

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and –

L.M.

**REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE ROBERT D. GORIN**

Restriction on Publication

Identification Ban – see *Criminal Code*, s.486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

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

Note: This judgement is intended to comply with the identification and publication bans.

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	July 26, 2018
Counsel for the Crown:	Annie Piché and Brendan Green
Counsel for the Accused:	Peter Harte and Alanhea Vogt

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REASONS FOR JUDGMENT

1. Introduction

[1] L.M. is charged with manslaughter, contrary to s. 236(b) of the *Criminal Code*. He is also charged with sexual assault causing bodily harm contrary to s. 272 (c). Both charges arise from the same events that occurred on or around October 2, 2015 when L. was thirteen years of age and his victim, E.B. was twelve.

[2] L. has pleaded guilty not guilty to the count of manslaughter and guilty to the count of sexual assault causing bodily harm.

[3] For the reasons that follow, I have concluded that the Crown has proved all of the necessary elements of the manslaughter count beyond a reasonable doubt and therefore find him guilty. Having heard the relevant evidence, I also accept L.'s guilty plea to the count of sexual assault causing bodily harm and find him guilty of that count as well.

2. The Evidence

[4] Although it was presented intermittently throughout a period of several months, the evidence in this case was relatively brief. I think it useful to summarize its salient details at the outset.

a) The Crown's Evidence

[5] A large amount of evidence in this case was submitted by agreement. There were agreed statements of facts and books of photographs that were entered as exhibits with the consent of the L.'s counsel.

i) First Statement of Facts

[6] Exhibits 1 through 3 comprise the first statement of facts including its appendices which were filed separately. This statement of facts sets out that:

- E. was living with her mother in Fort Liard on the date charged;
- E.'s evening began with her socializing with two female friends with whom she smoked marijuana but did not consume alcohol. She had planned to spend the evening with one of those friends, K., whose residence the two proceeded to at approximately 8:15 to 8:20 p.m.;
- At approximately 8:45 p.m. E. said she had forgotten her phone charger and that she needed to retrieve it. About twenty minutes later, E. texted K. saying that her mother needed her. A number of text messages between the two were exchanged and the conversation ended with a text message from E. at 9:12 p.m.;

- During the early evening of the date charged, D.S. and L.M. were together at L.M.'s residence. The two are cousins. At 8:00 p.m., L. and D. left the residence. L's mother told them to be back at 11:00 p.m.;
- Later that evening, L. and D. met with E. The three proceeded to a wooded area on the bank of the Liard River that is not visible from the nearby road. The three consumed alcohol and as a result E. lost consciousness. L. then proceeded to put on a condom and have vaginal intercourse with E. It is admitted that E. was unable to consent to the intercourse which took place;
- L. and D. then left the still unconscious E. and went back to L.'s residence where they arrived at 11:05 p.m.. L.'s mother was still up watching the television. She did not observe L. or D. to be intoxicated. Neither L. nor D. said anything to her about E. All three then went to bed;
- On the following morning of October 3, D. woke up at around 8:00 a.m. He decided to check up on E. and found her in the same spot where he and L. had left her. She was unresponsive. D. attempted to get help and shortly before 8:40 a.m. was able to waive down a passing motorist, M.T. He told M.T. that someone was by the riverbank. When they examined E., it was apparent that she had died;
- Another passing motorist, D.N., observed that D. was panicking at the time when he was flagging down M.T. Upon M.T.'s request, he phoned the RCMP at 8:41 a.m. to report the presence of E.'s body. M.T. and D. then proceeded back to E.'s location and D. took his sweater off and placed it over E.;
- D. told D.M. and M.T. that he had been proceeding down the road when he observed something. Both D.N. and M.T. noticed that E.'s body was not visible from the road. D. later admitted to police that this had been a lie and that he had gone to the river to check on E.
- Constables Marc Gagnon and Kyle Hammond attended the scene where they noted E. to be dead. Photographs of the scene and E.'s body were taken by Constable Gagnon. Those photos have been entered into evidence as a bundle as Exhibit 5;
- Shortly after Corporal Jeffrey Butt also took photographs of the scene and E.'s body, which have been entered as Exhibit 6;

- Later that day at 3:55 p.m., Constable Kathy Lugosi from the RCMP Forensic Identification Section attended the scene and took photographs. Those photographs have been entered as Exhibit 7;
- The next day, on October 4 at approximately 2:10, she re-attended with Sergeant Jim Giczi and took further photographs of the scene and which were entered as Exhibit 9 in these proceedings;
- Several items were observed including: two swabs of a red stain on a tree close to E.'s body; a red lifestyle condom wrapper; a used condom; a flashlight; a wooden stick found under E.'s buttocks; and another used condom. A small quantity of marijuana was found inside the flashlight;
- On October 6, 2015, an autopsy was performed on E.'s body. E.'s body measured 164 cm and weighed 59 kg. E.'s nose and mouth contained abundant white foam tinged with blood. There was a laceration to her vagina that was 45 x 10 mm with purple bruising and evident tearing at the base of the wound. There was also abnormal redness of the mucosa at the entrance of the vagina on a surface of 45 x 10 mm;
- E.'s eye fluid indicated a vitreous alcohol level of 400 mg/100ml. A sample of her blood indicated a blood alcohol level of 320mg/100ml. These alcohol levels would have been the same at the time of her death;
- The photographs taken by Constable Turvey who attended the autopsy have been entered into evidence as Exhibit 10;
- A number of items were later seized from D. and L. In D.'s case those items included E.'s mobile phone and items of his clothing. In L.'s case they included items of clothing;
- Forensic testing was later carried out on swabs taken from the scene and E.'s body and items, which were seized at the scene, as well as a known sample of E.'s blood. Similarly the items of clothing seized from D. and L. were also tested;
- Samples of D.' and L.'s blood were ultimately taken as well;
- One of the condoms that were found close to E.'s body was found to contain DNA from both E. and L. There was a biological substance found on the condom that may have been semen. However, this was not confirmed;
- The second condom was tested and found to have E.'s blood on it. No male DNA was found on this condom. No semen was found on it either.

- The wooden stick that was found under E.'s buttocks at the scene was determined to have E.'s blood on it.
- According to Environment Canada's Historical Weather Data for Fort Liard, on October 2 & 3, 2015, the temperature would have been: 1°C at 10:00 p.m.; 0°C at 11:00 p.m.; 1°C at 12:00 a.m.; and then varied from 0°C and 4°C between midnight and the time that E. was found.

ii) Second Statement of Facts

[7] A second agreement of facts was filed and entered as Exhibit 4. That agreed statement of facts dealt with the procedures in place for dealing with patients who present symptoms of alcohol poisoning. The agreed statement of facts states:

- Where a patient is brought to a health centre in the Northwest Territories, showing symptoms of alcohol intoxication, they are assessed in order to determine if it is clear that alcohol intoxication is the underlying problem;
- In situations where it is clear that alcohol intoxication is clearly the only cause of the symptoms, nurses will conduct a past and current medical history;
- They will also conduct a physical examination to determine body temperature, blood pressure, pulse and respiratory rate. Treatment is targeted at the patient's airway, breathing and circulation. The first priority is maintaining an adequate airway. The second is adequate breathing and oxygenation – usually by providing oxygen. The third priority is adequate circulation, including administering intravenous fluids;
- All the foregoing treatments were available at the health centre located in Fort Liard;
- If a patient does not respond to treatment or becomes unstable, nurses at the health centre will call an emergency physician in Yellowknife and a decision will be made on whether it is necessary to transfer the patient to Yellowknife for further assessment and treatment; and
- These assessment and treatment procedures were in place on October 2, 2015 and have not changed since.

