IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *R. v N.W.*, 2018 NSPC 14

Date: 2018-04-24
Docket: 3015277
Registry: Halifax

Between:

Her Majesty the Queen

v.

N. W

RESTRICTION ON PUBLICATION:

section 110 YCJA - Identity of Young Person and section 111 – Identity of Victim or Witness

DECISION ON CROWN APPLICATION TO SENTENCE YOUTH AS AN ADULT (SS. 64(1) & 72 OF *YCJA*)

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	January 23, 24, 25, 26, 29, 30, February 1, 26 and April 5, 2018 in Halifax, Nova Scotia
Decision:	April 24, 2018
Charge	section 235, *Criminal Code*
Counsel:	Terry Nickerson and James Giacomantonio for the Crown Roger Burrill and Anna Mancini for the Defence

By the Court:

Introduction

[1] N.W. is before me for sentencing on one count of 1st degree murder contrary to s. 235 of the *Criminal Code*. He was found guilty after trial of having shot and killed J.C. on March 29, 2016. At the time of the offence, N.W. was 17. He and J.C. barely knew each other. The murder was planned and deliberate, committed up-close, with the only apparent motive being to "catch a body" or establish status within the group that N.W. was associating with.

[2] N.W. is African Nova Scotian. He was raised in poverty and exposed to criminality from a young age. Despite this, until approximately 18 months before the offence, he was doing reasonably well in school, in the community and especially in basketball. He has no prior youth court record. However, in the time leading up to the offences, he was in a downward spiral which continued after the offences until his arrest. During this period, he was associating with people who were entrenched in criminality, was no longer engaged in things like school and basketball and was committing a variety of criminal acts.

[3] Since his arrest, he has been in custody at the Nova Scotia Youth Facility. During that time, about 20 months, he has again been doing reasonably well. He has been engaged in school, counselling, and employment and has not been a significant behavioural problem.

[4] At the time of the offence, N.W. was a "young person" under the *YCJA.* The Crown has applied under ss. 64(1) and 71 of the *Youth Criminal Justice Act* (*YCJA*) to have him sentenced as an adult. The defence opposes that application.

[5] If sentenced as an adult, N.W. will automatically receive a sentence of life imprisonment without eligibility for parole until he has served 10 years from the date he was arrested and taken into custody (*YCJA* ss. 73 & 74; *CC* ss. 745.1(b) & 746(a)).

[6] If sentenced as a youth, N.W. will receive a sentence not exceeding 10 years (s. 42(q) or (r)) which could, if the prerequisites are met, be served under an Intensive Rehabilitative Custody and Supervision Order (IRCS, *YCJA*, s. 42(2)(r) & (7)). The custodial portion of the sentence could not exceed 6 years in (*YCJA*, ss. 42(q)(i)(A) & 42(r)(ii)(A)), with the remainder served in the community under supervision. There is discretion as to whether he would be given credit for all or some of the time he has already spent in custody.

[7] An IRCS sentence cannot be ordered in the absence of a joint treatment plan and acknowledgement from the Provincial Director that services are available to offer that plan to the young person (s. 42(7)(c) & (d)). In this case, Correctional Services has provided both (Ex. 2, Tab 9 & 10) so, for the purpose of this Application, I consider N.W. to be "IRCS eligible".

Procedural History

[8] N.W. was tried and found guilty by Judge Derrick, as she then was. Judge Derrick was subsequently appointed to the Court of Appeal of Nova Scotia. Pursuant to s. 669.3, Justice Derrick continued to have jurisdiction to complete the sentencing, however, due to the amount of time that would have taken, she declined to do so. As a result, pursuant to s. 669.2(1) & (2) of the *Criminal Code*, the proceedings were continued before me.

[9] It is unusual but not unprecedented for a judge to impose sentence in a case where he or she has not been the trial judge. It brought with it additional challenges beyond those that were inherent in what was already a very challenging case. I want to thank all counsel for their tremendous assistance and patience throughout the process.

[10] Section 71 of the *YCJA* requires that the application be heard at the commencement of the sentencing hearing. The Crown and defence agreed that we would hear evidence relevant to both the Crown application and the ultimate sentence together, then the parties would make submissions and I would render a decision on the application. After my decision, additional evidence would be called if necessary followed by submissions and decision on ultimate sentence.

[11] These are my reasons for decision on the Crown's application to have N.W. sentenced as an adult.

The Application for an Adult Sentence

Onus

[12] The *YCJA* places the onus in this Application on the Crown (*YCJA*, s. 72(2)). The Crown's burden is "to satisfy" the court that the test under s. 72(1) is met.

[13] It is difficult and perhaps unhelpful to try to place that burden on a continuum with the conventional burdens of balance of probabilities and beyond a reasonable doubt. As the Supreme Court said in *R. v. M. (S.H.)* ([1989] 2 S.C.R. 446), when considering the onus and burden for transferring youth charges to adult court under the *Young Offender Act*,

> One is not talking about something which is probable or improbable when one enters into the exercise of balancing the factors and considerations set out in s. 16(1) and (2) of the Young Offenders Act. The question rather is whether one is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court (para. 26)

[14] The burden, "to satisfy", should not be characterized as a "heavy onus" (*R. v. A.O.*, [2007] O.J. No. 800, at para. 38 and *M.(S.H.)* at paras. 22-27). However, it has been stressed that when applying the onus, the youth justice has to bear in mind the "very serious consequences of an adult sentence for the young person, so as to only order an adult sentence when necessary to fulfil the objectives of the *YCJA*." (*A.O.*, at para. 38).

The Test

[15] In 2012, s. 72 of the *YCJA* was amended to the following:

> **72 (1)** The youth justice court shall order that an adult sentence be imposed if it is satisfied that
>
> **(a)** the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
>
> **(b)** a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.
>
> **(1.1)** If the youth justice court is not satisfied that an order should be made under subsection (1), it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed.

[16] This provision creates a conjunctive, two-part, test. In order to sentence a young person as an adult, the court must be satisfied of both parts (*R. v M.W.*, 2017 ONCA 22 and *R. v. Okemow*, 2017 MBCA 59). If the Crown does not satisfy the court that the presumption of diminished moral blameworthiness is rebutted, then the application must be dismissed even if the court is satisfied

that a youth sentence would not be sufficiently long to hold the youth accountable. (*Okemow*, at para. 54)

[17] Decisions under the previous section provide guidance on how the principles and purposes of the *YCJA* should be interpreted and applied in the context of this application and what factors and principles are relevant to the accountability analysis. However, they have to be used with caution given the new framework. Because the new test is a "two-prong" test, it is important to analyse each prong separately rather than in a blended analysis (*M.W.*, at paras. 93-108 and *Okemow*, at paras. 51-56). The two prongs address related but distinct questions with overlapping but not identical factors. Blending the analysis risks using a factor that is relevant to only one prong to support a finding on the other prong or of imposing an adult sentence where only one of the prongs is satisfied (*M.W.*, at para. 106 and *Okemow*, at para. 53).

Rebutting the Presumption of Diminished Moral Blameworthiness or Culpability

[18] In, *R. v. D.B.* (2008 SCC 25), the Supreme Court of Canada found that young people are entitled to a presumption of diminished moral blameworthiness because of their age, which results in a heightened vulnerability, less maturity, and reduced capacity for moral judgment (para. 41). That presumption is codified in s. 72(1)(a).

[19] To rebut the presumption, the Crown has to satisfy the court that, "at the time of the offence, the evidence supports a finding that the young person demonstrated the level of maturity, moral sophistication and capacity for independent judgment of an adult such that an adult sentence and adult principles of sentencing should apply to him or her." (*M.W.*, at para. 98). The focus under the first prong should be on maturity (*M.W.*, at para. 97).

Accountability

[20] Under the second prong, the Crown must satisfy the court that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his behaviour.

[21] I have not yet heard submissions from Crown and defence as to how long a "youth sentence imposed in accordance with the purpose and principles" of the *YCJA* would be. In questioning witnesses and in submissions, both referred to the maximum allowable sentence under the *YCJA* so that is what I will use for purposes of the accountability analysis.

[22] Young people should not be held less accountable for their behaviour than an adult but they are to be held accountable in a different way (*DB*, at para 93).

[23] The *YCJA* itself also provides some instruction on how accountability is to be viewed. Section 3(1)(b)(ii) instructs courts to emphasize "fair and proportional accountability" that is consistent with a youth's lesser maturity.

[24] Section 38 says that the purpose of sentencing young people is to hold them accountable by imposing just sanctions that have meaningful consequences to the young person and promote his rehabilitation and reintegration (*YCJA*, s. 38(1)).

[25] Accountability is to be viewed as the youth sentencing equivalent of the principle of retribution in the adult context (*A.O.*, at para. 46, cited with approval by the NSCA in *R. v. Smith*, 2009 NSCA 8, at para. 28). Retribution is not the same as vengeance. Retribution as a sentencing

principle is meant to be restrained, measured, reasoned punishment that is no more than what is required for a just and appropriate sentence.

[26] To hold the young person accountable, the sentence must reflect "the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct". (*A.O.*, at para. 47). The sentence must be long enough to reflect the seriousness of the offence and the offender's role in it, and it also must be long enough to provide reasonable assurance of the offender's rehabilitation to the point where he can be safely reintegrated into society (*R. v. Ferriman*, [2006] O.J. No. 3950 and *Smith*, at para. 39).

Factors

[27] The post-2012 provision doesn't specify what factors should be considered in assessing the two prongs. Under the accountability analysis in the previous provision, the court was directed to consider: the seriousness and circumstances of the offence, the age, maturity, and character, background and previous record of the young person, and any other factors the court considers relevant. Those factors continue to be relevant to the accountability analysis with considerable overlap to the determination of whether the presumption of diminished responsibility continues (*R. v. M.M.* 2013 NSPC 45, at paras. 6 – 11, and *R. v. Ellacott* 2017 ONCA 681, at para. 18).

