

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

K.M.  
(A Young Person)

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MEMORANDUM OF JUDGMENT  
APPLICATION FOR IMPOSITION OF ADULT SENTENCE

I) INTRODUCTION

[1] On March 22, 2014, K.M. beat Charlotte Lafferty to death behind the elder's complex in Fort Good Hope. He was arrested the same day and charged with first degree murder. He has been in custody since then.

[2] K.M. elected to be tried by a Court composed of a judge and a jury. His trial proceeded in January and February 2016. The jury found him guilty as charged.

[3] The Crown has applied, pursuant to section 64 of the *Youth Criminal Justice Act*, S.C. 2002, c.1 (the *YCJA*), to have K.M. sentenced as an adult. The hearing of that Application proceeded in January 2017.

[4] If he is sentenced as an adult, K.M.'s sentence will be, by operation of section 745.1(b) of the *Criminal Code*, life imprisonment with a parole ineligibility period of 10 years.

[5] If he is sentenced as a youth, the maximum sentence that can be imposed on K.M. is a global sentence of 10 years, consisting of a maximum of 6 years in custody followed by 4 years of conditional supervision in the community. *YCJA*, s. 42(2)(q)(i).

[6] The Crown argues that K.M. should receive an adult sentence. K.M. argues that he should be sentenced to the maximum youth sentence, in addition to the three years he has already spent in custody.

[7] Crown and Defence agree that the maximum youth sentence is available in this case: the *YCJA* gives the Court the discretion to reduce a youth sentence to account for the remand time, but there is no requirement in law that the sentence be so reduced. *R v D.D.T.*, 2010 ABCA 365, paras 33-59.

[8] For the reasons that follow, I have concluded that K.M. should be sentenced as an adult.

## II) LEGAL FRAMEWORK

[9] There is no significant dispute about the legal framework that governs this Application.

[10] The applicable test is set out at Section 72 of the *YCJA*:

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.

(2) The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is on the Attorney General.

(...)

*YCJA*, Section 72.

[11] The onus is on the Crown to establish that a young person should be sentenced as an adult. The analysis does not engage the application of traditional burdens of proof such as proof on a balance of probabilities or proof beyond a reasonable doubt. Rather, the Court must engage in an assessment and weighing of all the relevant factors. The decision comes down to a serious evaluative decision that must be made after careful consideration of all relevant factors. That decision must be made with significant care, recognizing, among other things, the serious impact of a young person receiving an adult sentence. *R v O.(A.)*; *R v M.(J.)*, 2007 ONCA 144, paras 33-34; *R v. Estacio*, 2010 ABCA 69, paras 8-12; *R v B.J.A.*, 2016 MBQB 2017, paras 18-20.

[12] To succeed on this Application, the first thing that the Crown must do is rebut the presumption of diminished moral culpability or blameworthiness that K.M. benefits from. That requirement must be understood in the broader context of the principles that underlie the *YCJA*.

[13] Section 3 of the *YCJA* sets out an unequivocal policy statement by Parliament that the criminal justice system for young persons in this country is separate from the system dealing with adults, and is based on the principle of diminished moral culpability and responsibility for youths. That policy choice recognizes that there is a difference between adults and young persons in terms of development and maturity.

[14] An earlier version of the *YCJA* placed the onus on a young person charged with certain offenses to show that he or she should not be sentenced as an adult. The Supreme Court of Canada struck down that provision on the basis that the presumption of diminished blameworthiness for youths is a principle of natural justice. The Court said:

(...) because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability.

*R v D.B.* [2008] 2 S.C.R. 3, para 41.

[15] The Supreme Court also endorsed a number of comments from various authors who had put forward reasons in support of the presumption of diminished responsibility for youths. These reasons include the following: age plays a role in the development of judgment and moral sophistication; adolescents and children lack a fully developed adult sense of moral judgment and lack the intellectual capacity to fully appreciate the consequences of their acts; in many cases youths act without foresight or awareness, and they may lack empathy for those who may be the victims of their wrongful acts; offenders who act out of immaturity, impulsiveness, or other ill-considered motivations are not to be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals. *R v D.B.*, para 64.

[16] K.M. benefits from this presumption of diminished moral blameworthiness or culpability. The first question to be decided is whether the Crown has rebutted that presumption. That inquiry is concerned with the time of the commission of the offence, not the time of sentencing. *R v L.(B.)*, 2013 MBQB 89, paras 37-38.

[17] The second thing that the Crown has to establish to succeed on this Application is that a youth sentence would not be of sufficient length to hold K.M. accountable for his actions. In making that determination, regard must be had to the principles set out at Subparagraph 3(1)(b)(ii) and Section 38 of the *YCJA*.

[18] Section 3 sets out the overarching principles and policy statements that govern the youth criminal justice system. Subparagraph 3(1)(b)(ii) provides that:

3. (1) The following principles apply in this Act:

(...)

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(...)

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity

(...)

[19] Section 38 sets out the principles and purposes of sentencing, and the factors that must be considered in determining the sentence imposed on a young person:

38. (1) The purpose of sentencing under section 42 (youth sentence) is to hold the young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;

(b) the sentence must be similar to sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances.

(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

(d) all available sanctions other than custody that are reasonable under the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;

(e) subject to paragraph (c), the sentence must

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1);

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community, and,

(f) subject to paragraph (c), the sentence may have the following objectives:

(i) to denounce unlawful conduct, and

(ii) to deter the young person from committing offenses.

(3) In determining a youth sentence, the youth justice court shall take into account:

- (a) the degree of participation by the young person in the commission of the offence;
- (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
- (c) any reparation made by the young person to the victim or the community;
- (d) the time spent in detention by the young person as a result of the offence;
- (e) the previous findings of guilt of the young person;
- (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

[20] This branch of the test set out at Subsection 72(2) has been interpreted in a number of cases. Many of those cases were decided before amendments to the *YCJA* that came into force in 2012. Those amendments, among other things, added specific deterrence and denunciation as permissible sentencing objectives, subject to the principle of proportionality. Before then, deterrence and denunciation were not part of the sentencing legal framework for youths.

[21] It can be assumed that the amendments to section 38 of the *YCJA* were intended to have an effect on the overall sentencing framework under the *YCJA*. Even so, the central focus of Paragraph 72(1)(b) remains accountability and the amendments did not alter the basic meaning of that concept. I agree with the conclusion reached in that regard in *R v P.J.*, 2016 ONSC 3061, paras 53-55.

[22] In *R v O.(A.); R v M.(J.)*, the Ontario Court of Appeal discussed at length what "accountability" means. Although that decision pre-dates the 2012 amendments, those comments remain instructive.

[23] The Court found that accountability is the equivalent of the adult sentencing principle of retribution, which has been described as "the objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, the consequential harm caused by the offender,

and the normative character of the offender's conduct". *R v O.(A.)*; *R v M.(J.)*, para 46.

[24] Accountability is achieved through the imposition of "meaningful consequences for the offender and sanctions that promote his or her rehabilitation and reintegration into society". *R v O.(A.)*; *R v M.(J.)*, para 42.

[25] In considering the issue of accountability, the question comes down to whether a youth sentence would be long enough to reflect the seriousness of the crime committed by the young person, and whether it would be long enough to provide reasonable assurances of the young person's rehabilitation to the point that he or she could be safely reintegrated into society. *R v O.(A.)*; *R v M.(J.)*, para 50; *R v C.H.T.*, 2015 MBCA 4, para 26; *R v Estacio*, para 14; *R v A.(D.R.)*, 2014 MBQB 199, para 17.