iii) D.'s Evidence

[8] The first witness to be called was D. In examination-in-chief, he testified that:

- He was born on October 7th 2000. Therefore he would have been 14 years old on the date alleged;
- He is a cousin of L.;
- He knew E. through soccer;
- On October 2, 2015, he ended up sleeping at L.'s Grandpa A.'s place;
- He had been invited to do so by L.;
- In order to get his mother's permission, he went to his home where he stayed for twenty minutes;
- After she gave him permission, he went to the Hamlet where he met L., who was there already;
- L. had a plastic bottle of alcohol that he showed to D. at L.'s grandfather's place;
- L. told him that he found the bottle under his front steps.
- The label of the bottle was red and the liquid inside was clear like water.
- The bottle was about thirty centimeters tall;
- The liquid tasted awful and smelled like alcohol;
- D. and L. drank from the bottle when they were at L.'s residence;
- L. put the bottle in D.'s backpack;
- D. saw L. text E.;
- They met up with E. while D. and L. were sitting on the steps of the Hamlet;
- The three went behind the Northern Store where they then went for a walk;
- They proceeded to the nursing station and then walked to "the arbour";
- They then went to "the dip" by the riverbank;
- They were planning on drinking there and chose the spot so that no one could see them;
- They were concerned that they not be seen since they were minors;
- The idea to go to the dip was D.'s;
- He talked to L. and E. about why he chose that spot before they went there;
- It was partially light out when they got to the dip.
- Upon arriving there, they proceeded to drink;
- However they also drank while they were walking to the dip;

- L. began to stagger and lose his balance. He became more talkative. He got close to E.
- D. first noticed these changes in L. while they were walking from the harbour to the riverbank.
- D. only had a cap of alcohol at L.'s grandfather's house;
- He had just another cap from the bottle during the walk to the dip;
- Prior to drinking the second cap, L. asked D. if he wanted some of the alcohol. D. responded by saying "I don't know." L. then said "If you're not going to drink then why did you come?" D. replied by saying "Okay then", and drank the second cap;
- When they got to the dip, they continued drinking. D. drank just a little bit more but was the one who finished the bottle. When he finished it he threw it down the river bank;
- D. became dizzy and talkative;
- E. was also consuming the alcohol.
- She took her first drink when the three were walking;
- When the three were drinking during their walk, L. took the bottle out of D.' backpack;
- E. began to walk differently. She was staggering. D. began to notice this when they were walking from the harbour to the dip by the river bank;
- She was dizzy and talkative;
- E. was carrying marijuana with her in her flashlight, which she showed to D. and L. L. said "Let's smoke it up." However, E. refused. D. did not see E. smoke any marijuana while the three were together;
- The dip on the riverbank is close to the Northern Store's storage building;
- There is a road between the dip and the Northern Store that is about five metres away from the dip;
- When they were in the dip L. was seated in the middle of the three. E. was on his right and D. was on his left;
- The three would take turns drinking. L. would tell each of E. and D. when it was their turn to drink and E. and D. would then drink;
- At one point L. tried hugging E., who then pushed him away;
- L. gave his jacket to E. when they were sitting down at the dip;
- At one point E. hugged L. back. L. then pushed her away from him;

- E. then said she was going to close her eyes for a while and passed out;
- D. and L. tried shaking her and tapping her face. When they realized that they could not wake her up, D. said that he wanted to take her back to her friend's place;
- L. responded by saying "No. It's okay";
- The two did not move E.;
- They then talked some more and L. said, "It's your only chance";
- D. took that to mean that it was his only chance to have sex;
- L. then took a condom out of his pants right side pocket and pulled E.'s pants down to her knees;
- L. pulled his pants down to his thighs, put the condom on and told D. to keep watch. D. complied;
- L. went on top of her. D. was three or four feet away from him while he was keeping watch;
- E. was on her back and L. proceeded to have sex with her;
- The sex lasted roughly ten minutes;
- L. told D. to touch her chest and D. did so;
- After L. finished, he told D. that he was done and that it was his turn;
- He gave D. a second condom out of the same pocket from which he had taken the first;
- D. took his pants down to his thighs, put on the condom, and got on top of E. who was still on her back;
- D.'s genitals made contact with E.'s genitals. However, he did not penetrate her or ejaculate.
- L. had first showed him the two condoms when the two were at L's grandfather's place and had said that he had gotten them at the health centre;
- D. was on top of E. for roughly five or seven minutes;
- L. asked him if he was done and D. got off of E.;
- E. was still passed out;
- D. tried to wake E. up;
- E. was making "mmm" sounds;
- D. tried to shake her;
- L. asked D. to help him pull up E.'s pants;

- D. was behind E. by her head and lifted up E.'s upper body while L., who was on his knees, pulled up her pants;
- D. did not want to leave E. there because it was cold and he was worried that dogs or people might come by;
- L. said, "She'll be okay." The two then left E. L. took back his jacket before they left her;
- E. at no point regained consciousness between the time that she passed out and D. and L. left her;
- L.'s mother was awake when the two got home;
- D. and L. sat down on the couch. D. was tired and lay down and went to sleep;
- L.'s brother, C., was also at the house;
- When D. woke up the next morning, he told L. that he was going to check on E. He put on his clothes, took E.'s phone and proceeded to the dip;
- He saw E. and tried to rouse her saying her name. She was lying on her face;
- He rolled her on her back. Her face was pale and her cheeks looked pushed in by leaves like they were bruised. Her skin felt cold and her lips were blueish. E's mouth was open and there were leaves and "puke" in her mouth;
- D. tried cleaning the leaves off her face and out of her mouth. He checked to see if she was breathing. He put his right ear against her mouth. He checked her pulse by grabbing her wrist and then put his right ear against her chest to check her heartbeat. He could not find any signs of life;
- D. began to panic and went straight to the road telling E.'s body that he would be right back. He had tried to carry her but was unable to;
- He saw M.T. and told her that he was running to his house to get a controller when he saw E.;
- When they got back to E., D.s tried to carry her. M.T. told him not to and that E. was dead;
- M.T. tried to get a blanket from D.N. to cover E. D. offered to give her his sweater, which M. put on top of E.;

- D.'s two older brothers and cousin then showed up. D. told them the same story about running to his house to get the controller and seeing E. on the way;
- They took him back to his parents' residence where he washed his face because he had been crying. He went to his parents' room and watched a movie;
- Later that day while D. was at his home, Constable Marc Gagnon came by to ask D. what had happened. D. did not tell Constable Gagnon the truth about what had happened the night before;
- He gave E.'s telephone to Constable Gagnon;
- He had gotten the phone from the coffee table at L.'s grandfather's place when he woke up;
- L. had taken the phone out of E.'s pocket when the two left her at the dip;
- Prior to picking the phone up off the coffee table, D. had not touched it;
- D. saw E. vomiting after she had passed out. She was making gurgling sounds when she was puking. L. told D. not to let E. puke on his jacket;
- D. talked to Corporal Britt Bancroft on two occasions. The first time he spoke to Constable Bancroft, he was not honest with him because he was still scared. He was scared because he did not want people to think badly of him and because he thought he would go to jail if he told them the truth;
- The second time he spoke to Constable Bancroft, he was completely honest with him. However, it was sometime into the conversation before he told him the complete truth;
- Before she passed out, D. had given E. his sweater because she said she was cold. L. told her to try his jacket which he then gave to her;
- When he and L. left E., she was on her side. The two had rolled her over on her side after L. had suggested that they should do so that she would not choke on her vomit;
- At the time of the events in question, D. considered L. a friend.