Race and Culture

[28] What other factors will be relevant will depend on the specific circumstances of the case. One potentially relevant factor in this case is N.W.'s race and cultural background. N.W. is African Nova Scotian. Dr. Hansen's s.34 psychological report includes a "race and culture"

component. That report and Dr. Hansen's testimony provide information about N.W.'s historical and current cultural context as well as specific background and systemic factors that have impacted his life and may have played a role in the commission of the offence. In *R. v. "X"* (2014 NSPC 95, at paras. 34 and 198), Judge Derrick, as she then was, concluded that evidence of race and culture was relevant to the determination of whether the presumption of diminished moral blameworthiness or culpability had been rebutted. The Crown before me agrees that if it is relevant it would be under that prong. I agree for substantially the same reasons as those give by Justice Derrick in *"X"*.

[29] First, the *YCJA* instructs in s. 3(1)(c)(iv) that measures taken against young people should, to the extent that they can given the limits of fair and proportionate accountability, respect the ethnic and cultural differences of young people.

[30] Second, background of the young person is one of the factors I am required to consider in determining whether N.W. should be sentenced as an adult and his race and culture are part of his background.

[31] Third, there is a growing acceptance in the adult sentencing context that, like Aboriginal offenders, African-Canadian offenders are over-represented in prison and have unique systemic and background factors that may play a role in offences (See: *R. v. Perry,* 2018 NSSC 16, *R. v. Gabriel*, 2017 NSSC 90; and, *R. v. Q.B.* [2003] O.J. 354). These same cases recognize that, despite the absence of a statutory duty to consider these unique circumstances for African-Canadians, in appropriate cases, a sentencing judge could take into account the impact of these circumstances

using an approach similar to that provided for in *R. v. Gladue,* [1999] 1 S.C.R. 688, *R. v. Wells,* 2000 SCC 10 and *R. v. Ipeelee.* 2012 SCC 13.

[32] Finally, in *Ipeelee* the Supreme Court of Canada explicitly said that "systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (at para. 73). Moral blameworthiness is the sole issue to be decided under the first prong of the test for imposing an adult sentence and is indirectly engaged in the second prong due to the generally accepted definition of accountability which includes reference to the moral culpability of the offender (*A.O.*, at para. 47). I recognize that the first prong is specifically aimed at the presumption of diminished moral blameworthiness that N.W. is entitled to because of his age but it is difficult to imagine how a court could properly assess that without considering other factors that might impact on moral culpability.

[33] Concluding that race and culture are relevant doesn't answer the question of how to use that information in deciding whether to impose an adult sentence. This is often also the challenge in using "*Gladue* factors" in the sentencing process – the factors must be taken into account in sentencing an aboriginal offender but do not necessarily provide a justification for a lighter sentence, particularly in serious crimes. In *Gabriel,* Justice Campbell was determining parole eligibility for a young African Nova Scotian man convicted of second degree murder. In that context, Justice Campbell examined the impact of racial background on moral culpability:

> **54** A person's racial background is also a part of his identity. It does not determine his actions. It does not establish a lower standard for assessing moral culpability. It does not justify or excuse criminal behaviour. It may however help in understanding the broader circumstances that acted upon the person."
>
> . . .

> **56** The Cultural Assessment is not a single simple answer to a complicated question. It does not suggest that Kale Gabriel was destined by his race or his circumstances to find himself here. Like the *Gladue* report it provides important context and raises as many questions as it answers."
>
> **57** Sentencing judges struggle to understand the context of the crime and person being sentenced. To do that judges rely on our own common sense and understanding of human nature. Sometimes that isn't enough. Our common sense and our understanding of human nature are products of our own background and experiences. An individual judge's common sense and understanding of human nature may offer little insight into the actions of a young African Nova Scotian male. The Cultural Impact Assessment serves as a reminder of the fallibility of some assumptions based on an entirely different life experience.
>
> . . .
>
> **89** An individual African Nova Scotian male like Kale Gabriel is entirely capable of making moral decisions. To the extent that he is relieved of some degree of responsibility or is considered to have in some way diminished moral responsibility based on his experience as an African Nova Scotian male he is treated less as an independent moral agent than someone else. Members of some communities would then be seen as products of their social and cultural environments who are acted upon by forces beyond their control, while others would be held to a standard of individual moral responsibility. If the decisions and actions of an individual African Nova Scotian male are "explainable" with reference to the experience of the community of which he is a part, the same presumably is true of everyone else. The lawyers, the judge and the writer of the cultural impact assessment are all members of communities that have shaped their attitudes and perceptions of the world. Kale Gabriel is not an object who is acted upon by other forces being assessed and judged by those who unlike him make determinations rising above and independent of those kinds of forces.
>
> **90** Those questions are why a Cultural Assessment with respect to an African Nova Scotian offender serves such an important purpose. It does not provide a justification for a lighter sentence. Like a *Gladue* report it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as helpless victim of historical circumstances

[34] I agree with many of the general concepts expressed by Justice Campbell. N.W. is not a helpless victim of his background and circumstance. He is entirely capable of making moral choices and no community or cultural background should be held to a lower standard of moral

responsibility. However, Justice Campbell's comments about moral culpability have to be considered in light of the statement from *Ipeelee* that systemic and background factors may bear on the culpability of the offender (para. 73). The court in *Ipeelee* went on to explain that statement:

> **. . .** "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (*Wells*, at para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely -- if ever -- attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. . As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing -- that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. (emphasis added)

[35] In my view, the Supreme Court is not suggesting that a person's moral culpability is potentially diminished because of that person's race or cultural background. Rather, a person's moral culpability is potentially diminished because of the "constrained circumstances" which they may have found themselves in because of the operation of systemic and background factors that are connected to their race and cultural background.

Evidence

[36] As part of my preparation for the hearing, I reviewed decisions rendered by Justice Derrick during the trial and her trial decision (*R. v. N.W.*, 2017 NSPC 39). I also reviewed portions of the trial transcript including the testimony of three of the teens who were present in the hours before the murder. The evidence presented at trial provided me with context for the facts found by Justice

Derrick. However, for the purpose of sentencing N.W., I have only relied on evidence referred to by Justice Derrick as having been accepted by her or those that were proven to the appropriate standard during the sentencing hearing.

[37] A great deal of evidence was heard or filed during the sentencing hearing. Documents filed either before or during the hearing include: a pre-sentence report, dated October 12, 2017 (PSR); a s. 34 - psychoeducational report and amended report, prepared by Peyton Harris, dated December 5, 2017; a s. 34 - psychological report with a cultural component, prepared by Dr. Simeon Hanson and Dawn Hall, dated November 29, 2017; a s.34 - psychiatric report, prepared by Dr. Philip Klassen, dated January 5, 2018; letter from Chris Collett, Executive Director, Correctional Services, dated January 19, 2018; IRCS Joint Treatment Plan, prepared by Dr. Simeon Hanson, Ralph Hayden and Mike Quinn; N.S. Correctional Services incident reports and a summary relating to N.W.'s behaviour in pre-trial custody; information from Correctional Services of Canada concerning youthful offenders and correctional planning; N.S. Correctional Services policy and procedure regarding IRCS sentences, a statement written by M.W., N.W.'s mother. I have not been provided with a victim impact statement but I understand that J.C.'s family has been advised of their right to file one.

[38] We also heard from 12 witnesses over the course of seven days. These witnesses included: people who have had regular involvement with N.W. during his time in the Youth Detention Centre (Kami Anderson, Alexa Forsyth, and Kim Troop); experts who assessed him for the s. 34 reports (Dr. Klassen, Dr. Hanson, Dawn Hall, and Peyton Harris); and, witnesses who testified more generally about administration of an IRCS sentence and the potential conditions of N.W.'s

incarceration (Mike McAloney, Deputy Superintendent Ralph Hayden, Heidi Rogers, Nancy Cormier and Kathy Richards).

[39] I have reviewed all of the material and listened carefully to the witnesses and have attempted to extract, summarize and distill the evidence that was significant to my decision-making.

Analysis

Seriousness of the Offence

[40] Details of Justice Derrick's findings are contained in her trial decision (*R. v. N.W.,* 2017 NSPC 39). A summary of her findings in relation to the actual murder is contained in the following concluding paragraphs of her decision:

> [237] I find the Crown has proven beyond a reasonable doubt that N.W. went to Mount Edward Road with M.B. He went there to kill J.C. It was a plan of murder that he formed when he, M.B. and L.D. were in the Kia and J.C. was walking home. M.B.'s testimony establishes it was a murder he deliberated on while he waited for Glenda Ashford to drive by. Ms. Ashford's evidence confirms that the shots were fired after she had passed. N.W. deliberated again when he fired the bullet into J.C.'s head so he wouldn't get up.
>
> [238] I find that N.W. caused J.C.'s death by shooting him in the chest and then in the head. He intended to kill J.C., a killing he planned in advance and deliberated upon. The Crown has proven each of the essential elements of first degree murder beyond a reasonable doubt.

[41] In addition, Justice Derrick made findings of fact concerning the events surrounding the murder that are relevant to this process.

[42] Pre-Offence Behaviour - Earlier in the evening, N.W. was actively involved in discharging a firearm through a window of an occupied home. Justice Derrick found that N.W. and L.C. went

to the residence to rob the occupants of drugs. Once there, N.W. urged L.C. to shoot through the window at a sleeping figure and L.C. fired the shot. Fortunately, the young man sleeping in the residence was not struck by the bullet (*N.W.,* at paras. 104 – 108).

[43] Post-Offence Behaviour – After the offence, for a time, N.W. was living in Toronto with his father. During that time, police were intercepting calls and texts on his cell phone. Those intercepts revealed he was actively involved with M.C.O. in a plan to, at the very least, do harm to M.B. and L.D. because they could implicate him in the murder. (*N.W.,* at paras. 111 – 148).