[26] "Reasonable assurances" as to the young person's rehabilitation does not amount to absolute certainty: it means a reasonable prediction of future behaviour based on an evaluation of all of the evidence. The issue is whether a youth sentence would be of sufficient length to promote the results of rehabilitation and reinsertion in a meaningful and realistic fashion. *R v C.H.T.*, para 26; *R v Casavant*, 2009 ABQB 672, para 16.

[27] Paragraph 38(2)(d) of the *YCJA* mirrors section 718.2(e) of the *Criminal Code*. It incorporates into the sentencing framework the principle of restraint and its particular significance when sentencing aboriginal offenders, in accordance with the principles outlined in *R v Gladue*, [1999] 1 S.C.R. 688 and *R v Ipeelee*, [2012] 1 S.C.R. 433.

[28] Counsel were not entirely in agreement, in their submissions, as to whether the *Gladue* and *Ipeelee* principles are relevant to both branches of the two-part test set out at section 72, or only to the second one. Nothing turns on this in this case, but it seems to me that generally speaking, the application of these principles belongs in the analysis of accountability. The principles set out in *R v Gladue* and *R v Ipeelee* address the particular circumstances of aboriginal offenders and, among other things, the impact that those circumstances have on their moral blameworthiness. That ties into the principle of proportionality, and relates to accountability. It has less to do with a young person's level of maturity. Of course, the circumstances faced by an aboriginal youth may have had an impact on that youth's development and maturity. If that is the case, that evidence may also be relevant to whether the presumption of diminished moral blameworthiness or culpability has been rebutted. Otherwise, in my view, *Gladue* and *Ipeelee* factors are to be weighed in the assessment of accountability.

### III) THE EVIDENCE TO BE CONSIDERED ON THE APPLICATION

#### A. The circumstances of the offence

[29] Crown and Defence agree that the jury's verdict leaves very little ambiguity as to the factual basis for K.M.'s conviction. The Crown's case at trial was a circumstantial case. It was a very compelling case.

[30] Many witnesses were called to recount how the evening unfolded the night that Ms. Lafferty died. It is not necessary for me to review all this evidence in detail. I will focus on the aspects that are relevant to this Application.

[31] During the evening of March 21, 2014 and throughout the early morning hours of March 22, Charlotte Lafferty and her friend Miranda McNeely had been socializing with a group of people in Fort Good Hope. They spent time at different residences over the course of the evening, and consumed alcohol. K.M. was part of that group.

[32] The group of friends eventually went to Leanna McNeely's house. While they were there, Miranda McNeely and Ms. Lafferty decided to go back to Miranda's house to retrieve a mickey of vodka. K.M. went with them. The plan was for them to retrieve the mickey and go back to Leanna's residence.

[33] Cora Rabisca was at Miranda's house, babysitting. She convinced Miranda not to go back out. Miranda gave the mickey of vodka to Ms. Lafferty. K.M. was getting impatient about leaving the house. According to Miranda, at one point he said to Ms. Lafferty "hurry the fuck up". Miranda was a bit upset about this but Ms. Lafferty did not seem offended. When she and K.M. left her house, they were getting along and everything seemed fine.

[34] Barthelemew Kotchile lived at the elder's complex. That building is a very short distance from Miranda's house. Mr. Kotchile woke up to noises outside his window. He saw a boy beating a girl. He was not able to identify the people he was looking at but was able to describe what the assailant was doing to the victim.

[35] What Mr. Kotchile described was a prolonged, brutal beating. He saw the boy hit the girl repeatedly with a wooden stick. He dragged her to different locations. He removed her pants and panties. He spread her legs apart and kicked



her between the legs. He turned her over. He continuing to hit her even though she was not moving anymore. He urinated on her.

[36] K.M. also sexually assaulted Ms. Lafferty with the wooden stick. He inserted it in her anus. Mr. Kotchile did not see this part of the assault, but it is established beyond a reasonable doubt by the whole of the evidence.

[37] Mr. Kotchile called the R.C.M.P. His calls went through the dispatch system in Yellowknife and were received at 7:17AM and 7:24AM. The dispatcher had difficulty understanding what Mr. Kotchile was saying. Eventually Mr. Kotchile woke up his neighbour, John Cotchilly, and asked him to help. Mr. Cotchilly called the R.C.M.P. and again, got through the dispatch in Yellowknife. His call was received at 7:33AM.

[38] Cst. Pudsey is a R.C.M.P. member and was based in Fort Good Hope at the time. He was on call as of 6:00AM that morning. He received the call from the Yellowknife dispatch at 7:18AM, reporting that there had been an assault at the elders' center. Cst. Pudsey got dressed and got ready to respond to the call. As he was walking out the door he received a second call, at 7:28AM, providing additional details. He started his truck and within a minute, drove to the elders' complex.

[39] When he arrived in front of the building he saw K.M. walking, carrying a wooden stick over his shoulder. When K.M. made eye contact with Cst. Pudsey, he dropped the wooden stick and started running. Cst. Pudsey chased him and almost caught up with him but tripped. K.M. got away.

[40] Cst. Pudsey went to the back of the elders' center and found Ms. Lafferty's body. He was shocked by what he saw. He said it was "almost indescribable", and "like a scene from a horror movie". The face was extremely badly beaten, beyond recognition. The eyes were gone. The nose was gone. There were deep cuts all over the face. There was blood everywhere behind the building. Ms. Lafferty was mostly naked and her clothes were strewn around.

[41] S/Sgt Standing is an expert in blood stain pattern analysis. He examined the scene. His analysis of the blood stains at the scene led him to conclude that there were at least six "impact patterns", meaning at least six different locations where Ms. Lafferty was struck and bled in the general area behind the elders' complex.

[42] The autopsy report provides further evidence of the severity of the beating inflicted on Ms. Lafferty: her face had multiple gaping cuts, one that exposed the bone beneath the skin; all her facial features were flattened; her nose bone and

cartilage were crushed and exposed through the skin; her facial bone and upper and lower jaw bones were fractured; several of her teeth were out of their sockets and were found in her mouth and in cuts on her lower jaw; she had bruising on both sides of her tongue; she had deep bruising to all areas of her scalp; she had bruising over her torso, arms and legs and scrapes on the front of her abdomen; she had bruising on her neck and the bone that supports the voice box was broken; she had blunt trauma injuries on her vagina and anus; she had a cut into her anus that was 4-5 centimeters in length.

[43] At trial, witnesses were asked about their observations of K.M.'s drinking pattern and level of intoxication that night. On the whole, the evidence establishes that although he was drinking that night, he was not highly intoxicated. Neither was Ms. Lafferty. The jury's verdict necessarily implies a finding that K.M. was not intoxicated to the point of not being able to form the intent to kill.

[44] The only factual dispute that arose during the sentencing hearing is whether I should find it proven beyond a reasonable doubt that K.M. urinated on Ms. Lafferty during this attack. The only evidence on this point is the testimony of Mr. Kotchile. There is no forensic evidence that confirms the presence of urine at the scene or on Ms. Lafferty's body.

[45] Virtually everything else about Mr. Kotchile's observations is corroborated by other evidence: the use of the wooden stick to strike Ms. Lafferty; the removal of her pants and underwear; K.M. moving her to different locations; the level of violence used in the attack.

[46] The only thing that Mr. Kotchile was demonstrably mistaken about was how long it took for police to attend after he called them. Mr. Kotchile testified it took two and a half hours for police to come. He repeated this several times and made reference to it again in his Victim Impact Statement. Mr. Kotchile is clearly mistaken about that.