[9] After his examination-in-chief, D. was cross-examined by defence counsel at some length. I will not review the entirety of D.'s responses to defence counsel's questions since in many cases, he was repeating what he said during examination-in-chief. I will therefore refer only to those portions of the cross-examination that I feel are noteworthy. During his cross-examination D. stated that:

- When L. gave E. his jacket, E. took off D.' sweater which D. took back;
- When L. ultimately took his jacket back from E., D. did not put his sweater over her;
- When L. was texting E., D. told him not to tell her that he was going to be there. He did so because he had heard that she was shy around him because she liked him;
- He stayed with E. and L. because he wanted to drink;
- He is sure that when the three were in the dip, L. was sitting in the middle;
- E. made no noises between the time that she laid down on her back and the time she made the "mmm" noise;
- She made the "mmm" noise on a few occasions;
- When D. was attempting to rouse E., he was shaking her shoulders with both hands;
- D. frequently sees people drinking on the street in Fort Liard. He often saw people outside in Fort Liard who were drunk or passed out;
- D. was drunk at the time of the events giving rise to the within charges;
- The total amount of alcohol he had to drink was three or four capfuls and then before he threw the bottle away, the remains of the bottle, which was less than another capful;
- D. and L. had discussed who of them was going to be the one to stay sober;
- D. had agreed to be the sober one, but drank anyway because he wanted to know what it felt like to be intoxicated;
- D. thinks that the first time that he told the police the whole story was the last time he spoke with Constable Bancroft;
- E. and L. were about the same size on the date charged;
- When he has seen drunk people in the past, they have been screaming and/or having trouble walking;
- L. and E. were having trouble walking to the point that they were almost falling down. They were also having trouble talking;
- Earlier on the date alleged, he remembers socializing with L. and someone else after school and L. eventually asking him if he wanted to sleep over.
- When he phoned his mother, he already knew that the plan was to stay over at L.'s to drink. L. had already pulled the bottle out from under the porch before D. spoke to his mother;

- L. also put some pop in D.'s backpack along with the alcohol;
- D. found out that E. was going to be with them when he and L. were walking by the health station or the nursing station when the two were on their way to L.'s grandparents' house;
- When they met near the library it was getting dark. L. had his phone, which he was looking at, and D. had his brother's ipad, which had wi-fi capability. He used the wi-fi at the library to text his friends;
- The Northern Store is about six or seven metres away from its storage building. The dip is about five metres past the storage building.
- It was D.'s idea to go to the dip;
- L. pulled out the bottle of alcohol out of D.'s backpack by the Northern Store. He is pretty sure that E. took the first drink;
- There were no animals near the dip and no one could see them when they were in the dip;
- The bottle was still three quarters full when they reached the dip;
- While they were walking, they went to the nursing station and had consumed some alcohol while doing so;
- They went to the Northern Store and then to the dip and then they walked downtown behind the nursing station where they saw buffalos and walked back. They then went to the harbour and then the dip and from there they again went to the harbour and again proceeded to the dip. The harbour and the dip are about eight or nine metres away from each other;
- There was no one else walking around other than kids.
- D. drank a cap of alcohol and L. and E. were drinking from the bottle;
- After a five-minute walk, they walked back to the harbour, which was another five minutes away. They then walked to the dip, which was only seconds away from the harbour. Then they walked to the harbour and the dip again;
- The bottle they were drinking from was the same size as a king can of pop.
- By the time they got back to the dip, the bottle was almost half empty;
- L. was staggering. They sat down in the dip facing the river with the Northern Store behind them;
- D. drank a couple of fingers of what was left in the bottle;
- Whenever the bottle was passed from one person to another, it went through L. who was sitting in the middle;

- After E. passed out, D. drank the remains of the bottle. He thinks there were a couple of fingers left in the bottle before he finished it. He had a couple of fingers when they were sharing the bottle and another couple of fingers when he finished it;
- D. wanted to take E. back to her friend's house because that was where she had said she was sleeping over. E. had told them that she told her friend K. that she was going out for a while and that then she would go back to her friends afterwards;
- When D. could not carry her, he did not think of telling somebody he wanted to take her back to her friend's because he was drunk and he wasn't thinking straight;
- He told L. about taking her back to her friend's place. L. said that she was okay;
- L. said that it was D.' only chance and took out a condom;
- There was just a little bit of daylight out at the time. It was 11:00 or 12:00 p.m. when they went back to L.'s house.
- D. does not know when it was that he and L. had the conversation when L. showed D. the condoms;
- He is sure that L. took the condom out of his right pants pocket;
- The first time that D. told the police about the condom he mentioned only that there was one condom;
- When L. pulled out the second condom, it was after he had finished having intercourse with E.;
- When he spoke to Constable Bancroft (apparently on the second occasion he spoke to him), he told him that he did not use a condom. This was after he had told Constable Bancroft that he was stalling over having sex with her. He did not admit using a condom because he was scared of telling him the truth of what he had done;
- Later on in the statement, when Constable Bancroft told him that a second condom had been found at the scene, D. stated that he could not remember using the condom but that he thought he did;
- When D. told Constable Bancroft that he did not remember using the condom he was not being truthful;

- When testifying in chief, he had told defence counsel that he told the police the whole truth during the second statement to Constable Bancroft;
- He was scared what people would think of him when he told Constable Bancroft he could not remember;
- He dropped the condom when he was done;
- He remembers that E. was wearing a blue sweater and leggings;
- D. first saw the condoms when he and L. were at L.'s grandpa's place;
- L. pulled them out of his right pants pocket. He put them back in the same pocket;
- L. told D. he got the condoms at the health centre;
- He is not sure exactly when or how L. told him that;
- He told the police that they were going to make a fire in the arbour;
- They were going to do so because it was cold out;
- D. did not want to leave E. Neither did L. They thought that someone or a dog might come by or even buffaloes;
- They had to go home because L. had a curfew;
- L. was sort of having trouble walking. He was not staggering that much. However, he was dizzy;
- D. thought that when he left her there something might happen to her. He thought that a dog or a buffalo or somebody might walk by;
- When defence counsel asked D. what a wolf would do if it came by, D. responded by saying that it would probably kill her;
- L. ultimately suggested that she would be fine;
- D. did not put his sweater over her;
- When the two got back to L.'s residence, they spoke briefly to L.'s mother;
- L. told him to sleep on the couch;
- D. could have told L.'s mother that he had seen E. in the dip and that she was passed out;
- He did not because he was worried about what people would think of him;
- L.'s older brother, C., came home and woke up D. at about 4:00 in the morning;
- L. woke up as well;
- L. took E.'s phone out of his pocket and put it on the coffee table;
- D. went to the bathroom;