[44] Motive - The Crown, in their brief, says that J.C. was killed for almost no knowable or understandable reason. Justice Derrick described the possible motive as follows:

> . . . But it is not as though J.C.'s murder came out of nowhere. J.C.'s life just didn't matter that much. The evidence indicates that he was marginalized and ultimately, expendable. M.B. testified that he and N.W. discussed the murder "a couple of times" afterwards. N.W. told him he "just wanted to kill someone. He just wanted to catch a body." It was M.B.'s evidence that N.W. selected J.C. "Because he didn't like him. He thought he was a bitch." (para. 222)

[45] N.W. still denies that he committed the offence so no further information concerning his motive has become available through the many reports provided for sentencing.

[46] The Crown has described the murder using words such as grave, cold, calculated and callous (*Crown Brief, p. 2*). Dr. Hansen, in his Report, says the murder "appears *prima facia* to be a cold, callous execution without significant justification or motive (*Hansen Report, at p. 5*). It is difficult to disagree with those characterizations – two shots fired at close range at the chest and head of the victim, with planning and deliberation, and apparently without provocation, impulsivity, or a heightened emotional state.

Victim Impact

[47] As I've said, no victim impact statement was filed in this case. However, I don't need an impact statement to imagine the impact J.C.'s loss would have on the people who cared about him. I understand that I have no ability to fully appreciate how they feel. For many, the loss would be unbearable.

[48] It has also had an impact on N.W.'s family. His mother speaks about that impact in her statement. She feels guilt, regret, disappointment, remorse for the harm done and fear for her son. There is also a tremendous impact on N.W.'s younger siblings who, I'm sure, looked up to him as a role model and looked to him for support.

[49] The impact of this kind of senseless killing is broader than the families of the people involved. It has also impacted the African Nova Scotian community and the broader community by feeding the stereotype of violent young black males and making people feel unsafe.

N.W.'s Background and Prior Record

[50] The Crown does not allege any prior youth record for N.W..

[51] Information about N.W.'s life before his incarceration comes primarily from interviews conducted by Dawn Hall, Dr. Klassen, and Peyton Harris for the various s. 34 Reports. Not surprisingly, given that we are dealing with a young person with limited life experience, a lot of the information is provided by his mother, M.W.. I accept that there are reasons to treat her information with some caution. She is N.W.'s mother and throughout his life has been his advocate. As such she is not impartial. She may have a tendency to excuse his bad behaviour or

blame it on other people or circumstances. I would also not expect her to be able to accurately recall events spanning N.W.'s life. I would also not be at all surprised if there were things going on in N.W.'s life, particularly as he got older, that she knew nothing about. Finally, I take into account that she does not believe N.W. committed the offence that I am sentencing him for.

[52] However, I find, in general, she was a reliable historian. The information she provided about N.W.'s good and bad behaviour, his general personality, his academics and leisure activity seem consistent with other sources of information such as school records, JEINS, or other people who provided information, such as Kenneth Fells and Greg White. In particular, I find she was quite candid in reporting various incidents where N.W. misbehaved. She reported the ones that were captured in school records and through JEINS but also disclosed fights in the community that would not have been otherwise discovered.

General Background

[53] N.W. is African-Nova Scotian. His parents are both from North Preston. Until the murder, he lived with his mother, M.W., and three younger siblings. She raised N.W. and his siblings on her own as his biological father lived in Toronto.

[54] N.W. has not had a constant, stable, supportive pro-social father figure in his life. His biological father lived in Toronto, so, at most, they would have seen each other few times a year. He claims he visited N.W. in Nova Scotia regularly and they had a relatively close relationship, albeit more like brothers than father-son. N.W.'s mother claims that contact was limited, that his father would visit Nova Scotia without coming to see N.W. and that he struggled to deal with that.

According to her, N.W.'s father did not come to Nova Scotia for N.W.'s trial and has not called or visited while he's been in custody.

[55] The main father figure for N.W. was his uncle. Unfortunately, he was sentenced to a lengthy period of incarceration. After that, they maintained regular telephone contact but his incarceration was a significant loss for N.W.

[56] N.W. experienced the loss of another significant male figure in his life when he was 11 when his mother's common law partner was killed in a motorcycle accident. For approximately three years, he had been a consistent and kind figure in N.W.'s life and they had developed a very strong relationship. That loss was described as devastating to N.W.

[57] For most of his life, N.W. has lived in communities in Nova Scotia that have high rates of poverty and violence. Until he was about 6 or 7, the family lived in public housing in "Jelly Bean Square". His mother said that when they first moved there, the neighbourhood was family-oriented. However, after a shooting that occurred nearby, she moved the family to Ontario where they remained for 3 – 4 years. They returned in 2010, when N.W. was 10 or 11, and moved to the Churchill Drive neighbourhood (CHD).

Elementary and Junior High

[58] N.W.'s mother said that CHD had issues with crime and violence and she looked for safer areas but couldn't afford anything.

[59] According to his mother, N.W. was bullied, both in that neighborhood and in North Preston when they went there to visit family. He was big for his age and new to the CHD neighborhood.

Bullies would come to their home to try to get him to fight. In the early years, she tried to keep him in or supervise him when he was out. According to Peyton Harris, this limited his ability to learn and grow. It is reasonable to infer that the family's limited finances and the fact that M.W. was a single mother of four children would also have placed limits on N.W. exposure to the world. Greg White, V.P. for Caledonia Junior High School (CJHS) where N.W. attended for grades seven to nine, also commented on N.W.'s limited exposure to the outside world.

[60] His mother reports that N.W. was shy as a child and lacked confidence. This is confirmed by other sources. N.W. told Ms. Harris that he'd been shy. School records confirm that he was a quiet child who had to be encouraged to speak, that he mumbled and kept his head down when speaking. It appears he continued to be quiet or reserved into junior high school. Mr. White told Ms. Harris that N.W. was a quite leader on the basketball court because he had confidence there, but the situation was different in class.

[61] Based on the information from his mother, school records, Greg White and Kenneth Fells, N.W. was not a significant behavioural problem in school or in the community until high school. There are specific instances of fights and other misbehaviour which I will refer to but he was not generally disruptive or out of control. According to Ms. Harris, he was not problematic in school and was respectful to students and teachers. He played basketball on community and school teams and there is no indication that he was ever benched or removed from a team because of bad behaviour and it seems that, in general, he was following the rules at home and in school.

[62] His school records disclose that in grade 1, he was exhibiting inappropriate aggression but his behaviour improved and there were no other negative comments until grade 5, when he was

suspended twice for physical violence. N.W. said that both incidents involved altercations with a cousin. He said they would fight and then everything would be fine by the end of the day.

[63] His general good behaviour in school, continued in junior high. His school records indicate one episode of violence in grade 7 when he got into a fight with a grade 9 student. N.W. said he was responding to what he perceived to be the other student purposefully hitting him with a frisbee. This account was corroborated by Greg White. N.W. recognized, both at the time and in discussing the incident with Ms. Harris, that it could have been accidental and he should have reacted differently.

[64] In grade 9, he was found in possession of marihuana at school. Mr. White said that N.W. apologized, accepted responsibility and acknowledged that he'd been intending to sell marihuana.

[65] His behaviour in the community, as reported by M.W., seems consistent with what he was demonstrating at school. His mother reports that he was still being bullied and challenged to fight but that he eventually started to stand up for himself. She reports one incident, when they were visiting family in North Preston, when an older cousin forced N.W. to stay and fight rather than run away and, as a result, he wasn't bothered any more. M.W. reports a couple of other fights in the community, where, from her perspective, N.W. was fighting to protect others.

[66] N.W. started playing streetball at a young age and got involved with organized ball on a community team when he was 10 years old. He continued to play on community teams and made his junior high team. According to M.W., basketball occupied his time, kept him out of trouble and exposed him to pro-social friends.

[67] Academically, N.W. has struggled. Issues were noted in elementary school and persisted into junior high. It appears that no formal cognitive or educational assessments were done so N.W.'s learning challenges were noticed but not diagnosed.

[68] M.W. recalled pushing for a psycho-educational assessment for N.W. and blames the educational system for not providing one. Peyton Harris confirms that M.W. pushed for an educational assessment, but based on her review of the school records, it appears one was offered but N.W. declined to participate.

[69] According to Ms. Harris, he worked hard and, given his challenges, did well in school. She noted that he improved when he was supported as he was for a couple of years in elementary school and, especially, in junior high. She said CJHS went above and beyond to help N.W. and N.W. said that he worked really hard in school in grade 7.

[70] Greg White, the V.P. at N.W.'s junior high, was interviewed by Ms. Harris. Mr. White knew N.W through his position as V.P., through coaching and through a mentorship program he ran that N.W. was involved in. He commented that N.W.'s mother loved him dearly and did all she could to support him. He said N.W. did well academically until the end of grade 9 when things went downhill. He was well liked by students and teachers.

<u>High school (2014-2016)</u>

[71] N.W. began high school at Prince Andrew High School (PAHS) in 2014, at age 15. Ms. Harris did not have access to school records from his time there.

[72] According to M.W., things started to go down hill there. She said N.W. was skipping classes and not completing assignments, primarily because he was connecting with a new, negative peer group, many of whom were older and had finished school. N.W also confirms that his lack of interest and effort in school was precipitated by his connection with criminally involved peers.

[73] When he started at PAHS, he made the school basketball team and, for a time, he also played for a community team. However, according to M.W., the demands were too much so he stopped playing for the community team. He was benched and eventually removed from the high school team because of poor grades and poor attendance. Then, when he could no longer play for the school team because of his grades, it was too late to get him back on the community team.

[74] After he was removed from the basketball team, N.W. started thinking about quitting school.