[47] Cst. Pudsey was contacted by Yellowknife dispatch even before Mr. Cotchilly called them. He left his house shortly after he received the second call from dispatch at 7:28AM. Nine minutes later, at 7:37AM he had found Ms. Lafferty's body and was calling Cst. Kraeker for backup. In those nine minutes Cst. Pudsey started his police truck, drove to the elders' complex, saw K.M., chased him, returned to the elders' complex, and found Ms. Lafferty's body. The R.C.M.P.'s response time was very short in this case.

[48] It is not difficult to understand why, for Mr. Kotchile, things seemed to take a lot longer. He was watching helplessly as a brutal beating was taking place, and

later waiting for help to arrive. He was understandably traumatized by what he saw. Anyone would be. His mistaken perception about how long it took police to get to the scene does not call into question the accuracy of his observations of the beating. Mr. Kotchile's testimony satisfies me beyond a reasonable doubt that K.M. urinated on Ms. Lafferty during this attack.

[49] During the investigation blood stains were found at the residence of Samantha Kelly. DNA testing established this was Ms. Lafferty's blood. The only reasonable inference from this is that after he ran away from Cst. Pudsey, K.M. went to that residence looking for his girlfriend Lyla Tobac. He had seen her there earlier that evening.

[50] Ms. Tobac was not at Samantha Kelly's house. K.M. returned home. His mother saw him when he walked in. She saw blood on him and asked K.M. about it. This was overheard by Joseph Turo, who had been sleeping in the living room and woke up to the conversation between K.M. and his mother.

[51] The next morning, news started to spread in the community that a young woman had been found dead behind the elders' complex. This, understandably, caused great concern in the community. Many people started looking for their daughters, including Ms. Lafferty's mother Louisa Lafferty. She heard that her daughter had been with K.M. the night before. She went to his house and asked him about when he had last seen her. K.M. told her he had left her with Miranda McNeely.

[52] K.M. also lied to his mother that morning. She had called Aurora McNeely, telling her she was worried that Ms. Tobac might be the girl found behind the elder's complex because K.M. had come home that morning with blood on him. With Aurora McNeely still on the phone, K.M.'s mother woke him up and asked him about this. She reported back to Aurora that K.M. told her some young men, "the Lennie boys", had tried to fight with him the previous night.

[53] K.M.'s mother denied at trial that this conversation took place. She also denied having been awake when K.M. came home that morning and having the brief exchange that Mr. Turo overheard. At a *voir dire* held before the trial, I found that these conversations did take place. I make the same finding in the context of this Application, based on the trial evidence.

[54] K.M. spoke with Lyla Tobac later that morning. He told her that when he walked home the previous night, he left Ms. Lafferty and Miranda McNeely at Miranda's house.

[55] K.M. chose not to testify at trial and he did not testify at the hearing of this Application either. He also chose not to discuss the circumstances of the offence with various professionals who interviewed him. That was his right, of course. As a result, there is no evidence before me about the circumstances of the offence from his perspective. There is no evidence about why he attacked Ms. Lafferty, or what his thought processes and feelings were before, during and after the attack.

[56] On the whole of the evidence, the only indication of a possible motive for this attack is that K.M. wanted the mickey of vodka that Miranda McNeely had given Ms. Lafferty before she and K.M. left Miranda's house. A mickey identical to the one Miranda gave to Ms. Lafferty was found at the scene. While he was chasing K.M., Cst. Pudsey saw him move his hand down towards his left pocket as though he was checking if something was still in there. This suggests that K.M. had the mickey in his possession after the beating, and that even as he was being chased, he was concerned about having dropped it.

#### B. K.M.'s circumstances

[57] With respect to K.M.'s personal circumstances, I have the benefit of two Pre-Sentence Reports. The first is dated November 4, 2014, and was prepared for K.M.'s sentencing on a charge of assault causing bodily harm for events that occurred on November 28, 2013. The second report was ordered after K.M.'s conviction for Ms. Lafferty's murder. It is dated April 29, 2016, and is essentially an update of the first one.

[58] A few issues were raised about the contents of the Pre-Sentence Reports. With respect to the 2014 report, K.M. takes issue with aspects of the conclusions that the Crown is asking me to draw from comments relating to his lack of empathy. That issue is addressed below at Paragraphs 81 to 89.

[59] With respect to the 2016 report, K.M.'s counsel advised that K.M.'s parents take issue with comments made by some of Ms. Lafferty's family members about alleged improper conduct on the part of members of K.M.'s family. I do not need to make findings about those issues. These are not things that K.M. himself is alleged to have done so they could not be used to draw any adverse conclusions about him. The disputed allegations have no bearing on my decision and I need not comment on them further.

[60] Finally, a number of support letters were filed at the sentencing hearing. Some of them refer to aspects of K.M.'s background and personal circumstances. The information in the support letters is generally consistent with the information

included in the Pre-Sentence Reports, in terms of how K.M.'s family members view him.

[61] The authors of some of the support letters express the view that K.M. should be sentenced as a youth. The Crown takes issue with those aspects of the letters. While I can understand why some of the people who support K.M. feel he should be sentenced as a youth, I agree with the Crown's position that those views cannot have a bearing on my decision. I have disregarded those aspects of the support letters.

#### 1. General circumstances

[62] K.M. was born on April 18, 1996, in Yellowknife. He was raised between Inuvik and Fort Good Hope.

[63] K.M. had, in many respects, a positive upbringing. His father is very skilled on the land. From a young age, K.M. accompanied him out on the land and engaged in traditional activities with him and other members of the family. K.M. acquired significant traditional and bush skills. He won an award for being "top youth trapper of the year" in 2012-2013.

[64] K.M. had a close relationship with members of his extended family, in particular with his maternal grandmother. He considered her his "second mom" and often spent time at her house. The author of the 2014 report writes:

Overall, (K.) stated that he always felt loved and cared for an always had family close by. He stated on a few occasions that he was "spoiled" and that his great-great-grannie often favoured him over the others. He also advised that he was given many gifts and allowed extra privilege on account of the latter.

*Exhibit S-8, page 5.*

[65] With respect to his formal education, K.M. was in grade 11 when he was taken into custody. It appears he was not actually functioning at this grade level at the time. As of April 2014, he was assessed to be at a grade 3-4 level with respect to vocabulary, reading, comprehension and math. By the time the 2016 Pre-Sentence Report was prepared, he was assessed to be at a grade 9 level. He has required one-on-one assistance but by all accounts, he has pursued his education diligently since he has been in custody and has made considerable progress.

[66] K.M. has some work experience. When he was 12 he worked for the Band in Colville Lake for the summer, doing some cleaning around the community and hauling gravel. He also worked in that community when he was 13 and 14. This was short-term employment that consisted of collecting piles of trees to make room for a new airport that was being built. Between 15 and 17, he worked for the Band, filling the town reservoir in the Spring and Fall, working the water hose and pumps.

[67] There were issues within the family when K.M. was young, linked to his parents' consumption of alcohol. There was family violence in the home. K.M. reports he was rarely in the house when these things occurred as he and his sister often slept somewhere else, but he recalls hearing stories from other family members and seeing marks and bruises on his mother.

[68] K.M.'s father's stopped drinking completely over 10 years ago, after the last time he was incarcerated. There is no indication of any further family violence issues from that point on.

[69] K.M. first experimented with alcohol when he was 14. It was not a positive experience. But by the time he was 15 or 16, he began using alcohol more regularly. He also experimented with marijuana when he was 15. By the time he was 17, he was using it daily.

[70] K.M. told the author of the Pre-Sentence Report that as a result of his consumption of alcohol he has had hangovers, black-outs, and on occasion has been in the "drunk tank". He has had conflicts with his mother and failed to return home. Asked if he felt he has a problem with alcohol, he answered "probably".

[71] By contrast, K.M.'s parents told the author of the report that K.M. drank "once in a while", "may" have used marijuana, but that he "always comes home". Neither was of the view that K.M.'s use of alcohol or marijuana was a problem.