- He did not remember watching a movie at that point;
- He did not go to check up on E. when C. woke him and L. He was thinking that she would be okay;
- He could have told C. He doesn't know why he did not. He did not think that wolves were going to be eating her alive;
- D. agreed that the bottle of alcohol was roughly the same size as a bottle that was shown to him by defence counsel and then entered into evidence. He advised however that the bottle was rectangular. It was wider as well. It was also full.
- The label on the bottle was yellow;
- The bottle that was entered into evidence was one litre in size;
- L. had told him to stop drinking at one point and D. agreed;
- At another point, he and L. discussed the possibility of dogs or animals being in the area;
- He does not remember if L. told him to retrieve L.'s jacket from D. so that E. did not get vomit on it;
- L. grabbed his jacket when he left;
- E. was "puking". By that he means that E. was vomiting;
- It looked like what was going on the ground was vomit;
- He does not know if it was a lot of vomit. But she puked;
- There was a bit of daylight out;
- After E. was sick, they left twenty to twenty-five minutes afterwards;
- It was completely dark when they walked back to L.'s grandparents' place;
- It is not possible that he is mistaken about E. actually vomiting. She was puking;
- He took a course in school just before he talked to Constable Bancroft about people overdosing on drugs. In that course the topic of rolling people on their sides if they were sick was discussed;
- D. is pretty sure that L. was using D.'s iPad to see where they were going.
- When all three of them had been walking, E. took the lid off her flashlight where she had a bag of marijuana inside;
- The topic of the flashlight came up because it was dark outside;
- D. does not remember if L. had his phone with him at the dip. However, he had had it with him at the Hamlet;

- D. does not remember discussing anything about E. when he walked home to L.'s grandparents' house;
- E. started drinking behind the Northern Store when they were walking; They walked something like fifteen to twenty minutes;
- They shared the bottle at the dip;
- It was approximately ten minutes while L. was having sex with E.;
- Then there was the period of time that D. was stalling and simulating sex;
- D. does not agree that it was forty to forty-five minutes from the time they started drinking behind the Northern until the time that he finished simulating having sex with E.;
- D. is not sure how long it was from the time that they started drinking until finishing the bottle. He agrees that the suggestion of forty to forty-five minutes sounds about right to him.

[10] In re-direct examination by the Crown, D. stated:

- They had the ipad out the entire time that night when they were in the dip. D. is pretty sure that they were using it for light the whole time they were there;
- While they were in the dip, there was a bit of daylight out. There were also northern lights and clouds and stars;
- D. had never been drunk before that night;
- At page 26 of D.'s second statement to Constable Bancroft, soon after D. had told him that he did not remember where the condom came from but that he thought he had had it, he responded to a further question by admitting, "I put the condom";
- Earlier in the statement at page 14, the following exchange had taken place between D. and Constable Bancroft:

Q: So go back and start where that happened.

A: Okay. I guess L. he had two condoms, like, then I guess he went first, and then he said he was done and then I was, like, okay. And then -- and then I got -- then I got -- then he gave one and I guess -- then I guess I -- I -- I put it on, but I didn't put it inside her, but I just, like touched her, like yea. I didn't put it inside.

- At page 24 of the same statement, the following exchange occurred:

Q: Okay. Alright. Carry on.

A: Then - - and then he said he was done. And then I said then -- then I - - he gave me the condom, and I put it on, and then I guess I - - I went on top of her. I was just, like ...

- Later on, at page 24, the statement continued:

Q: Okay. So and then what did you do with the condom?

A: I put it - - I think I just put it, like, I took it off and then I guess I left it beside her.

- The only thing that he recalls being said between L. and himself on the topic of E. vomiting was when L. said, "roll her over to her side,"

iv) Constable Kyle Hammond's Evidence

[11] Constable Kyle Hammond was the next witness called by the Crown. He testified that:

- He was stationed in Fort Liard on the dates in question;
- On October 3, 2015, about fifteen minutes before his shift was to start at 9:00 a.m., he received a call concerning a female who was blue and not breathing just behind the Northern Store;
- He asked that Constable Marc Gagnon be called to assist him. After leaving the detachment in the police truck with Constable Gagnon, they proceeded to the Northern Store on the main road;
- Shortly after leaving the detachment, they observed a white car coming towards them being driven by a person named D.N. He directed them to the area behind the Northern Store. Without stopping they proceeded to the area just behind the Northern Store about one hundred yards from the detachment;
- He observed two people in a truck parked about fifty yards away. When he got closer, he saw D. and M.T. standing just shy of the riverbank pointing towards where the body was;
- There was a gradual hill towards the water and a slight depression of a couple of feet within that hill;

- In the depression was a body that was covered with a kind of grey fabric. He is not sure whether it was a coat or blanket;
- Underneath there was a female, with whom Constable Hammond was unfamiliar, who looked to be roughly thirteen to sixteen years of age;
- Her face was very pale. Her lips were partially apart. There was a reddish bluish colouring around them. There was also crumpled dried leaf debris around her mouth and some dried blood at the base of her nose;
- They were of the understanding that she was deceased. Constable Gagnon checked her pulse;
- Behind the Northern Store is a flat treeless area with a road running parallel to the riverbank that people will use for walking and for driving on. About 20 feet on the other side of the road there is a tree-line which is effectively where the slope to the riverbank area starts;
- Constable Hammond could not see the body when he was standing on the service road;
- After Constable Gagnon examined the body, Constable Hammond stayed in the area to take photographs;
- Constable Hammond called his detachment commander Corporal Butt to inform him of the situation after which time he proceeded to take photographs;
- Although Constable Gagnon interacted with D. and M.T., Constable Hammond himself does not recall having any further contact with D.;
- Constable Hammond did not touch the body. However he tried moving the blue hoodie that was up over the body's head in order to examine the head and scalp area. He found that the neck was very stiff and consistent with somebody being deceased;
- The only person aside from RCMP who visited the scene that morning in an official capacity was the coroner;
- Two nurses who were in town that morning approached the scene and asked if their services were required. They were advised that they were not needed;
- During the time that he was posted in Fort Liard, Constable Hammond was familiar with both L. and his brother, C. He would estimate the size

difference between the two as being about five inches. He ultimately clarified that C. was the taller of the two;

- The photographs taken by Constable Hammond were recorded on a digital disk. However, they ultimately went missing. He does not know how that happened.

[12] During cross-examination Constable Hammond stated:

- He has been an RCMP officer for approximately five years;
- He has dealt with the arrest of intoxicated people;
- In determining whether to take such people to police cells or the health centre, a sort of qualitative process is followed since some people tend to exhibit signs of intoxication slightly differently than others. If people are grossly intoxicated to the point that there is a clear concern for their health - such as situations where they cannot talk, walk or stand under their own power - a more health oriented approach will be followed. That approach will be scaled down to people of minor impairment. However, there is no strict policy that requires that if certain symptoms are displayed, an arrestee will be taken to a hospital or health centre. It comes down to the officers observations;
- Those observations and the course that is to be followed would largely depend on the RCMP member's life experience;
- If a highly intoxicated person is in police cells, the process is a little bit more clear-cut. A guard will be continuously available to watch them. Checks will vary between five to fifteen minutes and will include ensuring the person is alive and breathing and has not gone into a medical distress;
- The check would be done from the door unless there is a clear sign of some type of medical difficulty occurring. If so, a member would be called to enter the cell;
- Officer Hammond knew that a detailed search of the scene was going to be done and was eventually aware that a forensic team was en route;
- He was aware that preservation of the scene would be very important;
- He does not recall observing any vomit found at the scene.

v) Constable Marc Gagnon's Evidence

[13] Constable Marc Gagnon was the next witness called by the Crown. He testified that:

- He was on duty in Fort Liard on the relevant dates;
- After receiving a call from dispatch to assist Constable Hammond with an unresponsive female he met with him at the detachment and drove to the area where they understood the body to be;