[75] M.W. tried to work with PAHS to try to find a way to hold him accountable for his poor grades without taking basketball away. Her interactions with the school over this and another incident, caused her to lose trust and she was not confident that N.W. would be treated fairly there.

[76] With encouragement from Mr. Fells, who was a school administrator at Cole Harbour District High School (CHDHS) and someone who had known N.W. since he was about 4 years old, M.W. made the decision to transfer N.W. to Cole Harbour District High School (CHDHS) for the next academic year. The school was further away but according to M.W., Mr. Fells said transportation wouldn't be a problem. Both she and Mr. Fells felt it would be good for N.W. to be there because they recognized he was deteriorating. At CHDHS, he could play basketball and Mr. Fells had worked to make the school a positive place for African Nova Scotian youth.

[77] At the beginning of the year, N.W. was on the basketball team and had drives to school from friends. When this stopped, M.W. spoke to Mr. Fells and he drove N.W. for about 1.5 months but that couldn't continue. By the fall of 2015, N.W. was only going to school sporadically and because of poor attendance and grades, he could not play games with the team.

[78] M.W. tried to have him transferred back to PAHS but they didn't have space. She tried to get N.W. to do school work at home when he couldn't get to school but that led to conflict.

[79] Mr. Fells said that N.W. got along well with teachers when he was in class and if he was caught out of class and told to go, he'd go. He said he was aware of other kids who were involved with drugs or weapons at school but did not have those concerns about N.W. School records reveal that there were behavioural issues there. He was suspended on two or three occasions – once or twice for using physical force and once for damaging property.

[80] M.W. started to have some concerns about N.W.'s behaviour when he started high school but the negative shift in his behaviour accelerated in his second year. He began to spend more time with older, anti-social peers. Peyton Harris's view was that this likely influenced him to make poor decisions and exposed him to a lifestyle that he hadn't been exposed to at home, in school and on the basketball team (*Harris Assessment, p.3*).

[81] His mother reports that just after he turned 16, he told her that his friends had said he didn't have to abide by her rules any more – that he didn't have to go home or listen to her. His behaviour in the community became problematic. He was charged and referred to community justice for assault and uttering threats. After he completed the community justice program, M.W. requested a youth worker for N.W. He began working with Sydney Tolliver and the relationship appeared

to her to be going well but ended when Mr. Tolliver left the position. She then tried to access support through Ceasefire (a community based project that works with young African Nova Scotian males). She was not initially successful but eventually was able to connect with Mario Rolle through a family member. Mr. Rolle began working with N.W. in 2016. Mr. Rolle said that N.W. participated voluntarily and they developed a positive rapport. Unfortunately, that connection came too late (possibly after the murder) and they did not have time to work together in a meaningful way because N.W. moved to Ontario.

[82] N.W. has admitted to professionals (Dr. Klassen and Dr. Hansen) that during this time, he was involved in various anti-social and criminal activity: skipping classes; shoplifting, selling marihuana in his community and at school; ripping people off by selling fake marihuana; receiving money or gifts from girls who were working as prostitutes; and committing "robberies".

Nova Scotia Youth Centre (2016 – present)

[83] N.W. has been in custody at the Nova Scotia Youth Centre (NSYC) since his arrest in July of 2016. Information about his time there, comes from a number of sources: a summary of incidents/behaviour prepared for this hearing (*Ex 2, Tab 5*); testimony and information provided to authors of reports from Kami Anderson (social worker), Alexa Forsyth (youth worker), and Kim Troop (unit supervisor); and information provided to authors of reports from Shane MacDow (teacher).

[84] By all objective, outward measures, N.W. has done very well at the NSYC. There have been breaches of the rules but, according to the witnesses, not an excessive number as compared to other youths and no serious problems with anger or violence. Some of the breaches show

underlying attitudes or beliefs that are troubling but he has demonstrated a willingness to discuss these beliefs and they have been noted as an area for future treatment. He has participated in every program available to him.

[85] The Summary of Incidents/Behaviour (*Ex. 2, Tab 5*) was authored by Alexa Forsyth but was also signed off by Kim Troop and Ralph Hayden. All agree that it is accurate.

[86] Youth in the facility are given incident reports for breaches of the rules. Level 1 are for minor breaches, level 2 are more serious breaches and level 3 are for the most serious violations.

[87] According to that report, for the 18-month period from July of 2016 to November of 2017, N.W. received 3 level "3" reports, 16 level "2" reports and 16 level "1" reports. Some of these reports are group reports where everyone is held accountable either because they are all involved or because no one will take responsibility for an infraction.

[88] The first level "3", in July of 2016, was for encouraging other youth to fight. The second, in November of 2016, was for being involved in three-way calls to a phone number that was not approved. The third, in July of 2017, was for fighting. He said he'd been called names and started the fight because he had no other choice. The level "2" reports relate to a variety of behaviour including, being rude to or disobeying staff, gambling, "almost" being involved in a physical altercation and possession of contraband. The most serious of the level "2" reports relate to writings found in his room relating to the sex trade (July 2017) and a note written by N.W. to a female youth in the facility suggestive of trying to have her become involved in the sex trade (June 2017).

[89] In summary, the authors point to two areas of concern with N.W.'s behaviour: initial attempts to intimidate people; and, his interest in the sex trade. However, they say that overall, his behaviour has improved since he's been there. He was noted to have been working on being a more positive influence and often shows good leadership skills. Ms. Forsyth says that he is personable, has developed a good relationship with her and has been open to dealing with issues.

[90] He has participated in a number of programs and has done very well, especially in education. As of January 2018, he had completed six high school courses. Witnesses testified that this was more than any other young person has ever completed while in custody. Of course, N.W. has been there for longer than many but still a remarkable achievement. Ms. Harris attributed this success, at least in part, to his relationship with his teacher. Ms. Forsythe reports that he spends a lot of his free time working on school work.

[91] He was also involved in recreation programs, career development, weekly chapel, the Rights of Passage Program, substance abuse education, music therapy and the maintenance program. This latter program is an earned privilege at the facility and had previously not been offered to youth on remand. According to Mr. Troop and Ms. Forsyth, N.W. earned his place in the program through good behaviour.

[92] The witnesses who have been involved with N.W. at the NSYC testified and provided their subjective views of N.W. Without exception, they describe him as personable, likeable and generally easy to get along with.

[93] Kim Troop, the unit supervisor in N.W.'s unit, had been at the youth facility for 28 years. He said that when N.W. first came in he had trouble adjusting, which is not unusual for youth. As

time went on, he learned the rules and that there would be consequences to breaching them. Significantly, he seems to have bought into the restorative process used at the facility and has learned to resolve problems differently. He said he's seen a huge improvement since 2016 and his relationship with N.W. has also improved. He said N.W. is capable of learning and has been highly engaged in programming. He said that there have been no significant behavioural issues with N.W. and he thrives when the unit is calm.

[94] He also testified that N.W. likes to control his environment, doesn't do as well when new people come into the unit and tends to tell new youth how things are going to be as opposed to taking them under his wing.

[95] Alexa Forsyth is N.W.'s youth worker. She's worked at the facility for over 9 years and started working with N.W. in February of 2017. When working, she would be with N.W. about 12 hours a day and would review reports written by on-duty staff when she wasn't working. She would be around him most of the time and observing him in a variety of situations including morning circle, education, doing homework etc.

[96] She said he was doing well in the facility and that she was impressed and proud of his effort and results in education.

[97] Ms. Forsythe also provided information to the author of the PSR and to Dr. Klassen. She was asked about the comments attributed to her in Dr. Klassens report.

> "She stated that he presents as likeable and responds well to females. He tries to lie at times, but this is reportedly relatively easily detected. He does not present as volatile, but is somewhat of an intimidating presence, can even have good leadership skills" (p.7)

[98] She confirmed that N.W. is personable and easy to like, gets along with staff and with most of the other youth. She said he does get along well with females (both she and his previous youth worker were female) but he also gets along well with her partner who is male and with Mr. Troop. In her view, gender wasn't a significant factor. She could not recall saying that he tries to lie and has found him to be honest with her. She explained the "intimidating presence" comment. She said that "intimidation" came up in some of his early incident reports and was a concern for a time. Since then, she would say that he can come across as intimidating which is consistent with what she told the author of the PSR (p.7). She said other youth may feel intimidated by him and she has spoken to him about how he is perceived but can't say that he is intentionally intimidating anyone.

[99] Kami Anderson is a social worker with IWK youth forensic services in the youth centre. She has worked there since 2012 and with N.W. since August of 2016. He started seeing Ms. Anderson for an hour every two weeks but that was increased to weekly during the time leading up to the sentencing hearing. He voluntarily sees her and has never declined an appointment. Her comments to the author of the PSR report and to Dr. Klassen would suggest that N.W. has not been actively engaged in the therapeutic process (PSR, at p.6 and Klassen Report, at p. 7): that she did not meet with N.W. more often because he does not engage enough in the process and presents as dismissive; that N.W. presents as having "no issues", with no "mood or mental health concerns", and is only in treatment because of the severity of his offending behaviour; and, that there hasn't been a lot of "goal setting" in their sessions. These comments are not consistent with the tone of Ms. Anderson's testimony or the comments provided by her to Dawn Hall and included in the s. 34 psychological report.

[100] In her testimony, she provided context to these comments. In responding to questions about "goal setting" during therapy, she described the difference between therapy offered to youth on remand vs youth serving a sentence. In summary, in contrast to sentenced youth, structured goal-directed therapy is not generally offered to youth on remand. Rather, the goals are to deal with emerging issues or areas of immediate concern and identify clear goals for future therapy. She explained that N.W. did not present with specific problems such as anger management issues, depression, aggressive behaviour etc. that would have provided clear goals to work on during their sessions. Instead they worked on things like: adjustment to the facility; coping with the court process; interpersonal skills with staff and other youth; male-female relationship dynamics; issues concerning intimidation; peer/lifestyle choices; and, identifying risk factors for N.W. These were topics he brought to her and topics she raised as a result of issues raised by staff or incident reports.