[72] K.M. reports that he was bullied when he was younger. When he got older, this stopped being an issue.

[73] K.M. told the author of the Pre-Sentence Report that he may have been sexually abused when he was about 5 years old. He reports having a faint memory of the son of a family friend touching him in an inappropriate manner. He never told his parents or peers about this.

[74] K.M. had one younger sister, F., born in 1998. Tragically, she froze to death while intoxicated in December 2012. She was 14 years old. Prior to this, she and

K.M. had been going through a phase where they were not getting along and were arguing a lot. This was enough of a concern that K.M.'s mother had arranged for counselling to address it. The last time K.M. saw F., they had an argument. K.M. continues to have some unresolved guilt about that. He was also the first family member to see her after her body was discovered. This is no doubt that F.'s death was an extremely traumatic event for K.M. and for his parents.

[75] As already noted, the 2016 Pre-Sentence Report is an update of the first one and addresses mostly how K.M. has been doing while in custody.

[76] The reports about his behaviour while in custody have all been positive. He has participated in all available programming. He has been described as kind and considerate when dealing with his peers and staff, and gentle with other inmates.

[77] He has worked hard on his schooling and has engaged in other productive and positive activities: he has been involved with cultural classes and activities and has taken an interest in cooking and baking. He has met regularly with the facility's psychologist and taken part in various other programs. He has had several visits from his parents and other family members.

[78] K.M.'s behaviour and engagement with the various programs was confirmed by Greg Spronken, the Deputy Warden of the North Slave Correctional Complex. The complex includes the youth and adult facilities in Yellowknife, which have recently been merged, administratively, under the authority of a single Warden and Deputy Warden.

[79] K.M. was admitted at the youth facility on March 24, 2014 and was transferred to the adult facility on July 8, 2016. Mr. Spronken confirmed that K.M. has not been a difficult inmate to manage in either facility. He has been cooperative and has engaged in the various programs available to him.

[80] K.M. has one conviction for assault causing bodily harm on his youth record. He was sentenced for that offence on November 2, 2014. The events that led to that charge arose in November 2013. K.M. pleaded not guilty to the charge initially and the matter went to trial. Partway through the trial, he changed his plea to guilty.

[81] The Agreed Statement of Facts that formed the basis for that conviction was filed as Exhibit S-3 on this Application. It states that K.M. and the victim had a disagreement on November 28, 2013 in Fort Good Hope. This led to a physical confrontation. A short time later, they met again outside another residence and the confrontation continued. At one point the victim was lying on the landing above

the outside stairs in front of the door leading into the house. His arms and hands were up around his head for protection. K.M. stood above him and repeatedly kicked and punched him in the upper body area. Two people who were present told K.M. to stop. K.M. picked up a bench and threw it on the victim. He then got into a truck and left the scene.

[82] The victim sustained injuries: his forehead was scratched and swollen; his upper left cheek was swollen; his ears were bruised; one of them was also swollen; he had pain to his ears and had difficulty hearing for 2 to 3 weeks after the assault; his hands were bruised; he had pain on the side of his chest and to one of his hands.

[83] The 2014 Pre-Sentence Report includes some comments made by K.M. about this incident. He told the author of the report that the victim "was cheeky and acting tough"; that he (K.M.) did not instigate the altercation and that a chair was thrown at him before the assault took place. K.M. is reported saying that he "blames the victim a little bit" for his situation and that the incident makes him "look like the bad guy". *Exhibit S-8*, p.3.

[84] The Crown argues these comments show a failure on K.M.'s part to take responsibility for his actions, and a lack of empathy for his victim. K.M.'s counsel argues that without more information about the earlier altercations, it would be unfair to draw such conclusions.

[85] On the whole of the evidence adduced on this Application, K.M.'s empathy or lack thereof for the victim of the 2013 assault is not determinative of the decision that I must make. Still, as the issue was argued in submissions, I will address it.

[86] I do not think that K.M.'s comments to the author of the Pre-Sentence Report should be disregarded entirely. But they must be considered in light of the other facts before me, including the fact that the assault K.M. was convicted for occurred after there had been two other altercations between him and the victim.

[87] I am far from convinced that it would have been open to the Crown, even if it had wanted to, to adduce evidence in the context of this Application that would provide a more detailed account of the November 2013 offence and more details of the earlier altercations. To the extent that the 2013 offence is relevant to this Application, the Crown may well be bound by the facts it alleged at the sentencing hearing for that offence.

[88] As for whether it would have been open to K.M. to provide additional context about these events, and about his comments to the author of the Pre-



Sentence Report, the issue did not arise because he chose not to testify on this Application. In the absence of evidence, he cannot ask the Court to speculate about why he made those comments. He also cannot ask this Court to speculate about details of the earlier altercations that are not in evidence before this Court.

[89] The two other altercations between K.M. and the victim were referred to in the agreed facts and are part of the context of the overall events. K.M.'s comments to the author of the Pre-Sentence Report must be read taking that context into account. I acknowledge that the comments are subject to some interpretation, and even those reported in the Pre-Sentence Report show some ambivalence. This is consistent with the ambivalence K.M. showed when discussing this issue during the assessment at the Alberta Hospital. I agree with K.M.'s counsel that it would be dangerous to make a firm finding of lack of empathy based on that evidence alone. But the comments do raise some concerns about K.M.'s level of insight and acknowledgement of responsibility.

## 2. The Psychiatric Evidence

[90] On February 12, 2016, I issued an Order pursuant to section 34 of the *YJCA*, that K.M. undergo a psychiatric and psychological assessment at the Alberta Hospital in Edmonton. K.M. was at that facility from for approximately 3 weeks during the timeframe between February 15, 2016 and March 15, 2016. Dr. Mahnoor Sultana, a youth forensic psychiatrist who was part of the team that conducted K.M.'s assessment and co-signed the report filed as an exhibit, testified at the hearing of this Application.

[91] K.M. did not challenge Dr. Sultana's qualifications to give opinion evidence in the field of youth forensic psychiatry. He does, however, dispute some of her conclusions.

[92] Dr. Sultana explained that assessments are done through the work of a multidisciplinary team that involves psychiatrists, psychologists, occupational therapists and psychometrists. Each team member conducts individual assessments. They meet regularly to share information. Ideally, this is done over a period of 30 days, but youths are not always at the facility for that long. As already noted, K.M. was at the Alberta Hospital for a period of about three weeks. He was anxious to return to Yellowknife because his father was about to leave on a hunting trip and K.M. wanted to get back to Yellowknife in time to see him.

[93] K.M. told team members that he intended on appealing his finding of guilt. In those circumstances, the offence is not discussed with the youth being assessed.

[94] Two diagnoses were arrived at with respect to K.M.: "substance abuse disorder" and "borderline intellectual abilities". Dr. Sultana explained that K.M.'s reporting about his substance abuse was inconsistent as he spoke with various team members. He was ambivalent about whether substance abuse was a problem for him at all. This made the assessment of the severity of the disorder more difficult, but the team's conclusion was that this disorder is at a moderate level.

[95] The second diagnosis was based on results of testing done in May 2015 by a psychologist in Yellowknife. Dr. Sultana explained that the tests could not be administered again by the psychologist on her team. The accepted standard is to not repeat these tests within two years because doing so affects the scoring and the results.

[96] Dr. Sultana's team examined the 2015 results and deemed them valid. These results place K.M., in the "borderline intellectual abilities" category.

[97] Dr. Sultana explained that while IQ can be increased if issues are identified early and interventions take place, usually by age 16 or 17 the progress slows down. As of age 18, the IQ level is considered permanent because by that age the brain is fully developed.

