R. v. C.K., 2008 ONCJ 236,*

paragraph 29) As I mentioned earlier, it was J.C.'s counsel who asked for the October 2016 sentence review saying it would provide impetus to J.C.'s efforts at rehabilitation.

[37] Mr. Bearden has also argued that a culturally-informed section 34 assessment might identify new services or programs for J.C. or greater opportunities for rehabilitation in the community. But there is no evidence on which to base that hope.

[38] Ms. MacLean testified on cross-examination that she is part of a consulting team that has been engaged by Burnside to develop culturally relevant training for staff given the high proportion of incarcerated African Nova Scotian men. It was her evidence there is no culturally specific programming at Waterville except for the community-sponsored Rites of Passage. Ms. MacLean said there is no new programming available now in either the adult facilities or Waterville that was not available in April 2016.

[39] Ms. MacLean's evidence indicates that the development of culturally relevant and appropriate programming for incarcerated African Nova Scotian youth and adults is very much a work-in-progress. It is heartening to learn that, at least in the adult correctional system for men, work on creating culturally informed programming is being undertaken. It is discouraging to think that such programming has not been available to young African Nova Scotians like J.C. who have been growing up in the youth criminal justice system. J.C. testified about the Rites of Passage program at Waterville which he described as "alright" - hardly a ringing endorsement – and not really very helpful.

[40] Ms. MacLean spoke of an "environmental scan" being a feature of a section 34 assessment with a cultural component, that is, an audit of what culturally relevant programming might be available to young criminalized African Nova Scotians like J.C. If J.C. was not 18 and remanded on serious adult charges to the adult correctional system, if he was being sentenced as a younger teen, such information obtainable through a section 34 assessment likely would be useful. However, that is not the context in which J.C.'s sentence review is occurring.

[41] I can find no basis for concluding that a section 34 assessment would, as Mr. Bearden suggests, enable me to make a more informed decision under section 94(19). I don't require a section 34 assessment to reach the inevitable conclusion on

this section 94 sentence review that J.C.'s April 14, 2016 sentence should be confirmed. I will not be ordering a section 34 assessment for J.C.

The section 92(1) Hearing

[42] What is left for me to address is the Provincial Director's section 92(1) "transfer" application. Section 92(1) of the *YCJA* permits the transfer of J.C. to a provincial correctional facility to serve the remainder of his Custody and Supervision Order sentence if I consider a transfer "to be in the best interests of the young person or in the public interest." As I indicated earlier, J.C. opposes the Provincial Director's application.

[43] The section 92(1) "transfer" hearing got underway on October 12 with evidence from James Nickerson, who at the time was the Acting Deputy Superintendent of Programs at the NSYF. On November 18 Mr. Nickerson was cross-examined and evidence was heard from Eileen Collett, Deputy Superintendent at Burnside. Mr. Bearden called C.M., J.C.'s mother to testify.

[44] The Crown tendered several documentary exhibits through its two witnesses – Mr. Nickerson and Ms. Collett: J.C.'s youth record (*Exhibit 1*), the Affidavit of the Superintendent of the NSYF attaching a "Report for the Court" about J.C. (*Exhibit 2*), a "Behaviour Contract" (*Exhibit 3*), and a Report dated November 15, 2016 and prepared by Jolene Dominix, a Case Management Officer at the CNSCF. (*Exhibit 4*)

[45] Reports dated February 22, 2017 by Ms. Dominix and February 10, 2017 by Valerie Ellis, Case Management Officer at Northeast (*Exhibit 5*) were also filed.

[46] In all, I heard testimony and received written reports detailing J.C.'s time in three institutions – Waterville, the Central Nova Scotia Correctional Facility at Burnside where he was remanded from September 2016 to January 2017, and the Northeast Nova Scotia Correctional Facility where he is currently housed.