[101] Ms. Anderson testified that the process with N.W. had gone really well. He was a willing participant in therapy from the beginning and always came to meetings engaged. She said they have meaningful discussions about whatever the topic was. She said she believed he was engaged, curious about how other people interact, capable of learning about interpersonal relationships, sincere, and positive. In her testimony and comments to Dawn Hall she provided numerous examples of topics raised by N.W. that support that view.

[102] Given Ms. Anderson's testimony, which I accept, I do not see the lack of specific goal setting in therapy as something indicative of lack of engagement by N.W. It is just a function of the circumstance. It was clear from Ms. Anderson's testimony that their time together was

productive and that she believed he was engaged in the process. In my opinion, N.W. has been as engaged with therapy as the circumstances allowed.

Basketball

[103] The role that the loss of basketball played in N.W.'s behavioural decline was explored during the hearing. Everyone agrees that basketball was important to N.W. and he was very good at it. He played from the time he was young until high school. It gave him confidence, provided a pro-social activity and kept him busy, so away from negative influences. N.W. described it to Peyton Harris as "his life". His mother commented that he had very little interest in any other leisure activity. He told Peyton Harris that losing basketball was like "someone took my hand, a little piece of my life or something", "my life was basketball. When that was gone I didn't have anything to do and didn't know what my purpose was. It was like being kicked out of my family". From his perspective, if he'd been playing basketball, he wouldn't have been "chillin with certain people" (*Harris Report, at p.3*). When he started spending time with negative peers, at least some of the pro-social peers he'd had with basketball distanced themselves from him.

[104] N.W. and his mother feel that his removal from the basketball team had a devastating effect on his life. I agree but it is too simplistic to say that he was a good kid until he lost basketball. Even N.W. recognizes in speaking to various professionals that he was messing up before he was removed from the basketball team. I have no doubt that his removal from the team accelerated his decline and made it more difficult to come back but the evidence suggests that he had started to move in a negative direction already.

Section 34 Psychiatric and Psychological Reports

[105] Dr. Hansen, a psychologist, and Dr. Klassen, a psychiatrist, are both experts in their fields. Both reviewed a great deal of background information, administered a number of psychological and personality tests, and conducted interviews of N.W. and various collaterals.

[106] The Crown argues that Dr. Hansen's opinion is unreliable because it was internally inconsistent, and he has become too close to the case and taken on the role of advocate. The defence argues that Dr. Hansen is in a better position to provide a holistic assessment because he more fully appreciated N.W.'s background and spent more time obtaining information from people who worked with N.W. at the youth centre.

[107] I do not accept that Dr. Hansen's testimony and opinion are unreliable. He was confused or mistaken about some factual findings made by Justice Derrick but I did not see evidence of internal inconsistency in his evidence or opinion. He has not been in a therapeutic relationship with N.W. I accept that he was passionate in his opinion that N.W. should receive an IRCS sentence and excited about the prospect of being part of that. However, I do not agree that this makes his evidence unreliable. It is simply something that I have to take into account when I assess his opinion. Dr. Hansen's opinions have been regularly relied on by the court. He has provided opinions in the past that supported the imposition of an adult sentence on youth and there is no evidence of a general bias or lack of impartiality.

[108] Similarly, in my view there are things I need to take into account when I assess Dr. Klassen's opinion. His initial opinion and scoring took into account aggravating information that was not in evidence at this hearing (a statement from MG-O and line-sheets from certain wire-

taps). He testified that removing this information from his analysis changed his scoring on some of the tests but not enough to change the result in a meaningful way and did not change his overall opinion.

[109] More problematic from my perspective is his subjective analysis. The information he included in his report from the people he spoke to at the NSYC and his interpretation of that information in court painted a very negative picture of N.W. This is in contrast to the witnesses who testified from the facility. They all recognized that N.W. has attitudes and beliefs that need to be addressed but their general impression of him and his behaviour was positive. This dissonance was most stark when one compares Ms. Anderson's testimony with the excerpts from her that are included in Dr. Klassen's report and then with his interpretation of that information when he related it to the court. There were many examples of this but one that was significant relates to discussions around relationships and the sex trade. Ms. Anderson's testimony on this left me with an impression that she viewed her discussions with N.W. on these topics as positive and a productive use of their time. My impression of her evidence was that N.W. was interested in hearing her advice on challenges in his relationship, was interested in learning about relationship dynamics that were different than those he'd been exposed to, was open to sharing his views around the sex trade (an area of risk for him) and open to having his views challenged by her. None of that is captured in Dr. Klassen's report which simply says " . . sees pimping as a safe and easy way to derive an income, could do it well, even takes pride in his ability in this area. He enjoys talking about it and if there was not risk his dream would be to pimp." When asked about this in cross-examination, Dr. Klassen said what he "heard" from Ms. Anderson was that it was not about treatment but that "He enjoyed talking about girls and pimping".

[110] I am not suggesting that Dr. Klassen failed to accurately record what was reported to him. In fact, Ms. Anderson confirmed that the words attributed to her in his report were mostly accurate, however, she felt it didn't paint a complete picture. She was surprised by its negativity. To paraphrase her, what he wrote was a snapshot, "it isn't all I see".

[111] Dr. Klassen and the Crown say that Ms. Anderson was in a difficult position when testifying. Because she has been in a therapeutic role with N.W., she might be reluctant to say anything negative about him with him sitting in front of her in court. I accept that it would be difficult but I do not accept that she would allow the accuracy of the information she provided under oath to be impacted by that. She is a professional who has worked with difficult/challenging young people for a number of years. I am sure that kind of work would regularly involve confronting youth with their misbehaviour, problematic attitudes or beliefs etc.

[112] In my view, her testimony and the more lengthy passages quoted in Dawn Halls report provide a more contextual and nuanced perspective than the brief excerpts in Dr. Klassen's report.

[113] Dr. Klassen acknowledged in his testimony that the information he relied on from Ms. Anderson was important to his opinion and if that information is different than her testimony, that could impact his view. I would not say that the specific information he relied on was different, it just wasn't complete. If I were to rely solely on the excerpts in Dr. Klassen's report and his interpretation of those excerpts, there is a risk that I would be left with an incomplete picture of N.W.'s attitude and behaviour at the facility. This does not mean that the entirety of Dr. Klassen's evidence or opinion is unreliable, just that I have to take into account that his interpretation of Ms. Anderson's information may not be accurate.

[114] The two experts come at this case with different training, experience and methodology. Dr. Hansen is a psychologist with an expertise in assessing and treating youth in conflict with the law. He favours an approach that examines formative influences and incorporates clinical judgement with actuarial tools. Dr. Klassen is a psychiatrist with a particular expertise in assessing risk, particularly in adults. He favours reliance on actuarial tools over clinical judgement and cautions against focussing on formative influences when assessing future risk. Each has provided me with valuable evidence. Having both perspectives has made my task both easier, because I am better informed, and more difficult because both perspectives are compelling.

Risk of Recidivism

[115] Risk of recidivism is measured primarily through objective assessment tools. There are tools for youth and tools for adults and at 18/19, N.W. straddles those tools. Dr. Hansen and Dr. Klassen disagreed on which tools provide more accurate predictions with Dr. Hansen favouring the youth tools and Dr. Klassen favouring the adult tools. They also disagreed on how individual items within the tests should be scored.

[116] Despite this, they generally agreed that the tests indicate a moderate to moderately high risk of violent recidivism in the community if there are no interventions. Both also recognize that risk in this case includes severe/lethal risk (Dr. Hansen, p. 52, and Dr. Klassen, at p. 25)

Treatability

[117] Actual risk is tied to treatability. The two doctors disagree on N.W.'s prospects of treatability. In summary, Dr. Klassen is not hopeful that N.W. will respond well to treatment and Dr. Hansen is. This disagreement is partly a result of how they score him on psychopathology

checklists, partly how they subjectively assess him based on their interpretation of the available information and partly because they approach their task with different training and methodology.

[118] A variety of psychopathology checklists were used. Dr. Klassen scored him on the Psychopathy Checklist-Revised (PCL-R) and on the PCL: Screening Version (PCL:SV) and Dr. Hansen used the PCL: Youth Version (PCL:YV). These tools are apparently designed as diagnostic instruments rather than risk assessment. They are used in conjunction with other information to formulate an opinion of risk of violence and amenability to treatment. Adults with high scores tend to have poor treatment prognosis and high levels of violence. Psychopathology is not diagnosed in youth.

[119] Dr. Klassen's scores on the PCL-R and PCL: SV would put N.W. as above-average for offenders for characteristics of psychopathology and would indicate difficulties with treatment responsivity. Dr. Hansen's scores on the PCL-YV would offer a more hopeful picture for potential treatment responsivity.

[120] Dr. Klassen and Dr. Hansen agree that N.W. has a conduct disorder, probably adolescent onset as opposed to early onset. Both also agree that this diagnosis is common amongst youth in custody. Dr. Hansen testified that adolescent onset has better treatment outcomes than early onset. However, Dr. Klassen testified that recent research suggests that it is more complicated. Some people with adolescent onset conduct disorder are "life course persistent". That group is at risk for criminal careers. There is some indication in the literature that early callousness is an indicator of "life course persistent" conduct disorder but it appears there is no reliable way of predicting which group a person falls into. Callousness is one of the areas where Dr. Hansen and Dr. Klassen

disagree on how N.W. should be scored within the respective tests. Dr. Klassen sees N.W. as fundamentally callous whereas Dr. Hansen sees characteristics of callousness, but would say it is not pervasive. Neither expert point to any indication of early callousness in N.W.