[98] K.M.'s verbal comprehension is significantly low, but this is balanced out by his learning from visual and hands-on experience. Despite his difficulties, with adequate supports and teaching methods geared towards his strengths, he is capable of learning and making progress. There was no evidence of K.M. suffering from a mental disorder. There was also no reference to any history of mental disorder in the materials that the team reviewed.

[99] Due to K.M.'s inconsistent reporting when speaking with various team members, they concluded that he should not be tested for personality disorders because the test results would not be valid. It was felt that a comprehensive assessment should be done about this in the future.

[100] Dr. Sultana explained that "inconsistent reporting" refers to K.M. having given different information and views when he was speaking with different team members. She testified that K.M.'s responses tended to minimize his actions. There were concerns from previous testing that he was answering questions with a view of trying to come out in a positive light.

[101] Different members of the team noted that K.M. had low empathy. When he was asked how other persons might be feeling, he would quickly move to how it affected him. For example, when K.M. would be asked about how Ms. Lafferty's

parents might be feeling, he quickly moved to how his parents would be feeling and also mentioned that he had been in custody for a long time already.

[102] Similarly, when discussing his earlier conviction, he quickly moved to the fact that he was being sued by the victim of that assault for an unreasonable amount of money.

[103] Dr. Sultana said that lack of empathy can be seen with people suffering from antisocial personality disorders. She agreed, in Cross-Examination, that it could also be a feature of immaturity.

[104] With respect to K.M.'s level of emotional maturity, Dr. Sultana testified that he presented with logical thinking processes, did not have any emotional breakdowns, was able to self-regulate his emotions and had his own internal checks. She added that there was no evidence in the records that she reviewed that he displayed any emotional immaturity during his time in custody.

[105] When she was asked to compare him with youths of his own age, she answered that K.M. was much more mature than other youths in their unit. She said he consistently presented as well poised and with logical thinking and that this was a striking feature. She also said that despite K.M.'s limited intellectual abilities, he was able to weigh pros and cons, understand right from wrong, and logically plan. In her opinion, these are all features of maturity.

[106] Dr. Sultana's team conducted a risk assessment of K.M. using the "Structured Assessment of Violence Risk in Youth" (SAVRY). The SAVRY is a recognized tool in youth forensic psychiatry and is used to assess adolescents between the age of 12 and 18 to assist in evaluating the level of violence risk associated with the individuals.

[107] The SAVRY is used to assess historical risk factors, social and contextual risk factors, and individual or clinical risk factors. These are weighed against "protective factors". Protective factors are things that are considered to mitigate the risk.

[108] Some of the factors that are scored as part of the test are "static", meaning they do not change over time, whereas others are "dynamic" and can change in either direction. Because adolescence is a time of significant change, the nature and degree of violence risk may change a lot. Dr. Sultana explained that the SAVRY is considered good at predicting risk in the coming six months.

[109] Dr. Sultana acknowledged that there have been very few studies that have examined the reliability of the SAVRY on non-caucasian populations. She knew only of one. She confirmed in Cross-Examination that the SAVRY has never been studied in relation to Canadian aboriginal youth.

[110] Dr. Sultana explained how K.M. scored on the various risk factors and protective factors. Her conclusion is that in the absence of effective intervention, K.M. would continue to present a high risk of violent reoffending, mainly because of his lack of remorse and empathy, failure to take responsibilities, his substance abuse difficulties, and from having witnessed violence during his childhood and having been abused himself.

[111] The SAVRY is considered effective to predict short-term risk. For the purposes of this Application, what is most relevant is long-term risk.

[112] Dr. Sultana testified that long-term risk is difficult to predict. She said that if the risk factors continue to be present and there is no intervention and effective treatment of K.M.'s issues, there would be concerns regarding ongoing risk. Because the team was unable to discuss the circumstances of the offence with K.M., it was difficult to know which risk factors played a predominant role in the murder of Ms. Lafferty.

[113] Dr. Sultana said generally speaking, when people have had a difficult past in terms of development, have been exposed to domestic violence in the home, have suffered abuse themselves, have been bullied or rejected, these are factors that may lead to violence generally and sexual violence in particular. Personality and anger issues can also lead to such behaviours.

[114] As far as treatment options, Dr. Sultana underscored the importance, for treatment to be effective, that there be internal motivation, as opposed to only external motivation. She also said that until someone acknowledges that they have a problem, it is difficult to achieve successful treatment.

[115] Dr. Sultana said that in her view, addressing K.M.'s risk factors would require extensive psychological intervention. This would be aimed initially at understanding the motivations, beliefs and trigger for the murder of Ms. Lafferty. The process would then move to treatment and intervention to address those issues. She said that any treatment and intervention would have to take into account K.M.'s intellectual limitations and be built around his strengths. This might result in treatment taking more time than would otherwise be the case.

[116] Dr. Sultana was unable to express a view as to specifically what length of time would be required for this process to be completed. She said that would depend on K.M.'s engagement and at what point he would start identifying issues.

[117] Dr. Sultana said that K.M. was compliant and polite during this time at the Alberta Hospital. There were no violent incidents, or any incidents of concern, during his time there. From her point of view, it appeared that structure and supervision, combined with lack of access to alcohol and drugs, were working well for him. But she also said that in her opinion, at the time of the assessment, K.M. was not ready for treatment.

[118] In Cross-Examination, Dr. Sultana acknowledged that impulsivity, lack of empathy, lack of insight, and not thinking through one's actions may be features of immaturity. In Re-Examination, she said that impulsivity and lack of empathy are not features unique to immature young persons. They can also be features of antisocial personality.

[119] With respect to assessing how much empathy or remorse a person has in relation to an event, she agreed with the suggestion that one would need to know the full details of that event.

[120] She acknowledged that several things referred to about K.M.'s background (having witnessed domestic violence, being bullied, being sexually abused, the death of his sister) would result in trauma and that trauma has an impact on how a person develops. She acknowledged that detachment and numbness may be coping mechanisms for someone who has suffered serious trauma. Minimizing involvement in subsequent actions may also be a defence mechanism.

[121] She acknowledged, as well, that in cases where a person has suffered significant trauma and has not received help to address it, it is possible that the person may later engage in extreme and unexpected violence.

[122] She acknowledged that it is not uncommon to see children or adolescents who have gone through traumatic experiences to behave in a reckless manner. She added that recklessness can also be a feature of antisocial behaviour.

[123] Dr. Sultana acknowledged that K.M. fully participated in the programs that were available to him during his stay at the Alberta Hospital. Getting him to engage in programs within a custodial setting has not been an issue. She could not, however, speak to what his level of engagement would be outside a custodial setting.

[124] Dr. Sultana was asked if K.M.'s personality and maturity would have likely changed between the time he was first taken into custody and the time of the assessment, given his participation to various programs while in custody, sessions with the psychologist, regular school attendance, and lack of alcohol or drug consumption. She said that it was possible it could have but that based on her review of the record, her opinion was that there was not a big difference in how K.M. presented at the Alberta Hospital compared to how he had presented since he was taken into custody.

[125] Dr. Sultana was questioned about the other youths who were in the unit at the time K.M. was there. This was in the context of her having testified in her Examination-in-Chief that K.M. was much more mature than the other youths in the unit. She explained there are usually a maximum of 15 youths on the unit and the average age is between 16 and 18, with a few who are 19 or 20. She did not have the actual numbers or ages of the youths who were there when K.M. was there. She said there is a high turnover at the unit, as many youths are sent to the unit for one-month assessments.