J.C.'s Time at Waterville

[47] J.C. did not navigate his time at the youth facility very successfully. He was assessed for programs at the time of his admission in April 2016 with his risk areas being identified as education and anger management. Addictions was not seen as a

high-risk factor and it was decided that J.C. would benefit more from a focus on program time with an IWK clinician.

[48] James Nickerson testified about J.C.'s programming at Waterville. He has worked at the youth facility for 21 years and known J.C. since he was 13. He has worked with J.C. as a program worker, a case manager, as an instructor in the CALM program and in the context of the daily restorative practices circles.

Education

[49] At Waterville, J.C. did not meet even minimal educational expectations, failing to complete the two courses in which he was enrolled, math and African-Canadian studies. A report prepared for this proceeding – Report for the Court – has the following to say about J.C.'s efforts in relation to his schooling:

> For much of the most recent custody term, [J.C.] displayed little or no motivation to do any school work or attend class, preferring to spend time in his cell reading. Though classroom time was always offered, Educational staff would provide work to be completed in cell as often [J.C.] was a negative, disruptive influence in class which negatively impacted other students. (*Exhibit 2, page 1*)

[50] In each of the courses, J.C. did do some assignments but "did not come close" to earning a credit in either.

One-on-One Counselling with the IWK

[51] While at Waterville J.C. met regularly with a clinical social worker from the IWK. According to the Report to the Court, although J.C. was initially reluctant to discuss his goals, he "Eventually came to state that he would like to learn to manage his behaviour better, not necessarily change it." (*Exhibit 2, page 2*) It was Mr. Nickerson's evidence that J.C. did not progress beyond the "goal-setting" stage of his counselling.

Anger Management – the CALM Program

[52] Mr. Nickerson testified that J.C.'s issues with anger were targeted in the CALM program (Controlling Anger and Learning to Manage It). It was his evidence

that youth who are assessed for the CALM program have "a low frustration tolerance or are easy to anger or show an inability to make decisions properly or…lash out and can be physically or verbally aggressive toward peers or staff."

[53] Notwithstanding extensive involvement in the CALM program – enrollment at least three times – J.C. never successfully completed it. The Report for the Court notes that J.C.

> …showed appropriate participation, but failed to put into practice what he was taught...He was unable to receive a certificate for completing the program as he had numerous absences for negative behaviour, resulting in time spent in the discipline unit…(*Exhibit 2, page 1*)

[54] Although the Report to the Court described J.C.'s participation in the CALM program as "appropriate", Mr. Nickerson's testimony indicated minimal participation. He said that J.C. would "sit there and not say much. He won't disrupt but he won't contribute much."

Behaviour at Waterville

[55] J.C.'s conduct at Waterville was poor. In the period between May 2012 and September 2016, he has received 80 disciplinary sanctions at the higher levels, Levels II and III. Due to J.C.'s escalating behaviours and him becoming increasingly threatening, a behavioural contract was developed to establish a clear and unequivocal process for dealing with it. The behaviour contract was intended to address what the Report to the Court characterizes as "a consistent pattern of problematic behaviour." (*Exhibit 2, page 2*) Mr. Nickerson testified that such contracts are not common at Waterville, having been used only three times in the last ten years. J.C. declined the invitation to participate in designing the contract.

[56] The particulars of J.C.'s behaviour at Waterville reveal a very negative profile:

> Daily Progress Reports indicate that [J.C.] generally presents as a strong willed, rigid thinking individual who routinely pushes defined limits and challenges the authority of those responsible for his supervision.