[121] Dr. Klassen also suggests that N.W. likely has a personality disorder. Because of his youth and because he's been in custody for 18 months, he would not diagnose him with antisocial personality disorder but feels he has characteristics that may well lead to behaviour in the future that would result in that diagnosis. People with anti-social personality disorder tend to be treatment resistant.

[122] Dr. Hansen sees some of the same characteristics but does not say there is a likelihood of anti-social personality disorder.

[123] Both doctors agree that a diagnosis of anti-social personality disorder requires a pervasive pattern of conduct which is not clearly present in this case during the last two years while N.W. has been in custody.

[124] Dr. Hansen's opinion is that this absence of a pervasive pattern of conduct mitigates against the diagnosis and that if there was a personality disorder, we would expect to see the behaviours persisting while in custody, particularly through violence.

[125] Dr. Klassen's opinion is that it is not clear that he meets the criteria but he's in an environment that is designed to keep him from meeting the criteria. We don't see a pattern of conduct in custody because his behaviour has been controlled or managed. In his view, we do see "echos" of the problematic behaviour he was exhibiting before his arrest and "echos" of the

characteristics of personality disorder in the PCL scoring. The information he reviewed, especially from Ms Anderson, leads him to believe that these personality features are still present in N.W., just contained.

[126] Dr. Hansen identified a number of things from N.W.'s time in custody that he saw as indicators of future success in treatment: within the limits placed on the type of therapy that can be offered pre-sentence, he has been fully engaged in treatment throughout his time in the institution; and, he has been able to identify specific risk factors and expressed that he wants a different life. These are significant in the model of change that is used in treatment and suggest that he is ready to change and already engaged in early treatment.

[127] Dr. Klassen questions N.W.'s level of actual engagement in treatment. In his report, he references comments from Ms. Anderson that there had not been a lot of goal setting, that N.W. presents as having "no issues", with "absolutely no mood or mental health concerns", and that he's only in treatment because of the severity of offending behaviour (*Klassen Report,* at p. 7). Ms. Anderson clarified these comments in her testimony:

- "There has not been a lot of goal setting" – she testified that therapeutic goal setting wasn't a high priority at the stage (meaning pre-sentence);

- "he presents as having no issues" - she testified that she meant that he didn't come to sessions with an identifiable goal like "significant mood or anger issues" as compared with someone who would say my anger is getting me in trouble;

- "no mood or mental health concerns" – she testified that she meant that he had no specific mental health concerns such as severe adjustment problems or clinical depression, that would require a referral to psychiatry. He did have concerns such as worry and mood. This aspect of her testimony was corroborated in her therapeutic notes that were referenced by Dawn Hall in her part of the s. 34 Psychological report – "N.W. reported feelings of stress, sadness, frustration, nervousness, anger and disbelief regarding the index offence and the implications for his life if found guilty . . ." (*Hansen Report, at p. ??*); and,

- "Only really in treatment b/c of the severity of his offending behavior" – she testified that his attendance is voluntary. With a serious offence or long remand, she would want to bring a young person in to try to build a rapport but that she would have discontinued if they weren't getting anywhere. She said he comes very willingly and is engaged.

[128] Dr. Klassen did not accept that the information provided by Ms. Anderson was indicative of amenability to treatment. In summary, he felt that the fact that N.W. was interested, engaged and open to discuss things was not an indication that he recognized difficulties in his behaviour, was learning, or saw a need to change his behaviour.

[129] Not surprisingly, Dr. Klassen and Dr. Hansen also disagree on the ultimate issue of whether N.W. should be sentenced as an adult or a youth. Simplistically, In Dr. Hansen's opinion N.W.'s moral culpability and past behaviour are informed by his life circumstance such that if the circumstance is changed and he is given the proper tools, he is treatable and an IRCS sentence is the proper vehicle to deliver that treatment. He also offers the opinion that in many ways an IRCS sentence provides greater accountability than an adult custodial sentence.

[130] Dr. Klassen does not feel hopeful that N.W. can be treated. As a result, the community would be better protected with the long term supervision provided by an adult sentence.

Race and Culture

[131] In his report, Dr. Hansen describes some of the ways African Nova Scotians have been historically and currently marginalized, isolated and discriminated against and explains how that has impacted N.W. in many ways, both macro and micro:

- Education – N.W.'s needs and learning challenges were not identified so not addressed. His poor performance in high school was met with a punitive response by removing him from the basketball team rather than trying to implement more supportive measures;

- Poverty and employment – poverty rates amongst African Canadians, particularly those with single parent families are very high. N.W. was raised in poverty which limited his exposure to the outside world, resulted in him living in neighbourhoods with high crime where gun crime and drug use are normalized. His mother couldn't afford transportation to get him to CHDHS where he might have been better supported and couldn't afford to move to get him away from negative influences; and,

- Male role model - Many African Canadian children grow up in a home without a male role model. Popular culture and the media often portray black men in unhelpful or negative ways. There is a cultural expectation of a need to command respect from peers. M.W. spoke to Dr. Hansen about the "ghetto community culture" which resulted in N.W. being bullied until he stood up for himself.

[132] N.W.'s mother spoke to Dawn Hall about her perceptions of racism. She said she and her children experienced more racism when they returned to Nova Scotia than they had in Ontario.

[133] N.W. has not spoken about specific experiences of racism but one example of where it appears that racial ignorance or systemic racism may have impacted him is his experience with speech pathology while in school. Peyton Harris reported that in grade 2, N.W. was sent to a speech pathologist who detected "errors" in articulation. According to Peyton Harris' testimony, this speech pattern was actually a community dialect.

[134] Dr. Hansen presents his formulation of how N.W. came to commit the offence at p. 53 and 54 of his Report. In summary, it is a narrative of limited opportunity and reduced choice:

- He was raised in a cultural context that limited his opportunities through things such as systemic racism, poverty and social exclusion. These curtailed his chances of success and increased his propensity to become involved in anti-social and criminal activity. He struggled to see a life for himself outside of basketball and crime;

- He struggled to emotionally adjust to the absence and disinterest of his father. This may have led him to be overly sensitive to the need for validation from others;

- He was raised in high crime areas and three of his cousins were murdered. This may have normalized violence. As he got older and more independent he was increasingly exposed to negative peers;

- His undiagnosed learning challenges made school difficult and he wasn't always given good supports;

- His disengagement from basketball removed him from pro-social peer groups further reducing his motivation to remain in school and caused him to gravitate more to negative peer groups; and,

- He started spending time with adults and more violent youth who exposed him to guns, the sex trade and violent crime. His cognitive and learning difficulties may have impacted his ability to understand the full consequences of his actions. He made a series of bad choices in part because of his reduced circumstances and cognitive challenges.

[135] Dr. Klassen's Report did not take into account race and culture. He said that it is a mistake to focus too much on formative influences as opposed to future risk. Formative influences are risk enhancing and returning to that environment would be risk enhancing but in Dr. Klassen's view, Dr. Hansen focused too much on formative influences and not enough on risk. Dr. Klassen is not opposed to taking a "Gladue lens" to the issue but, in his view, that is not the role of the court appointed assessor in assessing risk. Of course, risk assessment is only part of what I have to consider in determining whether N.W. should be sentenced as an adult.

[136] In *"X"*, at para. 194, Judge Derrick summarized her view of how the evidence of race and culture impacted her assessment:

> **…**I have asked myself what the evidence of Robert Wright contributes to the process of determining whether the presumption of "X"'s diminished responsibility has been rebutted such that he is no longer entitled to its protection? I find it raises significant questions about the assessment of "X" as a criminally-entrenched, sophisticated youth. It provides a more textured, multi-dimensional framework for understanding "X", his background and his behaviours…

The cultural evidence in the case before me provides me with a similar perspective. It helps me understand how a young man with no prior youth record could, in 18 months, go from being a generally well behaved, pro-social kid to committing murder. It provides an alternative to the assessment that he is a cold, callous, possibly psychopathic, killer. It also provides a check on my own "common sense" and belief in my understanding of human behaviour by reminding me that my views are formed by my life experiences which are not the life experiences of N.W. Finally, in keeping with the comments in *Ipeelee*, to the extent that N.W.'s race and cultural background resulted in "constrained circumstances", it also diminishes his moral culpability.

Age, Maturity, and Character

Age and Maturity

[137] When he committed the offence, March 29, 2016, N.W. was approximately 3 months past his 17th birthday.

[138] At that time, he was not living independently. He resided with his mother and younger siblings, was enrolled in school but was apparently not attending and was not employed. He started school at CHDHS in September of 2015 but by late fall he was going only sporadically. Eventually he stopped attending classes but hadn't told his mother. He was supported by his mother and criminal behaviour.

[139] N.W.'s mother told Ms. Hall that she always felt that N.W. was immature for his age and for a time worried that he might be developmentally delayed (*Hansen Report, at* p.9). She said his younger brother, D., who is two years younger, was more mature and "street smart". As an example of his immaturity, she told Ms. Hall of an incident from November of 2015 when, after

an argument, he apparently intended to leave home. Later, he called her to say he'd been stopped by police. She went to the scene and when she looked in his bag, realized he'd packed only one t-shirt, a pair of shorts and a keepsake from when he was a toddler, even though it was cold.

[140] In his Report, Dr. Klassen offers an opinion with respect to "the extent to which N.W.'s character is formed or unformed, and/or immature or malleable". That opinion is stated as ". . . at age 19, this gentleman's character is more formed [that] unformed . . ." (*Klassen Report*, p. 27). Dr. Hansen did not specifically address this issue in his report but when asked during testimony to comment on Dr. Klassen's opinion, he disagreed, saying that the neuropsychological evidence suggests that the brain is not fully developed until the mid-20s, particularly the pre-frontal cortex which is responsible for impulsivity and decision making. He also noted that Dr. Klassen was assessing N.W.'s maturity at age 19 and not at age 17, his age at the time of the offence.