### C. Evidence about correctional programs and sentence administration

[126] The Crown adduced evidence about the programs available at the North Slave Correctional Center and within the federal correctional system, how decisions as to placement are made, the various types of parole that can be granted to federal prisoners and how parolees are supervised. Mr. Spronken testified about the programs available in the territorial setting, and Cindy Sparvier, a parole officer employed with the Northwest Territories Parole office, testified about various aspects of the federal system.

[127] This evidence is relevant to the second branch of the two-part test set out at section 72 of the *YCJA*. K.M.'s rehabilitation and safe reintegration into the community are considerations under that branch of the test. Access to programs during the custodial portion of the sentence, the methods of progressive reinsertion into the community, and supervision options are important components of the rehabilitation and reinsertion process. At the same time, I note that the type of sentence imposed on K.M. will not be entirely determinative of his placement. If an adult sentence is imposed, a further hearing will have to take place to deal with that issue. *YCJA*, s.76. If he receives a youth sentence, there is still a possibility that an application could be made to the Court to have him transferred to a federal institution. *YCJA*, s. 89(2).

[128] Ms. Sparvier explained that as far as programming, in the federal system, there are low, medium and high intensity programs for offenders. Moderate

intensity programs are no more than two-months long. High intensity programs are six months long. High intensity programs are not offered in the Northwest Territories. Mr. Spronken testified that the territorial system has moderate and low intensity programs that are similar to those offered federally. He also talked about the various initiatives in place in the northern facilities to ensure that there are culturally relevant programs and supports for the inmates.

[129] Ms. Sparvier explained how day parole and full parole are administered. The only location in the Northwest Territories where an inmate can be on day parole is Yellowknife, because that is the only community that has a halfway house and one of the requirements for someone on day parole is spending nights at a halfway house.

[130] Ms. Sparvier explained that federal inmates on full parole in Yellowknife are supervised by her office. Those who are in other communities are supervised by Probation officers, as part of an Exchange of Service Agreement between the federal and territorial authorities. The frequency of face-to-face meetings a parolee has with the parole supervisor depends on the supervisor's assessment of how the parolee is doing.

[131] The decision to grant full parole is made by the National Parole Board, on application of the offender. The case has to be prepared for presentation to the National Parole Board, which includes a risk assessment and an outline of the proposed conditions to control the risk.

[132] If a parolee breaches parole conditions, the supervisor may report that breach and the parolee is taken back into custody pending a determination of whether a revocation hearing will take place. Not all breaches lead to revocation proceedings.

[133] In cross-examination, Ms. Sparvier acknowledged that there are issues with gangs in the maximum security penitentiaries. There is a high rate of incidents of all kinds, including violent incidents between inmates and with staff, in those institutions. These issues are not as prevalent in medium security and minimum security institutions.

[134] She confirmed that the Correctional Services of Canada considers that family and community support are important from the point of view of rehabilitation. However, there is no program in place, at this time, to offer financial assistance to families who wish to travel from the north to visit family members who are incarcerated in southern institutions.

[135] She also testified that there are no core programs in the federal system that are designed specifically for northern aboriginal offenders. Ms. Sparvier spoke of a few initiatives in specific institutions, but on the whole, access to culturally relevant programs is extremely limited in the federal system compared to what is available to inmates who serve their sentences in northern institutions.

#### IV) APPLICATION OF LEGAL FRAMEWORK TO THE EVIDENCE

[136] I now turn to the application of the legal principles to the evidence presented in this case.

##### A. Presumption of diminished moral blameworthiness or culpability

[137] The circumstances of K.M. and the circumstances of the offence must be examined in deciding whether the Crown has rebutted the presumption of diminished moral blameworthiness or culpability.

[138] With respect to K.M.'s circumstances, the evidence of Dr. Sultana is an important factor to consider. She gave opinion evidence about various things, including K.M.'s level of maturity. Just as with any evidence, I am not required to accept Dr. Sultana's opinions and conclusions. I must assess her evidence carefully and decide how much weight I will give to it.

[139] Dr. Sultana concluded that K.M. has a clear understanding of the impact of his actions. She concluded that he has the emotional maturity to look after himself, has shown autonomy and is able to engage in a cost-benefit analysis of his actions. She found that K.M. was more mature than the other youths on the unit. She found this was a striking feature about him.

[140] K.M.'s counsel argued that Dr. Sultana's assessment of K.M.'s maturity in comparison with other youths is dubious, because almost all the other youths who were there at the time were much younger than him. This, he argues, renders Dr. Sultana's comparative assessment meaningless and of little value.

[141] I disagree. Irrespective of the age of other youths who happened to be at the Alberta Hospital at the time as K.M. was there, Dr. Sultana, in her day-to-day practice as a youth forensic psychiatrist, sees a large number of youths. The turnover at the Alberta Hospital is high, as most youths are there for a maximum of 30 days. In my view, Dr. Sultana, by virtue of her training and her work experience, is in a very good position to compare the levels of maturity of different young persons. I accept her assessment about K.M.'s level of emotional maturity.



[142] Of course, Dr. Sultana's opinion of K.M.'s level of maturity at the time she saw him in 2016 is not what matters here. What matters is his level of maturity in March 2014, when he committed this offence. Dr. Sultana testified that, based on her review of the various reports she read, there had not been any significant change in K.M.'s maturity level over the time he spent in custody after his arrest. Her view was that K.M.'s level of maturity when she saw him at the Alberta Hospital was similar to what it would have been when he was first taken in custody and throughout his time on remand.

[143] K.M.'s counsel argues that this opinion should be rejected. He argues that given K.M.'s attendance in school, his sessions with the jail psychologist, and his participation to various programs during his time on remand, it does not make sense that he would not have changed over that period of time.

[144] Educational pursuits and other programs that K.M. engaged in while in custody no doubt had an impact on him. People can acquire and develop skills, and better themselves, throughout their lives. But when she spoke of there not having been any significant change in K.M., Dr. Sultana was referring to something else: she was talking about the areas of emotional maturity, vulnerability and capacity for moral judgment. Those are precisely the things that were underscored in *R v D.B.*, referred to above at Paragraphs 14 and 15. They are the factors that are central to the analysis of whether the Crown has rebutted the presumption of diminished moral blameworthiness or culpability. *R v J.F.R.*, 2016 ABCA 340, paras 18-25, leave to appeal dismissed 2017 canLII (SCC).

[145] Dr. Sultana's conclusions are supported by other evidence. The Pre-Sentence Reports and the evidence of Mr. Spronken suggest that K.M.'s behaviour and presentation were very consistent throughout the period of time he was in custody. He was calm and collected, managed his emotions well, and was never a difficult inmate to manage. He was cooperative and polite with staff. He did not generally have any difficulties with other inmates. He engaged in programs and schooling and made the most of what was available to him. He behaved this way when he was at the youth facility and this continued after he was transferred to the adult facility. This supports Dr. Sultana's conclusions that K.M.'s level of maturity when he was first taken in custody was comparable to what it was when he was assessed at the Alberta Hospital.

[146] Dr. Sultana acknowledged that certain things that were noted about K.M., such as lack of empathy, lack of insight, and the impulsive nature of his attack on Ms. Lafferty, can be features of immaturity. But she also testified that immaturity is not the only explanation for such traits. Lack of empathy and recklessness, for example, can also be manifestations of antisocial behaviour. I do not find that the

presence of these elements undermines or contradicts Dr. Sultana's conclusions about K.M.'s maturity level.

[147] There is additional evidence that suggests that K.M. had the emotional maturity and capacity of moral judgment of an adult in March 2014.

[148] At the time, K.M. had been in a long-term relationship with Lyla Tobac. She slept in his room, at his house, almost every night. That type of relationship is more consistent with an adult relationship than it is with teenage dating.