> These reports often describe his manner as argumentative, defiant and confrontational. It is also noted that he frequently attempts to control others by means of threats and intimidation and has, in fact, become aggressive and physically assaultive with NSYF [Waterville] staff and his peers on several occasions. (*Exhibit 2, page 2*)

[57] The authors of the Report to the Court, J.C.'s youth worker and Mr. Nickerson, concluded that J.C.'s behaviours, "according to those responsible for his supervision, contributed significantly to his lack of progress with respect to identified programming targets." (*Exhibit 2, page 2*)

[58] The Report details J.C.'s discipline record from April 6, 2015 to September 7, 2016 during which time he received four Level II and fourteen Level III Incident Reports. Level II Incident Reports are "a more serious breach of the rules" and Level III Incident Reports are "the most serious violations of the rules and regulations at the NSYF." (*Exhibit 2, page 2*) J.C. has been disciplined at Waterville for: being disrespectful and verbally abusive to staff; threatening on numerous occasions to assault staff in the facility and in the community; becoming involved in a verbal confrontation with another young person and pursuing him into his cell to attack him; causing a disturbance; refusing to comply with staff direction on a number of occasions and on one of those occasions, assaulting a member of the staff by biting him; threatening violence toward staff; and fighting with another youth. He was also given a Level III Incident Report after the riot incident of September 4, 2016. (*Exhibit 2, pages 3 and 4*)

[59] J.C.'s behaviours in Waterville over the three years from March 2012 to April 2016 were of the same character – aggressive, threatening, verbally abusive and violent. (*Exhibit 2, pages 4 and 5*) Although Mr. Nickerson testified it has not been his experience of J.C., other staff have found him to be "very demanding, confrontational and verbally aggressive if he doesn't get what he wants."

[60] Mr. Nickerson described J.C. as "on the high end of risk" to the staff and other youth. For each Level III Incident Report J.C. was sent to the "reintegration unit." How long he spent there depended on the seriousness of the incident and whether it

was repeat behaviour. At times he was in “the reintegration unit” for between four to seven days.

[61] Mr. Nickerson testified that at Waterville J.C. had tended to gravitate toward youth who are older, physically larger, more “pro-criminal” and serving longer sentences. Although the institution tries to counter the development of a social hierarchy amongst the youth, one exists and Mr. Nickerson ranked J.C. “near the top” of that hierarchy. He described J.C. as both a leader and a follower, noting that he will follow the lead of other youth “to maintain allegiance to certain people.” He held sway with younger, smaller youth who could be intimidated or would follow along at his instigation.

[62] Mr. Nickerson characterized J.C. as a threat at Waterville because of his physical size and “his perception of the world and how it causes him to act.” Mr. Nickerson testified that J.C. is “physically strong, large and capable. When he gets angry he tends to act on it.”

J.C.’s Youth Record

[63] J.C. has a lengthy youth record dating back to February 2012 when he was 13. He has accumulated convictions for a range of offences including threats, break and enters, assaults, including assault with a weapon, and breaches of release and sentence conditions. He has breached Deferred Custody and Supervision Orders and Custody and Supervision Orders. His sentence orders have targeted mental health and anger management for assessment and counselling.

[64] J.C.’s most recent youth sentence, the 27-month Custody and Supervision Order of April 14, 2016, was imposed for offences that included break and enter, personation of a peace officer, robbery and unlawful confinement.

The Riot Incident

[65] J.C.’s current adult charges arose out of an incident on September 4, 2016 at Waterville. It is alleged that J.C. and three other young persons engaged in a targeted attack on staff over a six to seven minute period. When Mr. Nickerson testified in October 2016, four staff were still off work indefinitely having received injuries that included broken noses, concussions, bruising, and facial injuries. One staff member sustained a cracked orbital bone. Another staff member had his teeth dislodged. A

fifth staff member who suffered injuries to his neck and hand had returned on light duties.

[66] Three other staff were involved in responding to the altercation between their co-workers and the four youths. The RCMP were called in. Mr. Nickerson described this as the most serious incident at the NSYF in its 29 year history. It was in his words, “an all-out assault.” The effects on the institution have been significant. Vacations were suspended as the staffing complement was down. Rules were enforced more strictly with none of the usual flexibility. According to Mr. Nickerson, staff at the facility were feeling “a multitude of emotions – anger, anxiety, questions about why it happened.”