[14] His evidence as to with whom they interacted and where they went paralleled that of Constable Hammond. He as well stated that E.'s body could not be seen from the road. Constable Gagnon went on to testify that:

- As he approached the body, he noticed that it was on its back and that there was a shirt covering its face. He removed the shirt from the face to determine if E. was still alive. He checked for breath and a pulse and found none. He noted the body was very cold and rigid. He also noted that E.'s eyes were open, her face was very pale and the body appeared very lifeless. He concluded that the person he was observing was deceased;
- He asked Constable Hammond to advise the Corporal of the situation and replaced the sweater on top of the deceased as that was how she initially appeared when he arrived at the scene.
- He took a number of photographs;
- In his testimony, he referred to the photographs previously entered into evidence that he had taken and pointed out different areas of the scene as it was when the photographs were taken;
- He stated that D. looked extremely shaken up and left the scene with his brother W.;
- He next saw D. about an hour or more later and took a statement from him beginning at about 10:10 a.m.;
- The statement was ultimately ended when Constable Gagnon concluded that D. had become a suspect and prevented him from continuing;
- During the taking of the statement, D.'s demeanor was very similar to what Constable Gagnon had observed earlier when he first arrived at the crime-scene;
- Constable Gagnon obtained from D. the cellphone that belonged to E. There were dried blood marks on the cellphone;

- The area where E.'s body was found is a well-known spot where people including youth, who want to drink or take drugs, will sit in order to avoid being seen.

[15] Constable Gagnon was referred to an aerial photograph and identified a number of points in Fort Liard including the nursing station, RCMP detachment, Hamlet Building, the residence of L.'s grandfather, the residence of E.'s mother, the harbour, the location of the body, the boat launch, and the Northern Store. The photograph was entered as Exhibit 12. Constable Gagnon went on to testify that:

- In October of 2015 there were two to three nurses in the community and there was an on-shift or on-call nurse twenty-four hours, seven days a week;
- The nurses lived on top of the nursing station. They could be contacted by telephone or by attending the building itself. At the entrance of the nursing station there is a telephone that will link to the nurses' telephone if it is lifted.
- The nurses always carry their emergency telephone with them;
- In October of 2015, there were four resident RCMP members in Fort Liard;
- Constable Gagnon was on duty from 4:00 p.m. on October 2nd, 2015 to the following morning at 1:00 a.m. He would also have been the primary responder if a call had come in after his shift ended but before 6:00 a.m.;
- He had first aid training prior to October of 2015.

[16] During cross-examination Constable Gagnon stated:

- During his initial statement to Constable Gagnon, D. had made no mention of E. vomiting;
- He protected and preserved the scene prior to the forensic team arriving in Fort Liard;
- He observed no vomit at the scene;
- It was not uncommon for people who were drinking outside to try to get rid of alcohol when they observed the police. He has found bottles of alcohol beside roads in the past.

[17] In re-examination by the Crown, Constable Gagnon clarified that he had never found a full bottle of alcohol on the side of the road.

vi) Constable Kathy Lugosi's Evidence

[18] Constable Kathy Lugosi was next to testify. The Crown asked that she be qualified as an expert in friction ridge analysis identification and comparison - or what is commonly referred to as fingerprint analysis. Defence counsel consented. Taking into account her training and background in the area, this court qualified her accordingly.

[19] I do not intend to review the entirety of Constable Lugosi's testimony as well as all of the photographs that she took. However, of note, she testified that:

- After being advised by Corporal Humbke that a scene in Fort Liard required investigation, she traveled to Fort Liard. She attended the scene to record it photographically both on its interior and exterior. A video specialist came with her to make video-recording of the scene as well;
- It was about 4:00 p.m. on October 3 that she went to the scene;
- She took photographs of the exterior of the scene as it was defined by cordon tape that marked it off;
- She also took photographs of the scene's interior.

[20] The photographs taken by Constable Lugosi illustrate where the various landmarks around the crime scene are located. Such landmarks include the Northern Store, the Northern Store's storage building, the river, the riverbank, the treed area along the riverbank, the grassy area behind the Northern Store, and the walking path/road that is located on it. They also depict the secluded nature of the "dip" where E.'s body was found as well as E.'s body as it was at the time.

[21] Constable Lugosi further stated that:

- The ground area around where the body was found was covered with leaves soil and dirt. It was dry at the time that she took her photographs;
- A yellow police emergency blanket had been placed over E.'s body;
- Once the emergency blanket was removed, she took further pictures of E.'s body;
- E.'s body was lying on its right side. Her arms were out of the sleeves of her sweater.

- The temperature was minus 2 degrees Celsius that day. E.'s body was slightly underdressed for the weather;
- Her hip area was exposed. So were her lower shins;
- There was a toque by her feet; and a condom wrapper amongst the leaves;
- After, the sweater was removed from the deceased's face, one could see that the hood of the hoodie was pulled over her head as far down as her eyebrows. There was foam coming out of her nose and mouth as well as leaves and debris on the left side of her chin.
- There was blood around her mouth, in the right crease of her nose, and smeared on her right cheek
- A condom wrapper was found around her feet;
- Both arms were not in the sleeves of the hoodie;
- At about 5:00 or 5:30 p.m. she left the scene and went back to the office to make some telephone calls that were necessary to the investigation. While at the detachment she photographed E.'s cellphone.

[22] Those photographs were entered into evidence as Exhibit 14. Constable Lugosi continued by testifying that:

- The cellphone was an iPhone. There was a red stain consistent with blood on the back of the phone;
- At around 7:00 p.m. Constable Lugosi returned to the scene;
- There she took photographs of broken glasses and a rope chain with an arrow pendant on the end.

[23] A diagram of the crime scene including the Northern Store storage area, walking path, treed area, body, riverbank and river was entered into evidence as Exhibit 15 through Constable Lugosi. Constable Lugosi then testified that:

- The victim's body was again covered with a tarp and left in the same position. Constable Lugosi then departed the scene and returned the following day on October 4th;
- At that time she took further photographs of the scene. She took photographs of hackings on a small tree close to E.'s body that looked like they had been freshly made with a sharp object. The tree also had stains on it consistent with blood. Swabs of these stains were taken;

- A second condom that was out of the wrapper and hung up in the twigs in the area of the dip was located and photographed;
- E.'s body was then examined at the scene. It was noted that her underwear was not at the correct waistband line and that the skin on her buttock's had dirt and remnants of leaves tucked under the pants;
- When E.'s hoodie sweater was moved up, her left arm was outside of her sleeve. It was bent and on top of her belly just below her bra line.
- There was no major bleeding in her hair or ears;
- When she was rolled over on her right side, her buttocks area was observed to be exposed. There were remnants of leaves observed on the skin underneath the pants she was wearing. Her underwear were below the area where the thigh meets the buttocks;
- When E. was rolled over, a branch that had been located under her buttocks area had red staining on it consistent with blood.
- There was also similar red staining noted on the lower seat of her pants.
- Once the body was removed, the second condom was photographed;
- E.'s flashlight was also photographed;
- Constable Lugosi later examined the condom wrapper that had been found at E.'s feet for fingerprints. She was unable to find any fingerprints on the condom wrapper.

[24] In cross-examination Constable Lugosi stated that:

- She did not observe any vomit at the crime scene;
- The area was dry;
- She had observed things very closely and had even noted tiny red stains on leaves;
- She believes that if there had been vomit present she would have seen it.