[141] In commenting on the offence and the immediate circumstances leading up to the offence, Dr. Hansen said that the context of the offence "had hallmarks characteristic of juvenile offending" (*Hansen Report, p.5).* He said that compared to adults, juveniles tend to be less experienced committing offences, tend to commit offences in groups, commit offences in public, commit offences close to where they live, commit offences involving stolen cars, and under the influence of drugs. In his view, N.W.'s offence shared many of these characteristics. He opined that the events of the entire evening of the murder was reminiscent of a criminal initiation. The discussions about robbery with weapons took place with another youth of exceptionally high criminal status and reputation who had access to guns and ammunition. That individual encouraged others to be involved, including N.W. He said the entire evening could be characterized as "episodic,

unplanned and opportunistic", all of which, in his opinion is a hallmark of juvenile offending. At first blush, this may seem to be contradictory to the finding of Justice Derrick that the murder was planned and deliberate. However, it is clear from the context, that Dr. Hansen was speaking about the evening as a whole, whereas, Justice Derrick was addressing the planning and deliberation required for a finding of first degree murder.

Intellectual Functioning

[142] Information about N.W.'s academic intelligence comes primarily from the evidence of Peyton Harris, her Psycho-educational assessment and the school records summarized therein. In summary, N.W. has struggled academically throughout his education. His best performance was in junior high but, according to Ms. Harris, during that time he was very well supported by the school. Ms. Harris administered a number of cognitive tests. He performed below average on all of those measures except the TONI, a cognitive test that is more culturally sensitive and effective when dealing with people who have not had good access to education. On the TONI, he scored in the average range.

[143] She diagnosed him with specific learning disorders in both reading and mathematics.

[144] Dr. Klassen expressed surprise at his low scores on the various intelligence tests. He testified that, clinically, he didn't get the sense that N.W. was intellectually compromised. He expressed the opinion that these tests can be lower than actual intelligence and felt that the score on the TONI was more consistent with his observations of N.W. during their interview. Ms. Harris was asked if she could explain why Dr. Klassen would think that N.W. was higher functioning than the scores reflected. She said that Dr. Klassen based his view on observations during an

interview and people do not always see what tests reflect. In her experience, it is not uncommon for people who are social or dynamic speakers, etc. to present as if they have more ability than they do.

Character

[145] Until he was around 15 years old, there was nothing about N.W.'s attitude or actions that would cause concern about his character. According to information provided by M.W. to Ms. Hall and Ms. Harris, which is generally corroborated by school records and information provided by Greg White, he had been involved in some minor fights in school and in the community. However, there's no indication that he was generally angry or violent. He was caught with marihuana at school in grade 9 and admitted he was trying to sell it but took responsibility and was apologetic. His mother reported that he did not make threats, talk back, steal, set fires, vandalize, bully or intimidate people or harm animals (*Hansen Report,* p. 14). He was described by Kenneth Fells as a respectful person who did not demonstrate any problematic or concerning behaviour.

[146] Mr. Fells reported to Ms. Hall that N.W. was always respectful and did not demonstrate any problematic behaviour. He said that N.W. was an everyday kid who was very family oriented. He said he was a good boy and he couldn't understand how this could have happened.

[147] After approximately 15, his attitude and behaviour changed and would lead to serious concerns about his character: skipping classes; shoplifting; selling marihuana in his community and at school; ripping people off by selling fake marihuana; receiving money or gifts from girls who were working as prostitutes; spending time with people with guns, riding in stolen cars and committing "robberies" (*Klassen Report,* p. 40 and *Hansen Report*, p. 4).

[148] During the evening preceding the murder, he identified the target for the shooting at Lakecrest Drive and encouraged L.C. to fire the shot into the apartment. In the days after the murder, he was involved in a theft or robbery of a shotgun and while in Ontario, he was involved in pimping and a plan to harm the people who might inculpate him for the murder.

[149] As detailed above, his behaviour in the NSYC has been very good. It is clear he still holds troubling attitudes about relationships with women and the sex trade. He has not demonstrated that he feels much empathy for people outside his immediate family and may have a tendency to manipulate or intimidate people to get them to behave as he wants.

[150] I do not find that he has, other than in the beginning, behaved in a bullying or intimidating manner in the youth centre. Based on the evidence from Ms. Anderson and Ms. Forsyth, I accept that he likes things to be calm, likes to control his environment so that it is calm and to that end sometimes tells new people how it should be. I also accept that this can come across as intimidating. However, there is no evidence to suggest that he is trying to get people to do inappropriate things or that he is purposefully trying to intimidate people.

Remorse

[151] N.W. denies he committed the offence but has expressed some remorse over what happened. To Dr. Hansen, he said:

> I feel bad cos from what I know it happened over something stupid. That's no reason to die. He didn't do anything that I can see. I feel real bad for what was done" (*Hansen Report*, p. 40)

[152] From a treatability perspective, Dr. Hansen testified that admitting the offence is not as significant as recognizing the reasons you ended up there and being prepared to change them. Dr.

Klassen shared the view that absence of remorse for the index offence is not a significant factor for recidivism.

[153] N.W. has also acknowledged regrets and a desire to change his life. To Dr. Hansen, he said:

> I got a lot of regrets, I regret not going to school. The first thing I regret though more than anything is not listening to my mom. All those things she used to say were true. . . she wasn't just saying it she really meant something. She was really honest and she knew what she was talking about. I felt like I knew it all and I regret not listening.

[154] He went on to recognize a need to change the people he associates with, change his education, and his lifestyle in general.

Post-Sentence

[155] If N.W. is sentenced as an adult, he would immediately enter the federal penitentiary process.

[156] Nancy Cormier testified about that system. She has been employed with Correctional Services of Canada for 18 years. She testified that, while N.W.'s youth would be a factor in some assessments, in general, he would be treated just like any other offender. After a brief stay in a local provincial institution, he would be transferred to the regional reception centre at Springhill Penitentiary. He would remain there for up to 90 days during which time information would be gathered to determine, ultimately, which penitentiary he should be placed in.

[157] A conviction of 1st degree murder, even for a youthful offender, would cause the objective security assessments to recommend placement in a maximum security institution. Those

assessments can be overridden by subjective factors such that, with approval from supervisors at the national level, a person can be reclassified from maximum security to medium security. However, the most likely result for N.W. would be that he would be placed at the maximum security penitentiary in Renous, N.B. (Atlantic Institution) for at least two years.

[158] Ms. Cormier testified that there is programming available in the federal system but candidly acknowledged that there would be no where near the same kind of counselling as would be available with the funding available under an IRCS sentence.

[159] Ms. Cormier acknowledged that the needs of youthful offenders, and particularly racialized youthful offenders, have not been properly addressed in the Federal system. Things are changing, such as the recent development of a cultural awareness training program to give staff a better appreciation of African Nova Scotian culture, but there are still areas where recommended improvements have not been made.

[160] If N.W. received a life sentence, he would be eligible for full parole in 10 years from the date of his arrest so in July of 2026. He would be eligible to apply for day parole in July of 2023. He would be supervised on parole for the rest of his life.

[161] If sentenced as a youth, N.W. could receive a maximum sentence of 10 years from the date of sentencing (6 in custody and 4 under supervision) and would be eligible for an IRCS sentence.

IRCS Sentence

[162] The IRCS sentence is composed of a committal to intensive rehabilitative custody (maximum of 6 years) and placement under conditional supervision to be served in the community (maximum of 4 years).

[163] Mr. McAloney, manager of policy and programs with Nova Scotia Correctional Services, is responsible for drafting policy for and maintaining the IRCS program. He testified that the IRCS program is different from other programs due to its intensity and the fact that there is federal funding (up to $100,000 per year) available to provide services over and above what is already available in the youth facility. This allows Correctional Services to hire expertise to carry out the goals of the joint treatment plan developed by the IWK and the youth.

[164] Deputy Superintendent Ralph Hayden and Heidi Rodgers testified about the IRCS implementation process and content. DS Hayden is responsible for programming, overall case management and overseeing IRCS sentences while the youth is in custody and Heidi Rodgers, a Social Worker with IWK forensic youth services, is a complex case manager who works with IRCS cases.

[165] In summary, a sentence plan is developed between IWK and the youth center which is intended to take the youth through four phases from the initial stabilization phase through to preparation for release to community supervision. Once the sentence is imposed, the plan is adjusted to take into account the duration of the sentence. The plans are generally designed to be implemented over a long period, with 4 years being typical. The plans are complex and intense and require the youth's consent and willingness to work with the plan. If the youth withdraws

consent after sentence is imposed, the matter could be brought back to court and converted to a regular custody and supervision sentence.

[166] The youth centre offers programming to all youth that includes violent offender programs, substance abuse courses and education but an IRCS sentence brings additional options such as family therapy, one on one counselling from psychiatrists, psychologist, mentoring, music therapy etc.

[167] The details of the proposed plan for N.W. is set out in the Joint Treatment Plan (JTP). DS Hayden met with N.W. to discuss it and testified that the meeting went very well. He warned N.W. of the enormity of the commitment that would be required from him – that he would be challenged, pulled, and would have to give up things - and gave him examples from other cases. He said N.W. was receptive, open to working with them and expressed a desire to stay in the youth facility beyond his 20th birthday.

[168] His 20th birthday is significant because of s. 93 of the *YCJA* which requires that at age 20, a young person be transferred to a provincial adult facility to serve the remainder of his sentence **"**unless the provincial director orders that the young person continue to serve the youth sentence in a youth custody facility."