[67] Mr. Nickerson expressed his concerns about the prospect of J.C. returning to Waterville:

> My primary concern is that [J.C.] is now an adult serving time in a youth facility. He’s not taken advantage of our programs whether it’s academics, anger management. He’s not gotten past the goal-setting stage in therapy with the IWK. His threats and intimidation and threats of assault toward staff have increased and now he’s followed through with an assault on staff on September 4th which was not an attempt to escape, it was not an attempt to gain something from staff, it was an attempt to harm staff, it was an all-out assault on staff. So that would be my primary concern.

[68] It was Mr. Nickerson’s evidence that staff at Waterville are not equipped to deal with a large, aggressive, violent 18-year-old who is unresponsive to the interventions available to deal with his issues and who has become entrenched in negative behaviours.

[69] Mr. Nickerson’s outlook on J.C. didn’t change under cross-examination. He testified that when J.C. was 13, the NSYF was the “right place” for him. J.C. would have had access then to the same programming and opportunities but, Mr. Nickerson says, “You have to want to change for those programs to work.” It was his evidence that J.C. has not reached an understanding that he needs to make “a better life” for himself as many 17 and 18 year olds in trouble with the law do. Mr. Nickerson views

J.C. as an 18-year-old who has not turned away from old, negative patterns of behaviour.

[70] Mr. Nickerson emphasized that J.C. has been part of every program and treatment option available at the NSYF. He has had the benefit of different youth workers and case management styles. In his words: “I can’t think of anything we haven’t offered.”

[71] Mr. Bearden raised with Mr. Nickerson the issue of J.C. being housed in a different unit in order to separate him from negative associations. This was a theme that emerged from J.C.’s mother as well. It was her evidence that Waterville should not have “mixed the units up.”

[72] In response Mr. Nickerson indicated that a transfer to an alternative unit would not have been possible in J.C.’s case because of “incompatibles.” Mr. Nickerson also said he thought J.C. would have refused to transfer. He rejected the suggestion that the clustering together of certain youth including J.C. led to J.C. being involved in the events of September 4.

[73] It was Mr. Nickerson’s evidence that transferring J.C. to the “secure care unit” at Waterville was also not an option. He testified that the “secure care unit” is a hospital site at the youth facility for youth who are found not criminally responsible or who have been identified by nursing staff and the psychiatrist as having mental health issues that would make them unable to function in the general population. No such mental health issues were identified in J.C.’s case.

The Evidence of J.C.’s Mother

[74] J.C.’s mother had a different view of his time at the NSYF. Her evidence addressed three main themes: J.C.’s progress in the last year, his mental health needs and the fact that, in her opinion, Waterville should have done more for her son. C.M. testified the past year had been J.C.’s “most progressive.” She said that through his own initiative he got baptized, started taking his medication again, met with a worker from the IWK, and was working as a cleaner at the institution. She disputed Mr. Nickerson’s characterization of J.C. as not taking advantage of programming. She said she believed J.C. was being treated unfairly at Waterville, having been told that,

she said, by a mental health professional from the IWK. There was no evidence that corroborated this allegation.

[75] It was C.M.'s opinion that J.C.'s decision to take his prescribed medication – Concerta – is an indication that he was trying to change. She testified that he was diagnosed through the IWK with Oppositional Defiance Disorder, Conduct Disorder and "extreme" Attention Deficient Hyperactivity Disorder. Concerta is a drug that is prescribed to manage the symptoms of ADHD. C.M. testified on cross-examination that she assumes J.C. was taking "his meds" in September 2016.

[76] C.M. was a forceful advocate for her son. They have a close relationship. She had been visiting J.C. at Waterville but said in November when she testified that she had not been able to visit him at Burnside where he had been since September 2016.

[77] C.M. said that J.C. wants to get his education and was doing "some programs" at Waterville. She acknowledged he has "anger issues". It was her opinion there were "no real opportunities" for J.C. at Burnside - where he was in November 2016 when she testified - and she expressed concerns about him being subjected to extended stays in segregation which she felt posed a risk for him.