[25] In re-examination Constable Lugosi testified that:

- Vomit has a distinct odour and she smelled nothing to indicate its presence;
- If food had been consumed, the vomit would be chunky. If it were liquid it would seep into the ground between the leaves;
- She believes that if there had been vomit, she would have smelled it;
- If the vomit had been liquid, she would not have seen it.

vii) Dr. Brooks-Lin's Evidence

[26] The next witness to testify was Doctor Elizabeth Brooks-Lin. Following a voir dire, I qualified Dr. Brooks-Lin to give expert opinion evidence on the topics of forensic pathology and general medicine. Dr. Brooks-Lin testified that:

- To the best of her knowledge and belief E. died of acute alcohol intoxication;
- There was no evidence of any other natural disease or trauma that could have killed her. Given her high blood alcohol level and the absence of any other rational explanation, it is reasonable to conclude that alcohol intoxication was the cause of death;
- The alcohol level in the vitreous fluid in her eye indicated an alcohol level of 400 milligrams per 100 millilitres. The blood alcohol level that was determined by taking a sample of her blood was 320 milligrams per 100 millilitres;
- The difference between the levels makes sense since due to the isolated nature of the eye fluid, it is not affected as much by a phenomenon that is called post-mortem drug redistribution;
- Even a level of 250 milligrams percent could be potentially fatal to an adult who is not very tolerant to alcohol;
- There is an assumption that children are more susceptible to alcohol poisoning than are adults;
- E.'s lungs were very heavy and congested. They were twice as heavy as would have been normal due to the fact that they were filled with fluid and blood. With acute alcohol intoxication there is a degree of respiratory depression. The lungs start to fill with fluid and blood because the breathing rate has slowed and fluid can come out of the lungs into the airways where it mixes with a material called surfactant. A fine foam is then produced. The presence of this fine white foam within the airways, mouth and nose is a nonspecific finding that is observed in a number of deaths caused by respiratory depression;

- The presence of the foam does not necessarily equal a drug or alcohol related death since it can occur in people who drown or suffer from congestive heart failure;
- In this case, there was no indication that E. was suffering from a heart disease or that she could have drowned;
- Scattered petechiae were also observed to be present on E.'s body. Petechiae are small pinpoint sized hemorrhages or bleeds into the skin surface or causal linings. They are very small dot-like hemorrhages or bleeds. They are nonspecific because they can occur in suffocation-type deaths or if someone has been lying face down for a period of time after death;
- The mechanism through which death occurs as a result of alcohol intoxication varies. A severe respiratory depression can occur, which may lead to foam in the mouth, could lead to a coma and death. An imbalance in blood and body fluids resulting from alcohol intoxication can lead to an abnormal heart rhythm;
- Children may suffer from hypothermia as a result of acute alcohol intoxication alone. Because alcohol causes blood vessels to dilate and because of the higher surface to body mass ratio of children, they lose heat more quickly than adults;
- The length of time it takes for death to occur following unconsciousness caused by acute alcohol intoxication is a very difficult question to answer with any degree of medical certainty. It will vary with individuals and is not something on which Dr. Lin-Brooks can assign a time period;
- While somebody could theoretically suffer from an idiosyncratic hypersensitivity reaction to alcohol and die in a matter of seconds, it is more likely that a time frame would be minutes to hours;
- The length of time required will depend on: the individual's health; the actual mechanism of death; the amount of alcohol in the individual's system; and whether they've stopped drinking and the blood alcohol level is going down;
- There was no evidence of aspiration or vomit in the case of E.;
- Aspiration can cause a quicker death;
- Given the high level of alcohol in E.'s system and a presumed normal tolerance for a 12-year-old, one could assume that her death may have been

relatively swift. However, that depends on how long it took for her to get to the level of 400 milligrams per millilitre;

- It is reasonable to scientifically conclude that an otherwise healthy child who drinks enough alcohol to get her level to 400 milligrams percent would die more quickly if they drank all of that alcohol in a half hour to an hour than would be the case if they were drinking over a longer period of time;
- It is entirely possible that swift medical attention would have saved E.'s life. Dr. Brooks-Lin is aware she was showing signs of acute alcohol intoxication such as unconsciousness;
- Her airways could have been protected. A breathing tube could have been put in and she could have been provided oxygen. She could have been rehydrated. She could have been provided a dextrose solution. She could have been kept warm;
- Alcohol does not have an antidote. Trying to pump out the stomach is not something that is undertaken generally since alcohol is absorbed very quickly from the stomach;
- Hypothermia was a possible contributing factor to E.'s death;
- Hypothermia does not require freezing temperatures. It is not uncommon for hypothermia deaths to occur up to 10 to 12 degrees Celsius. This is particularly true if one is acutely intoxicated by alcohol due to the confusion that can occur and the consequent inability to protect oneself. Also the vasodilation of the blood vessels caused by alcohol can result in an accelerated loss of heat from the body;
- Dr. Brooks-Lin noted that the body of E. had a laceration on right lateral wall of her vagina. The laceration was 3.5 centimeters from the entrance of the vagina. It could best be described as a tearing of the tissue as opposed to a cut caused by a sharp object. Its area was 4.5 by 1 centimeters and had a depth of 3 millimeters. The wound was superficial with purple blue bruising;
- The laceration had bridging at the base of the wound indicating tearing caused by blunt force trauma. The object that caused the injury was not sharp;
- There was also erythema at the entrance of the vagina. Erythema simply means redness, possibly caused by chaffing of the tissue in that area;

- Based on the presence of condom packets at the scene nearby E.'s body and the fact that E. had acute alcohol intoxication, Dr. Brooks-Lin is of the view that the injuries were likely the result of some form of penetration of her vagina and that that may have been through sexual intercourse;
- The penetration occurred before death. The bruising that Dr. Brooks-Lin referred to is a vital reaction that occurs during life;
- The object could not have been sharp. It could easily have been a body part such as a hand or a penis or another blunt object;
- E. would have bled as a result of the injury. The fact that she was still alive and her heart was still beating would cause this to happen;
- The body may still bleed a small amount after death. But the majority of the bleeding would have stopped after death because the injury was superficial;
- The injury to E.'s vagina would not have contributed to her death;
- Had E. lived, the injury would have healed due to its superficial nature, although there may have been a risk of infection;
- If no infection occurred the laceration would likely have taken several weeks to heal;
- If a child is brought to a medical facility within minutes of becoming unconscious that would increase her chance of being saved. This is because she is not in a position to save herself. One can argue that once one has gone into a coma it's already a late stage of intoxication. However, the chances of survival are higher once they are in the hospital because at that point their airways can be secured and their vital signs can be monitored so that resuscitation can be attempted if required.

[27] In cross-examination Dr. Brooks-Lin testified that:

- There was no physical evidence of hypothermia at the autopsy;
- She observed no evidence that E. had been lying on her side;
- Due to the dried blood that pooled into the side corner of E.'s right naris (the crease between her lower nose and her face), it would make the most sense that E. would have been on her back when the blood emanated;
- If the alcohol consumption had occurred rapidly, it would be more likely that the individual would have died faster;

- A blood alcohol level of .4 milligrams percent is likely toxic in the case of a 12-year-old;
- From a scientific perspective it is reasonable to suggest that it would make sense that for a blood alcohol level of .4 milligrams percent to occur in a 12-year-old, the alcohol would have had to have been consumed in a short time frame such as half an hour. It is reasonable to suggest that otherwise the subject would pass out before being able to consume sufficient alcohol to reach that level.