[149] K.M. had consistent work experience from a young age. He got his first summer job working for the band in Colville Lake when he was 12 years old. He worked during the summers every year after that. He made good wages, enjoyed his work experiences, and thrived in that environment.

[150] K.M.'s family members trusted his maturity and sense of responsibility enough to give him vehicles. He did not have a driver's licence but had his learner's permit.

[151] K.M.'s was less than a month away from turning 18 when he committed this offence. His counsel argued that age should not play a great role in the analysis because the process of maturing is very individualized and a youth's age, in and of itself, says very little about that youth's level of maturity.

[152] As was noted by Dr. Sultana, maturity is not just about age. But that does not mean that age is entirely irrelevant. Courts have considered that factors in deciding whether the presumption of diminished moral blameworthiness or culpability has been rebutted. *R v Casavant*, para 52; *R v Logan*, 2009 ONCA 402, para 16; *R v MacKenzie*, [2009] O.J. No.1068, para 14.

[153] I consider that the fact that K.M. was very close to turning 18, combined with other evidence about his personal circumstances in March 2014, supports other evidence, and Dr. Sultana's view, that he was a mature young man in March 2014.

[154] As for the circumstances of the offence, I accept that Ms. Lafferty's murder was an impulsive act, and that impulsiveness can be a feature of immaturity. But as I already noted, that is not determinative. Many adults commit crimes impulsively. We see this all the time in the adult criminal justice system.

[155] On the night of these events, K.M. was socializing with a number of people who were young adults. K.M. was the one who initiated contact with Renay

Boniface, who was in his late 20's at the time, and suggested that they drink together. There were a number of younger teens who Mr. Boniface did not allow in his house when the party moved there. K.M. was among those who were allowed in. Other people there were adults: for example, Miranda McNeely was in her mid 20's; Ms. Lafferty was 23; Stella Rabisca was 23; Melanie Gardebois was 24.

[156] K.M. followed Ms. Lafferty and Miranda McNeely to Miranda's house to go get more alcohol. They told him to wait at Leanna McNeely's house but he still followed them. This is not the behaviour of a vulnerable teenager who is intimidated by adults. The way K.M. talked to Ms. Lafferty when he wanted them to leave Miranda McNeely's house is also inconsistent with the behaviour of a vulnerable teenager. Certainly, this is not determinative, because an immature teenager could also be impatient, rude, and show bravado. *R v J.F.R.*, para 27. But in the broader context of the rest of the evidence, I find K.M.'s attitude and behavior that evening does not suggest that he was a vulnerable or intimidated youth who was just "tagging along" and influenced by the adults around him.

[157] K.M.'s conduct after the offence is also relevant. He did not panic after the offence. He was walking calmly when Cst. Pudsey saw him. And even after he ran away from the officer, he appears to have been thinking clearly. He went looking for his girlfriend at Samantha Kelly's house, which was the last place where he had seen her earlier that night. He then returned home, had a brief exchange with his mother and went to his room.

[158] The next morning, despite what he had done, he was calm and composed enough to have the presence of mind to lie to Louisa Lafferty about when he had last seen her daughter; to make up a story when his mother woke him up to ask him why he had blood on him when he returned home; and to lie to Lyla Tobac about having walked home and left Ms. Lafferty with Miranda McNeely at Miranda's house.

[159] All this evidence points to K.M. having, in March 2014, the maturity and the capacity of moral judgment of an adult. I am satisfied that the Crown has rebutted the presumption of diminished moral blameworthiness or culpability.

## B. Accountability

[160] As noted above at Paragraph 25, the Crown has the burden of showing that a youth sentence would not be sufficient to hold K.M. accountable for his actions. This factor requires consideration of whether a youth sentence would be long enough to reflect the seriousness of the crime he committed, and whether it would

be long enough to provide reasonable assurances of his rehabilitation to the point that he could be safely reintegrated into society.

[161] Again, in assessing this factor, K.M.'s personal circumstances and the circumstances of the offence must be considered.

[162] K.M.'s risk assessment was done using, among other things, the SAVRY instrument. Leaving aside the issues raised at the hearing about the value of that instrument to predict risk for Canadian aboriginal youths, the instrument is only considered a good predictor for short-term risk. What is more relevant here is the assessment of long-term risk.

[163] Dr. Sultana testified that it is difficult to predict long-term risk. Her opinion, however, is that without significant intervention, K.M. presents a high risk to reoffend.

[164] She testified that K.M. would require treatment for a long period of time. The first stage of that intervention would be to attempt to identify the factors that were at play in the commission of this offence. Once those factors are identified, a treatment plan would be developed to attempt to address them.

[165] Dr. Sultana was not able to be more specific about the length of treatment that will be required. That is not surprising. Assessing the length of required treatment would be difficult at the best of times. Here, as Dr. Sultana noted, much remains unknown about what caused K.M. to attack Ms. Lafferty that night. There is absolutely no indication of what triggered this explosion of violence. This makes assessing the nature and duration of treatment required to rehabilitate K.M. very problematic.

[166] Another factor to consider is that K.M.'s intellectual challenges will have an impact on the duration of his treatment because any treatment that he receives will have to be adapted to play to his strengths and take into account the areas where he has difficulties.

[167] Dr. Sultana also said a number of times that to be effective, treatment has to be based on internal motivation, as opposed to external motivation. At the time of the assessment, it appeared to her that K.M.'s motivations were largely external. He was ambivalent about acknowledging that certain things were even an issue. Dr. Sultana testified that in her opinion, K.M. was not ready for treatment when she saw him. I accept her conclusion in that regard.

[168] Dr. Sultana noted that K.M. has functioned well in a structured environment and has been open to making the most of what was offered. But she could not say whether this would continue outside a custodial setting. Aspects of the evidence filed on this Application suggest that K.M. has not, in the past, done particularly well with complying with restrictions placed on his freedom when he is not in custody. The night of Ms. Lafferty's murder, for example, he breached several conditions of the process he was on in relation to his then pending assault causing bodily harm charge.

[169] K.M.'s criminal record is another factor to consider. The circumstances of the November 2013 offence, even considering that it happened following other altercations with the victim, are disturbing: whatever had happened beforehand, the victim was in a vulnerable position and no longer fighting back as K.M. repeatedly kicked and punched him and threw a bench at him. K.M. continued to hit the victim despite attempts by other people to get him to stop. Irrespective of the issues raised during the hearing on the question of K.M.'s empathy or lack thereof after the fact, the circumstances of that offence, in and of themselves, raise serious concerns.

[170] The violence K.M. displayed in March 2014, and to a lesser extent in November 2013, is in stark contrast with how many of his family members describe him. It is also in stark contrast with his behaviour while in custody: he has been described as cooperative, polite, gentle with other inmates. The level of violence and other aspects of his attack on Ms. Lafferty are profoundly disturbing and, even from a layperson's standpoint, suggests that there are serious, deep-rooted issues with K.M. that will have to be identified and meaningfully addressed before he can safely reintegrate society.

[171] The duration of a youth sentence and that of an adult sentence are very relevant to the assessment required under this branch of the test. And for first degree murder, the difference between the two is enormous.

[172] Sentenced as an adult, K.M. will receive a sentence of life imprisonment. He will be in custody for a period of time and subject to a minimum period of parole ineligibility. Once he is eligible for parole, how long he will remain in custody will depend on the evaluation of his progress as assessed by the National Parole Board. Assuming that he is eventually released on parole, he will be subject to external controls for the rest of his life.

[173] By contrast, under the maximum youth sentence, the starting point would be for K.M. to be in custody for the first 6 years, and under a supervision order for the following 4. As noted by his counsel, there is a possibility that the Crown could

apply to have him remain in custody longer than 6 years. *YCJA*, s.104. One way or another, K.M. would be back in the community without any external controls by the time he is 31 years old.