J.C.'s Behaviour at the Central Nova Scotia Correctional Facility

[78] The evidence I heard about J.C.'s time at Burnside came through Eileen Collett, the Deputy Superintendent of Program Administration, a witness called by Mr. Kennedy. D/Supt. Collett worked at Waterville from 1989 to 2001 when she transferred to the just opened CNSCF where she has worked ever since. She had some limited contact with J.C. but was familiar with a report prepared by J.C.'s Case Management Officer, Jolene Dominix – Exhibit 4.

[79] In November 2016 when D/Supt. Collett testified, the number of prisoners at the CNSCF aged 18 to 21 was small, approximately 25. D/Supt. Collett said that very little consideration was given to age in relation to where prisoners are housed in the institution. J.C.'s placement was the West Unit although by November he had already been placed in segregation due to misconduct.

[80] D/Supt. Collett was unable to say whether J.C. is "a leader or a follower" but she said he had been problematic on several occasions in the "day room", the common area for his unit, by not responding to staff and not listening.

[81] J.C. was assessed by the CNSCF as "high risk/high needs." According to Jolene Dominix's report of November 15, 2016, an Institutional Security Assessment completed for J.C. produced a "HIGH" score of 12. (*Exhibit 4, page 1*) (The Report indicates that a "high" score is 11 or more.) D/Supt. Collett testified that this was based primarily on past institutional behaviour, J.C.'s JEIN (Justice Enterprise Information Network) report containing his youth record, and speaking to staff about his history.

[82] J.C.'s criminogenic needs were also scored as "high" by the CNSCF. He received a 28 in a range of 20 – 29 for a high score. He was assessed as "very high" for criminal history; "very high" for education/employment; "high" for "companions"; and "high" for both "procriminal attitude/orientation" and "antisocial pattern." (*Exhibit 4, page 15*)

[83] D/Supt. Collett testified that the categorization of J.C. as high risk/high needs meant the institution would try to intervene more to address his issues. Although Ms. Dominix described J.C. as compliant, open, honest and cooperative, her November 2016 report echoes themes of James Nickerson's testimony. Ms. Dominix's report indicates in relation to "education/employment" that J.C.'s "state of change" was "precontemplation – unaware, resistant." As for "Procriminal Attitude/Orientation", although an October 13 assessment indicated the same "stage of change" – "precontemplation – unaware, resistant" (*Exhibit 4, page 17*) – Ms. Dominix's November report noted: "Currently [J.C.] appears to be beyond pre-contemplation in regard to companions and pro-criminal attitude." (*Exhibit 4, page 2*)

[84] Ms. Dominix stated that J.C.'s "level of risk" will remain high until he addresses his education/employment, companions, pro-criminal attitude and anti-social pattern. (*Exhibit 4, page 1*) J.C. is reported to be "refusing to take any education courses" while at the CNSCF (*Exhibit 4, page 1*) and "seems to condone" his anti-social reactions. (*Exhibit 4, page 2*) In response to that Ms. Dominix stated: "The Case Management team needs to encourage, support and motivate appropriate behaviour." (*Exhibit 4, page 2*)

[85] Ms. Dominix's Report indicated that J.C. agreed to participate in an upcoming program (Building Bridges) designed to target pro-criminal attitudes and choice of

associates. He also expressed an interest in participating in the "Options to Anger" program which was to be offered on his unit. (*Exhibit 4, page 2*)

[86] J.C. accumulated a discipline history at Burnside which included periods of segregation. J.C. started out in segregation due to his involvement in the September 4 altercation at Waterville. That first segregation was for 15 days. Ten days is the provincial limit for segregation although it can be extended if an extension is requested by the institution or the provincial adjudicator who conducts the discipline hearings. A segregated prisoner is visited regularly by his case manager who will involve health care if there are mental health concerns.