[28] When defence counsel suggested to Dr. Brooks-Lin that given that there were attempts to rouse E. and that the two people who were with her ten to fifteen minutes after that then left her, she must have died a relatively short space of time after they were unsuccessful in rousing her, Dr. Brooks-Lin responded by stating that she is unable to be absolutely precise about the number of minutes it would take for an individual to die from acute alcohol intoxication. She added that one reasonable assumption is that E. may have died shortly after she was last seen. However, if there were still alcohol in her stomach that was being absorbed, that alcohol could still be absorbed, so it would have depended on that factor as well. She further testified that:

- It is not unreasonable to suggest that all of the alcohol in her stomach would be absorbed within ten minutes after she stopped drinking. It would be a matter of minutes before it would all be absorbed;
- It is not unreasonable to assume that any alcohol that is absorbed at the thirty-minute mark would be absorbed and distributed throughout her body at the forty-minute mark. However, she cannot be definitive about it;
- With the scenario provided by defence counsel it would make reasonable sense that E. would have survived minutes as opposed to hours following the forty-minute mark.

[29] In re-examination by the Crown, Dr. Brooks-Lin stated that all of the answers that she had given to defence counsel concerning the time it could have taken E. to die were based on the assumption that the alcohol was consumed within thirty minutes.

[30] I then asked Dr. Brooks-Lin if the difference in the blood alcohol levels taken from the body and the vitreous humour could be explained through elimination that occurred prior to E.'s death as well as after death. Dr. Brooks-Lin responded in the affirmative.

[31] Defence counsel then examined Dr. Brooks-Lin on the response that she had just given to my question. Dr. Brooks-Lin stated that she could not state whether or not E.'s elimination of blood alcohol indicated by the differences in blood alcohol level in the eyeball and the body were ante-mortem or post-mortem.

viii) Constable Britt Bancroft's Evidence

[32] The next witness to testify was Constable Britt Bancroft. He stated that:

- In October of 2015 he was a member of the RCMP Major Crime Unit in Yellowknife. He had been contacted by his supervisor, Corporal Humbke on October 3rd concerning E.'s death. He was appointed as lead investigator for the file;
- He arrived in Fort Liard at around 2:00 p.m. and visited the scene at approximately 3:40 p.m.;
- He noted a bison in the general area of the crime scene;
- After the RCMP had secured the scene, he gave instructions that if the bison came near the scene it was to be shot in order to protect the scene's integrity;
- Corporal Humbke took two statements from D. The first one was on September 28, 2016 and the second was on February 28, 2017;
- The purpose of the second statement was to clarify the type of liquor that was consumed and where it came from, and the presence of a second condom that had been located at the scene. It was a more focussed statement;
- In the second statement, D. stated that he had a conversation with L. in which L. told him he got condoms at the Health Centre;
- After clarifying things with D., he believes that D. told him that the conversation between himself and L. occurred at L.'s house;
- During the first statement he took, D. stated three times that E. had vomited that night.

[33] In cross-examination Constable Bancroft was asked a number of things concerning his “understanding” of what transpired or was observed during the investigation. His responses to the questions were not based on first-hand observations and were clearly based on what he had been told by others. They were not admissible and I will not refer to them.

[34] However, he testified that no steps were taken to ascertain to whom the toque which was found at the scene belonged to and that a patch of dirt depicted at the top of photograph 142 of Exhibit 9 was uphill from the deceased.

ix) Third Agreed Statement of Facts

[35] The final evidence provided by the Crown during its case was a further agreed statement of facts entered as Exhibit 20. The agreed statement of facts stated that the audio recording of the statement that D. initially provided to Constable Marc Gagnon on October 3, 2015 lasted for 28 minutes and 29 seconds. It was agreed that in the statement he stated that:

- C. was shaking D. and L. and trying to get them up to watch TV;
- He turned on the television and they started watching a movie called Riddick;
- It was about 6:00 o'clock in the morning when this happened.

[36] During the statement D. made to Constable Gagnon, he did not describe any sexual assault or mention that E. had “puked” or vomited in any way.

[37] The Crown then closed its case. Defence counsel applied for a directed verdict of not guilty on the manslaughter count. I dismissed the application.

b) The Defence Evidence

[38] The defence elected to call evidence. The first witness to testify for the defence was L.

i) L.'s Evidence

[39] L. testified that:

- His birthdate is July 11, 2002. He was 13-years-old in October of 2015;
- His parents are V.M. and W.M.;
- He has seven other brothers and sisters;
- His family lives in Fort Liard;
- He has not always lived with his parents. There have been times when he was in foster-care with his aunt Shirley and Uncle George;
- He grew up living on and off with either his parents or his aunt and uncle;
- He lived with his aunt and uncle about sixty percent of the time and with his parents for the remainder;

[40] He provided some details of Social Services' involvement with his family as well as the conditions that existed in his mother and father's residence. He advised that:

- He would cook for himself and take care of himself when he was staying with his father and mother due to the fact that they were often drunk;
- It was normal for him to see his parents drunk;
- He thinks they would often drink a couple of forty ounce bottles of liquor;
- He would often see them black out;
- When they were blacked out, they could talk and walk. But they would just usually sit down;
- He could tell they were blacked out by the way they were acting;
- He would sometimes live with his Uncle Booboo, who lived next door to his father;
- In 2015, his parents lived at his Grandpa A.'s residence;
- At least seven family members were staying there at the time, including his brother, C.;
- He had never consumed alcohol prior to October of 2015;
- He cannot remember if anyone had talked to him about consuming alcohol;
- His older brother and sister had consumed alcohol, but they did not tell him anything about it;

- After October 2015, he learned about alcohol in the DARE program in Fort Nelson;
- He attended the program about a month or two after E. died;
- He learned that you can pass out if you drink too much;
- However, they did not talk about whether or not alcohol was something that could kill you. He never learned that that could happen while he was in school;
- He had seen his parents being drunk and sleeping as a result of consuming alcohol;
- He had never seen his parents get injured as a result of drinking alcohol;
- He had never seen his brother, C., or his sister, N., get injured as a result of drinking alcohol;
- It was never a problem for him to wake up his parents if they had fallen asleep after drinking;
- He had seen people stumble every once in a while and get back up when they were intoxicated;
- He never saw anyone get injured as a result;
- He used to hang out a lot with D. when L. was living in Fort Liard;
- They played soccer together and would walk around and have sleep-overs at each other's' houses;
- He met E. at a soccer tournament in Fort Simpson;
- She moved to Fort Liard in mid-2015;
- They were in the same split-grade class at school;
- She was a friend of his;
- He had found the bottle of alcohol that they consumed on October 2, 2015, in a ditch across from his family's house;
- Finding the bottle was not unusual, because people usually throw bottles in the ditch if the police come;
- He found the bottle about a week before October 2;
- He took it home and kept it under the porch because he didn't know what to do with it;
- He went to school and after school was finished he asked D. if he wanted to go for a walk. They went for a walk and afterwards went to L.'s house

where they played games. While they were playing games L. asked D. if he wanted to drink;