[174] Simply put, under the scope of a youth sentence, all external controls and monitoring of K.M. will come to an end by virtue of the passage of time, irrespective of whether the root causes of his conduct are identified, whether he receives treatment, and whether he is responsive to it. If he is sentenced as an adult, the National Parole Board will have the ability to decide when he can safely reintegrate society and on what terms. If there are concerns about renewed risk while K.M. is at large, due to alcohol or substance abuse for example, there will be mechanisms available to control that risk.

[175] There would of course be advantages to the imposition of a youth sentence from the point of view of K.M.'s rehabilitation. Although, as noted above, his placement will not be entirely determined by the type of sentence that is imposed, I accept that he has greater chances of remaining in a northern institution if a youth sentence is imposed. This would enable him to remain close to his support systems, have more frequent access to certain resources, such as the psychologist, and remain in an environment that is more culturally relevant for him. These things would be beneficial to his rehabilitation.

[176] Still, under the circumstances, and with all that remains unknown about the root causes of K.M.'s violence, long-term monitoring and controls is of particular concern.

[177] Although each case is different, I find the following observations of the Court in *R v Todorovic* well suited to this case:

Ultimately, in this case, we are left with a horrific event caused by a young person for reasons that are still unfathomable. The evidence of the psychiatrists, fairly taken, is that there is a risk of a repetition of this conduct. While the precise degree of risk is unknown, the nature and extent of [the youth]'s role in this incident is cause for grave concern.

The concept that a young person would ultimately be left free of supervision where there has yet to be an accurate diagnosis of the problem, nor any effective treatment program developed, is as contrary to the need for the public's protection as one could imagine. Someone must be charged with the task of at least making an effort to follow [the youth]'s progress so that if a risk should again present itself there may be some hope of interrupting its path. A youth sentence fails to provide the needed level of protection that an adult sentence does. As MacPherson J.A. said in Logan:

Such supervision is entirely consistent with the overarching sentencing goal of protecting the public from violent criminal conduct.

*R v Todorovic*, 2009 ONSC 40313, paras 74-75.

[178] I endorse those comments. The paramount consideration in terms of K.M.'s rehabilitation, reinsertion into the community, and the protection of public safety is the requirement for long-term monitoring.

[179] Even if I had concluded that a youth sentence would be sufficient to foster K.M.'s rehabilitation and provide reasonable assurances that he can be safely reintegrated into the community, I would nonetheless have imposed an adult sentence in this case because I am profoundly convinced that a youth sentence would not reflect the seriousness of his crime. I am persuaded that such a sentence would not, fundamentally, be just.

[180] First degree murder is the most serious crime known to our law. Murders always have considerable impact on the victims' families and their community. But this murder was particularly horrific, senseless and brutal.

[181] The seriousness of the crime cannot overwhelm the other factors that must be considered. *R v Wong*, 2016 BCCA 305. But it also cannot be disregarded when considering what is required to hold a youth accountable for his actions.

[182] I am satisfied beyond a reasonable doubt that K.M. was not merely reckless about the consequences of his actions: impulsive as this attack was, there was a point during it when he decided and intended to kill Ms. Lafferty. No other reasonable conclusion can be drawn from what he did to her.

[183] He struck her repeatedly with a heavy wooden board. He struck her and kicked her all over her body. He continued to hit her with the wooden board even when she was not moving any more. He struck her face enough times and with enough force to literally destroy it. In addition to this mind-boggling violence, K.M. degraded Ms. Lafferty. He removed her clothes. He inserted the wooden board in her anus. He urinated on her.

[184] This was an unfathomably violent and extremely degrading crime committed against a distant relative and, someone who, just a short time before, K.M. had been socializing with, laughing with, and getting along with.

[185] The senseless killing of this young mother had a profound impact on her children, her parents, her extended family and on the community of Fort Good Hope as a whole. That impact is referred to in the 2016 Pre-Sentence Report and is reflected in a compelling way in the many Victim Impact Statements that were filed with the Court. I expect it was felt acutely by all those who were present at the Victim Impact Statement Hearing held in Fort Good Hope on September 14, 2016, when many of the Victim Impact Statements were read.

[186] Many people have been deeply traumatized and have struggled significantly in the aftermath of Ms. Lafferty's murder. The Court can only hope that these families, and the community, will find a way to heal from these events. It is difficult to imagine, however, what the path will entail and how much time that healing will take.

[187] In considering the issue of accountability, I have not overlooked the positive things about K.M.'s background and the efforts he made to better himself while on remand, and the many support letters that have been filed on his behalf. I have not overlooked his parents' remarks to the Court at the conclusion of the submissions at the hearing, or what K.M. himself said when he addressed the Court directly.

[188] K.M. has taken some positive steps during his time in custody. But on the whole of the evidence, there remain many questions about his level of insight and appreciation for the enormity of what he has done. He appears more focused on the impact that events have had on him and his family than on others. This came across even when he addressed the Court at the conclusion of the hearing of the Application, even though by then, he had listened to the trial evidence, listened to the Victim Impact Statements, listened to the evidence adduced at the Application, and had almost three years to reflect on what he did.

[189] K.M. is fortunate to have the support of his parents and other family members. He will continue to need that support. I would add that those who are supporting him must also come to terms fully with what he has done.

[190] To be truly helpful to his rehabilitation, that support must include helping him face the reality of what he has done. There are aspects of the evidence adduced at this trial that suggest that some of the attempts to support K.M. have been at the expense of the truth. Being protective of a loved one is understandable, but for that support to be healthy and helpful to K.M., it has to be rooted in an acknowledgement of what he did and a resolve to help him meaningfully address the issues that are the root of the terrible violence he is capable of.



[191] In considering the issue of accountability, I have also not overlooked the principle of restraint, and its particular significance in sentencing a youth aboriginal offender.

[192] K.M.'s exposure to family violence and abuse of alcohol in the home as he was growing up, the tragic losses the family has suffered, more significantly the death of his younger sister, the impact that residential school had on his father, must all be taken into account.

[193] But the principle of restraint, as important as it is, cannot be paramount in deciding this Application. K.M.'s crime was the most serious known to our law. His victim was a relative, an aboriginal woman from their aboriginal community. This crime had a profound impact on that community. The principles articulated in the Supreme Court of Canada in *Gladue* and *Ipeelee*, important as they are do not reduce K.M.'s blameworthiness to the point that a youth sentence can adequately address the need to hold him accountable for his actions.

[194] I am satisfied that the Crown has met its onus on the second branch of the test set out at section 72 of the *YCJA*.

## V) CONCLUSION

[195] For these Reasons, the Crown's Application to have K.M. sentenced as an adult is granted. Having granted the Application, the sentence to be imposed is mandated by law. I sentence K.M. to imprisonment for life, without eligibility for parole until he has served ten years.

L. Charbonneau  
J.S.C.

Dated this 20<sup>th</sup> day of April, 2017

Counsel for Crown:

Annie Piché and Jeannie Scott

Counsel for the Young Person:

Charles Davison

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**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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BETWEEN:

HER MAJESTY THE QUEEN

-and-

K.M.  
(A Young Person)

**Publication Ban:** Information contained herein is prohibited from publication pursuant to **ss. 110 and 111** of the *Youth Criminal Justice Act* and pursuant to **s. 28** of the *Youth Criminal Justice Act*.

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MEMORANDUM OF JUDGMENT  
OF THE HONOURABLE JUSTICE  
L. A. CHARBONNEAU  
(APPLICATION FOR IMPOSITION OF ADULT  
SENTENCE)

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