[87] Programming is very limited in segregation and education and anger management are not available to segregated prisoners at all. Ms. Dominix's report detailed J.C.'s discipline at the CNSCF for seven different incidents between September 7 and November 6 – detrimental behaviour, fighting, abusive language to staff, disobeying an order, threats and use of force. He was segregated on four occasions and otherwise has been "confined to cell" (CTC) or "confined to cell/loss of privileges". (CTC/LOP)

[88] An entry on November 7, 2016 into J.C.'s "Activity History" contains the following comments: "Offender has received a level for detrimental behaviour during this review period. Offender behaviour continues to be aggressive toward officers and offender continues to make vague threats towards staff. Officers continue to hold the offender accountable for his behaviour." (*Exhibit 4, page 24*) In her report Ms. Dominix observed that J.C.,

> …has been placed on Sentence Management Plans while housed in an attempt to deter negative behaviour, and ensure the safety of officers and offenders. He also made a point to state that he does not respect authority, specifically police officers. This is a concern. He would not elaborate as to why he despises authority figures. (*Exhibit 4, page 2*)

[89] D/Supt. Collett explained that a Sentence Management Plan links privileges with good behaviour. If a prisoner follows all the required rules, he is removed from the Plan. D/Supt. Collett observed that J.C. received more incident reports than most prisoners and did not seem to have been able to "adjust to the living situation"

although he “fits in quite well” with the other prisoners on his unit. She noted that while J.C. could be cooperative and polite, “he tends to get involved too quickly if something is going on.” In her view, J.C. “finds himself in trouble when he is around other people.”

J.C.’s Behaviour at the Northeast Nova Scotia Correctional Facility

[90] Ms. Dominix prepared an updated report on J.C. dated February 22, 2017. (*Exhibit 5*) She indicated that since her November report, J.C. has been found guilty of four disciplinary infractions: January 7, 2017 – causing a disturbance (shouting abuse at staff and making accusations of racial discrimination); January 27, 2017 – intimidation with three other prisoners of another prisoner; February 14, 2017 – detrimental behaviour (being disrespectful and disruptive); and February 14, 2017 – detrimental behaviour (covering his cell window in the Closed Confinement Unit).

[91] Ms. Dominix’s report describes J.C. in January 2017 as “in the pre-contemplation stage” in relation to education and employment. She notes that he “did not submit a request to the teacher to attend or participate in school learning.” She also characterized J.C. as in the “precontemplation stage/contemplation stage in relation to antisocial pattern.” She added that it “remains important that [J.C.] is aware that he reacts differently than others in situations, however, it seems he condones such behaviour.” And although J.C. agreed to attend and participate in the Options to Anger program when he was released to the dayroom from close confinement, his attendance was short-lived. Ms. Dominix was advised that J.C. told Program Officers: “I was only going to program because it got me out of my cell while on a level.” J.C. denies having said this.

[92] J.C. was attending the Building Bridges program on a weekly basis at Burnside until he was transferred on January 18, 2017 to Northeast. Ms. Dominix describes the Building Bridges program as a facilitated program that includes, psychological and emotional support; culturally specific conversations; offenders speaking of their experiences and choices and the “joys and pains they may have caused”; and networking with community partners to “provide a safe community and to decrease recidivism.”

The Evidence of J.C.

[93] J.C. disputed some of the evidence I have from the institutional witnesses and reports but shed little light on why serving the remainder of his youth sentence in Waterville would be in his best interests.

[94] I can say without reservation however that hearing J.C. describe his expectations for his future was deeply troubling. J.C. testified, "I picture myself going back inside" saying "it's hard to follow conditions when you have been on them so long." He talked about wanting programming specially tailored for his needs with someone "that understands you more", and said programs that "actually help" rather than programs he experiences as repetitive and formulaic, might enable him to break out of the cycle of re-offending and re-incarceration.