[169] In his letter to the court (Ex. 2, tab 9), Chris Collett, Executive Director of NS Correctional Services, wrote:

> . . . given the age of this young person and the relative trajectory of an IRCS order it is highly unlikely that he would be maintained within a youth centre in Nova Scotia past the age of twenty years. Given that the mandate of a youth centre is to respond to the needs of youth between the age of twelve to eighteen years; the prospect of an individual in this environment past the age of twenty years creates

> potential impacts that cannot be assumed by Correctional Services. Furthermore I would advise that upon reaching the age of twenty years this young person would be immediately removed from youth custody should there be any indication of violence or serious breach of custodial rules"

[170] D.S. Hayden and Ms. Rodgers testified about the impact of this on the JTP for N.W. In his view, the stabilization phase for him would be short since he has been in the facility for some time. However, when he turns 20, he will be just in to phase 2 which is the intensive treatment phase. During that phase, N.W. would spend most of his week meeting with clinical staff and involved in programming. Many of these clinicians would be from outside the institution and would travel into the facility to meet with N.W. If he were transferred to a provincial facility, staff would meet with staff at the provincial adult facility to explain how IRCS is delivered in the youth centre. However, they have no control over the adult facility so could not say what kind of access N.W. would have to clinicians. The situation becomes more challenging if he is transferred to an adult facility outside metro since many of the clinicians are in metro or attached to the youth centre in Waterville. In D.S. Hayden's opinion, services to N.W. would be diminished if he were transferred to an adult facility.

[171] The treatment plan is adaptable and the team would work with what they are given in terms of duration. If N.W. were in a provincial adult facility, arrangements for delivery of services would be between the IWK and that facility.

[172] Heidi Rodgers has had some experience with youth who were transferred out of NSYC during IRCS. In one, the youth was transferred to an adult facility but segregated within that institution. In that case, she did communicate with staff at the adult facility to try to maintain IRCS. In two other cases, the IRCS didn't follow them – 1 opted to have the IRCS sentence

collapse and the other was sentenced to an adult sentence for another offence so also collapsed or converted. She confirmed that it would be very challenging to administer the program if N.W. was moved out on his 20th birthday.

[173] During Phase 1, N.W.'s needs would be assessed and clinicians identified and put in place to address those needs. She would then set up the schedule of clinicians. During Phase 2, the young person would typically have at least weekly meetings with an individual therapist, a family therapist weekly, a mentor, and a case manager and would meet as needed with a psychiatric as needed, nursing staff, etc.

[174] Ms. Rogers testified that there is policy in place to address the situation where a youth withdraws his consent. She would convene a case conference to clearly identify that this is the person's wish, perhaps also have the young person get advice from counsel and then return the matter to the sentencing court.

[175] She confirmed that an IRCS sentence is a lot of work for the youth and that this has been discussed with N.W. She said that it is not uncommon for the person's commitment to the sentence to vary over time and her team has ways of dealing with that by attempting to re-motivate the person through relationship building and rapport. If it becomes more of a problem, further steps can be taken depending on the circumstances, including, letters of understanding, taking the youth back to court, involving the family.

[176] A number of witnesses were asked about the possibility of N.W. being kept at the youth facility beyond his 20th birthday if he was meeting all expectations of the facility. All acknowledge that it is theoretically possible but has never happened, except in a few cases for a very short period

of time to allow a youth to finish a program. The concern voiced by all is the risks associated with having an adult in a facility designed for and populated by youth.

[177] The other challenge is that s. 93 (2) of the *YCJA* allows for the provincial director to apply to the court to have a young person serving a sentence in an adult correctional center, transferred to a federal penitentiary if there is more than two years remaining on their sentence.

[178] Mr. McAloney testified that if a youth is sent to a federal facility, the IRCS funding for that youth ends.

Other Cases

[179] I have reviewed many other cases involving Crown applications to have youth sentenced as adults. In many of those cases where the charge is murder, the youth has been sentenced as an adult. However, those cases generally involve youth with significant criminal history and poor post-offence conduct (eg. *R. v. Smith* 2010 NSPC 53, *R. v. Skeete* 2013 NSPC 3). N.W. is unique in that respect.

[180] There are certainly examples of youth sentences being imposed for offences approaching the seriousness of this one. For example, *X*, where a non-IRCS youth sentence was imposed for attempted murder but with extremely aggravating facts. In that case, the young person's antecedents were more troubling and the maximum youth sentence was three years as opposed to the 10-year sentence available here. Other examples include *R. v. T.P.D.* 2009 NSSC 332 and the two co-accused in *R. v. M.W.* 2017 ONCA 22.

[181] Finally, I have been advised that the other young person who was involved with N.W. in the murder of J.C., pleaded guilty to 2nd degree murder as a party. He was not the shooter and was

younger than N.W. He had a significant youth record and pleaded guilty at the same time to another shooting. In that case, the crown agreed to a youth IRCS sentence.

Analysis

[182] To decide whether N.W. should be sentenced as an adult, I have to decide whether the Crown has satisfied me both that the presumption of diminished moral responsibility is rebutted and that a youth sentence would not be long enough to hold N.W. accountable for his behaviour. If not, I am required to sentence N.W. as a youth (s. 72(1.1)).

1. Has the Crown Rebutted the Presumption of Diminished Moral Culpability?

[183] There is nothing more I can say to emphasize the seriousness of this offence. It is a shocking crime, particularly for a 17 year old, and impossible to understand, perhaps even for N.W.

[184] At the time of the murder, he was 17 and still living at home. He had learning disabilities which Dr. Hansen feels impacted his ability to make decisions. Overall, his level of maturity, or lack thereof, appears to be similar to other 17 year olds. In one moment appearing to be virtually adult in their thoughts and behaviour, in another appearing quite child-like.

[185] He was immersed in a violently anti-social group, populated by adults and criminalized youth. He entered that group with a background that included crime, poverty and racism that had the effect of limiting and narrowing his view of what was possible for him. He had no consistent positive male role-model in his life and was raised in a community where male violence was

normalized. The result being, in my view, that he learned a warped concept of what it is to be "a man".

[186] He continues to hold very disturbing beliefs about the dynamics of male – female relationships, particularly surrounding the sex-trade. Many of those beliefs are ill-informed, unsophisticated and immature. He also does not appear to be able to fully appreciate the harm that he has done, either through this offence or his other behaviour. He has, however, demonstrated that he is open to discussing even very difficult topics, open to having his beliefs challenged, and capable of working hard and learning.

[187] In summary, as a 17 year old of average maturity, N.W. committed a terrible act and for 18 months was living a life that was profoundly anti-social. However, for the first 15 years of his life, he was apparently of good character and for the 20 months since his arrest he has shown signs of promise. His background, including the impact of his racial background, reduces his moral culpability. Despite the seriousness of the offence, I am not satisfied that the Crown has rebutted the presumption of diminished moral responsibility.

2. Has the Crown satisfied me that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold N.W. accountable for his offending behaviour? (s. 72(1)(b))

[188] Because of my finding on the first part of the test, I would not be permitted to sentence N.W. to an adult sentence, even if I was satisfied of this part of the test. But, in case I am wrong, I will address it.

[189] Deciding whether a youth sentence would be long enough to hold a young person accountable is not simply a calculation of time and punishment. (*"X"*, at para. 253). It requires a consideration of true accountability, rehabilitation and reintegration. Having said that, the 10 year maximum youth sentence for first degree murder is not an insignificant amount of time in the life of a 19 year old.

[190] Clearly an adult sentence would be longer. But the principle of accountability requires that the sentence be no more than what is just and appropriate.

[191] A youth sentence, particularly an IRCS sentence, has built-in accountability requirements. A youth in custody is brought back before a youth court judge every year to review the sentence (s. 94). An IRCS sentence is an onerous sentence which, in the view of Dr. Hansen, holds people accountable in ways that a strictly custodial sentence cannot. If a youth is not co-operating or withdraws consent, the IRCS sentence can be collapsed and turned into a normal custodial sentence. Because of N.W.'s age, there is the potential for added accountability in the sense that the Provincial Director has advised him that if he is permitted to remain in the youth centre beyond age 20, he would be moved to an adult facility if there are any behavioural issues or if he fails to co-operate with the IRCS sentence.

[192] The JTP that has been put forward here is comprehensive and intense. It addresses all the risk factors and recommendations made by Dr. Hansen and Dr. Klassen. Dr. Klassen acknowledges that an IRCS sentence would offer a better chance at rehabilitation, that the JTP here addresses the right risk factors and that exposing someone as young as N.W. to adult offenders would be deleterious to him.

[193] I accept that the chances of N.W. staying at the youth centre through to completion of an IRCS sentence is highly unlikely. However, I am confident that the people involved in that program who testified before me would do everything possible to try to make it as effective as possible in the limited time or circumstances in which they have to administer it.

[194] In assessing whether a youth sentence could hold N.W. accountable, I have been influenced to a great extent by the views of the witnesses who testified from the NSYF. Many of these witnesses have been employed with correctional services for decades. They have a tremendous amount of experience dealing with youth and have been dealing with N.W. for 18 months. Not one of those witnesses expressed any reservations about having N.W. there under an IRCS sentence except for the concerns about his age.

[195] In deciding whether to impose a youth sentence, I do not have to conclude that there is a guarantee that N.W. would be rehabilitated by a youth sentence. I cannot say that. I only have to conclude that there is a reasonable assurance that N.W. would be rehabilitated to the point where he can be safely reintegrated into society. I can say that, and, based on the evidence in this case, I can say that I have very little faith that he would be rehabilitated with an adult sentence.

[196] In all the circumstances, I am satisfied that a youth sentence would be long enough to reflect the seriousness of the offence and N.W.'s role in it.

[197] I am not satisfied, given the trajectory of N.W.'s life to date, that he is a criminally entrenched youth or a lost cause. Like Dr. Hansen, I am hopeful that with a great deal of effort on his part, a youth sentence with IRCS (even a shortened IRCS) would be long enough to provide

reasonable assurance of N.W.'s rehabilitation to the point where he could be safely reintegrated into society. Therefore N.W. will be sentenced as a youth.

Buckle, JPC