[95] J.C. spoke positively about his involvement as a young person with the Youth Advocate Program through which he was mentored by a young African Nova Scotian man. That relationship ended when he got too old for it. He told Lana MacLean this was painful for him: "I felt like no one cared…lost another father like figure…that happens a lot to me but the street was always there." (*Exhibit 4, section 94 sentence review, Lana MacLean's letter to Joshua Bearden dated February 9, 2017*)

[96] On cross-examination by Mr. Kennedy, J.C. said there are programs at Waterville that are not available to him in the adult correctional system. But he did not speak of some of that programming – the CALM program and Rites of Passage – in wholly positive terms. Although he testified that "some of the anger stuff" at Waterville "made sense" and helped him, he also said he "had problems doing the same thing over and over again." And, as I mentioned previously in these reasons, J.C. had been unimpressed with the Rites of Passage program.

[97] J.C. testified that he wants to go back to Waterville because there are "people there I feel more comfortable with" and "one-on-one programs I can do." He says he does want to continue his education and has requested schooling at Burnside and Northeast but there is a waiting list.

Deciding Where J.C. Should Serve the Balance of His Youth Sentence

[98] It may be that J.C. would have succeeded better at Waterville had there been the kind of culturally relevant programming and resources that Ms. MacLean's testimony suggested should be available to incarcerated African Nova Scotian youth. But trying to assess what could have worked is far beyond the scope of what is involved in a section 92(1) "transfer" application. I am required by the *YCJA* to assess, on the basis of the evidence before me, whether the transfer of J.C. into the adult correctional system for the remainder of his youth sentence is in his best interests or the public interest.

J.C.'s Opposition to the "Transfer" Application

[99] Despite J.C.'s opposition to the Provincial Director's application I have been unable to identify how it will be in J.C.'s best interests to order that he return to Waterville. J.C.'s opposition to the application indicates he views a return to the youth facility as being in his best interests. (As an aside, I recognize that even if I were to dismiss the Provincial Director's "transfer" application, J.C. will remain in an adult institution unless he secures bail on the riot charges.)

[100] The evidence I have reviewed from Waterville establishes that J.C. was not progressing at the youth facility. Given J.C.'s history of being regularly incarcerated at Waterville, perhaps the youth criminal justice system in Nova Scotia should bear some responsibility for the fact that he has not been rehabilitated. For example, the only culturally relevant programming for J.C. at Waterville was the Rites of Passage program which J.C. did not find helpful. His reaction to the program may reflect what Ms. MacLean had to say about it. I understood Ms. MacLean to have developed "the core competencies" for the program, designing it to be delivered with a racialized or Afro-centric perspective by a clinician with a Master's of Social Work. It was not facilitated at Waterville on this basis. As Ms. MacLean observed in her evidence it has not been "an intervention-based program" and "does not allow for a clinical transition of knowledge [about what influences behaviour] that would be in the best interests of the young people participating in that program."

[101] But it would be inappropriate to view J.C. as having no responsibility for his conduct in Waterville and his as yet unrealized rehabilitation. He was engaged in one-on-one programming during his most recent sentence there when he was

charged with violent offences and remanded to Burnside. One-on-one programming did not slow the pace of J.C.'s discipline record. He can say there is programming only available at Waterville that he would like to access, but he failed to demonstrate, when he had the opportunity, that he could apply the programming to positively influence his behaviour.

[102] And as for J.C.'s evidence that there are people at Waterville he feels more comfortable with, I accept the evidence of Mr. Nickerson that J.C. sought to associate at Waterville with older, more criminally sophisticated teenagers. I would expect that to be an even more pronounced tendency as he approaches 19 and after the past six months in an adult facility, where I have been told, he fits in well with the other prisoners. J.C. has not shown an inclination in Waterville or on the street to resist the pull of these associations.

[103] I cannot see in either the programming at Waterville or its social context support for the argument that J.C.'s return there is in his best interests.

[104] In his submissions, Mr. Bearden emphasized the mandatory nature of youth programming in contrast to the adult correctional system where programming is optional. That being said, by being disruptive and confrontational J.C. was able at Waterville to circumvent programming requirements. And as for the youth justice system's focus on rehabilitation, another argument advanced by Mr. Bearden as a contrast to the adult system, J.C. demonstrated a consistent resistance to that objective.

[105] Mr. Bearden submits that J.C.'s transfer will deprive him of the benefits afforded by the *YCJA*, such as a further sentence review under section 94 and "the opportunity to lay the groundwork for rehabilitation" under the legislation. As I observed earlier in these reasons, I am dealing with this section 92(1) "transfer" application in the twilight of J.C.'s time in the youth criminal justice system. There has been no new programming instituted at Waterville since J.C. was sentenced. I have not been persuaded by any of the evidence I have heard, including from J.C. himself, that it is in his best interests to finish his youth sentence at Waterville. I do not see any remaining or residual prospects for J.C.'s rehabilitation in the youth criminal justice system.

The Public Interest

[106] Mr. Anderson made submissions on behalf of the Provincial Director that it is in the public interest for J.C. to serve the remainder of his youth sentence in an adult correctional facility. He rightly points out that the power to transfer a "young person" to an adult institution should be used sparingly. (See *R. v. S.P., 2014 YJCN 1* at paragraph 8, dealing with the issue in the context of a section 30 *YCJA* remand.) Facilities for youth in conflict with the law are expected to deal with and manage angry, troubled, violence-prone young persons and rehabilitate them. But there are exceptional cases where a transfer to the adult correctional system will have to be considered, "not simply because [the young person] is 18 years of age or there are no suitable programs available for him". (*S.D.F. (Re), 2007 ABPC 103, paragraphs 72 and 73*) The *YCJA* directs that the public interest will be a basis for a judicial determination that a transfer is required.

[107] Mr. Anderson has submitted that J.C.'s case is one of those exceptional cases that warrant removing from J.C. the ability to return to Waterville to finish his youth sentence.

[108] On the basis of the evidence before me on this application - which has not been refuted - I find that it is in the public interest to transfer J.C. to an adult correctional facility under section 92(1). He has shown that his aggression and anger can no longer be safely managed at Waterville. Staff and the other residents of the youth facility are at risk of being intimidated and assaulted. He is a negative role model for young persons at Waterville struggling to confront and address their own issues and challenges. It is in the public interest that these young people be able to engage in their programming and rehabilitation in a safe environment.

[109] It is in the public and J.C.'s best interests that he rehabilitate and successfully reintegrate into the community. That rehabilitation has not been happening. It is a joint responsibility of the correctional system and J.C. Based on Ms. MacLean's evidence about the initiatives under way at Burnside there may be some prospect that J.C.'s rehabilitation will gain traction in the adult correctional system. Her report (*Exhibit 4*) and statements made about J.C. by his lawyer at his April 2016 sentencing suggest he has potential. It is potential he has been squandering.

Conclusion

[110] I am granting the Provincial Director's section 92(1) application to have J.C. transferred to a provincial correctional facility for the remainder of his April 14, 2016 youth sentence. I am persuaded it is in the public interest to do so. I see no alternative on the evidence. It is my hope there will be culturally relevant resources made available to him that will assist in any efforts he decides to make to rehabilitate himself and return to the community. While J.C.'s history in the youth criminal justice system and his behaviour over the past six months in Burnside and Northeast is discouraging, he is still young enough to start making the significant changes required to break out of his long pattern of re-offending and re-incarceration.

[111] I will make a final comment on the issue of a section 34 cultural assessment in case J.C. thinks that had one been ordered, the section 92(1) "transfer" application would have gone differently. J.C. is very far downstream now in the youth criminal justice system. A section 34 assessment would not have created new programs for him and it would not change the evidence I have heard about his behaviour in Waterville. The Provincial Director's "transfer" application comes after much water has already passed under the bridge as far as J.C.'s time in the youth criminal justice system is concerned.

[112] I want to thank Mr. Kennedy, Mr. Anderson and Mr. Bearden for their assistance in dealing with these complicated and difficult proceedings. And I want to wish J.C. better success for the future.

Derrick, J.P.C.