- D. was excited with the idea. He wanted to see the bottle so L. showed it to him. The bottle was a “twenty-six” of Smirnoff;
- He asked D. if he wanted to take a shot. When D. said “Yeah”, L. took a shot and then D. took a shot;
- D. told L. he wanted to go for a walk;
- L. put the bottle in D. packsack and the two went to the Hamlet to check Facebook. There was free wi-fi at the Hamlet;
- D. asked L. if it was just going to be the two of them drinking;
- Before they had gone to the Hamlet, L. had told D. that it was just going to be the two of them drinking;
- It was after they had checked Facebook for twenty minutes that D. asked him if it was just going to be the two of them drinking;
- L. told D., he could get somebody else if D. wanted. D. said okay and L. texted E.;
- He knew that she drank;
- He texted E. on Facebook Messenger;
- He asked her if she wanted to drink. She said sure. She asked if there was going to be just the two of them. He said there would be someone else. She asked who and D. told him not to tell her.
- L. does not know why D. told him not to tell her;
- E. did not find out that D. was going to be there until L. told her. That was part of his Facebook conversation;
- She said she would be there in like 20 minutes, 10 minutes. This was also on Facebook;
- She came to the Hamlet and met them there;
- They went for a walk. They walked towards the bank behind the Northern Store. When they were behind the Northern it got dark. L. asked the other two if they wanted to take another shot and they said okay;
- They were behind the Northern when this happened;
- They did not go to the harbour or the nursing station;

- They walked from the Hamlet to behind the Northern Store. They had sat down at the Hamlet and that was when L. asked them if they wanted to go for a walk;
- That was when they went behind the Northern Store;
- Behind the Northern Store, he asked them if they wanted to drink out of the bottle. They agreed and L. took the bottle out of D.' bag;
- L. grabbed the water bottle and told D. to hold the water bottle. L. opened it, took a shot, and asked, "Who is next?" E. grabbed it and passed it to D., who passed it back to L.;
- The water bottle came from his grandparent's house when they left.
- It was in D.' packsack
- D. was carrying the packsack;
- L. told D. to hold the water bottle after he had a shot. L. drank the water bottle after he drank out of the liquor bottle;
- E. and D. had water to drink as well;
- After they had the shots behind the Northern, they went to a log that is right behind the Northern Storage area;
- The log is forty to fifty metres from the riverbank and forty to fifty metres from the Northern;
- The log is sort of at the riverbank;
- They were walking from the Northern to the riverbank when L. said "Let's stay at that log for a bit";
- They sat there for five or ten minutes. L. went towards the Northern storage to urinate. The Northern storage is about ten meters from the log before the Northern Store;
- After he urinated, he saw the dip about five or ten meters away from the log.
- He asked them if they wanted to sit there because the log was too hard to sit on;
- The three of them ended up sitting in the dip;
- The three sat in a triangle formation;
- L. asked them if they wanted to take another drink. They said okay;
- L. told D. to grab it out of his bag. D. did so and handed the Smirnoff bottle to L.;
- L. opened it and took the cap off the bottle;

- D. gave him the water bottle as well;
- L. drank from the Smirnoff bottle but did not drink any water;
- L. asked who was next and E. said that she was. L. passed her the Smirnoff bottle and E. took a shot. She passed the Smirnoff bottle to D. and drank some of the water;
- D. also drank some Smirnoff which he followed by drinking some water;
- The Smirnoff bottle and water bottle proceeded around the triangle in the same way for two or three more times. However, D. skipped his turn a couple of times, telling L. that he did not want one on those occasions;
- On those occasions that D. skipped his turn, E. would hand the bottle directly to L.;
- They had shots in this manner until the bottle was half empty. This would have taken fifteen to twenty minutes;
- They stopped for five minutes and talked in a circle. L. then went to use the bathroom at the Northern Storage. He was feeling dizzy and could not walk straight. After going to the bathroom, he went back and joined the others in the dip. L. asked them if they wanted to take another couple of rounds;
- When he got back, the bottle was beside D. There was about a quarter of it left;
- He does not know how the bottle got down to a quarter;
- The next thing he remembers after the bottle got down to a quarter was telling them to stop. Everything was spinning. L. was dizzy. He told them just stop for a bit;
- He was trying to look straight. Things were spinning. He couldn't see straight;
- He wanted to eliminate the dizzy feeling. He laid down for a couple of seconds and then he stood up. After he sat back down again, everything went black. He could not hear anything;
- The next thing he remembers is waking up at his grandfather's place on a couch;
- The last thing he remembers before things went black was E. and D. talking while he was lying on the ground. He sat back up and was trying to look straight. He could not see straight so he tried to stand and walk it off.

However, that made things worse. When he sat back down things went black;

- When he woke up the next morning, C. and D. were watching TV at 4:00 in the morning. L. could see the television in the kitchen;
- He thinks they were watching Riddick, L. felt sick and had a headache;
- He felt like he was going to puke. This was the first time that evening he felt like he was going to throw up;
- Previously he had seen people throw up only as a result of consuming alcohol the morning after they had done so when they were hungover;
- His brother, C., was shaking L. when he woke up. He was half drunk at the time. He was shaking L.'s foot trying to wake him up;
- L. lay there for 10 or 15 minutes. He went to the bathroom and went back to sleep on the couch;
- Before going to sleep, he did not talk to D. or his brother, C., other than to ask C. what he was doing home. C. told him that he had just got home an hour before L. woke up;
- After he went back to sleep, he was woken up by D. at around 8:00 a.m.
- D. asked him for E.'s telephone. When L. had woken up earlier at 4:00 a.m., he had noticed that he had two phones in his pocket, E.'s and his own;
- D. said he was going to go home. He asked where E.'s phone was. L. pointed to it. D. said he would see him later and L. said "bye" to D.;
- Ten minutes later L.'s mother woke him up asking why D. left so early. His mother then went to work;
- Sometime between 10:30 a.m. and 11:00 a.m. he woke up to go see his mother at work to ask for money to buy junk food. That was when the police picked him up and told him about what had happened;
- When he woke up he had a little headache. He did not really feel like vomiting;
- E. had been wearing a blue sweater, toque, black leggings, socks and shoes;
- L. did not give her any of his clothes;
- He does not remember if it was cold that evening;
- L. was dressed normally for the weather;
- He had had no experience with condoms prior to October of 2015;
- He had had no prior sexual experience either;

- He did not take sexual education in school until afterwards;
- L. did not have any condoms on him that evening;
- He knows that because he remembers D. testifying that L. had them in his pants pockets. He wore those pants to school and did not have anything in his pockets for the whole day;
- He did not pull out condoms at his house;
- In October of 2015, he knew that he could get condoms at the Health Centre;
- He had gotten them to play with. He would blow them up into a balloon and things like that;
- Prior to October of 2015, he had never taken a course in school dealing with the topic of drugs being dangerous. He had never discussed turning anybody on their side;
- He learned about turning people on their side to avoid choking on their vomit in the DARE program;
- He had never learned about doing this before taking the DARE program;
- About a year after the incident with E., he turned his brother on his side after he had taken drugs and been rendered unconscious;
- From what he had seen growing up, he had noticed that people who drank too much alcohol, would go to sleep, wake up and start drinking again;
- He never tried to wake them up because he thought they were sleeping;
- He has never heard of anyone around Fort Liard being eaten or injured by a wolf or a bison;
- When they were walking around the Northern Store, they walked by the harbour;
- The harbour is fourteen to twenty meters away from the Northern Store. The harbour is on the opposite side of the road as the Northern;
- They never walked across the road;
- The only alcohol, they had to drink prior to going to the Northern was at his house. They had no alcohol anywhere else;
- He did not see E. walking after they started drinking;
- He does not recall her leaving the area of the dip;
- He does not remember having a conversation with D. about one of them needing to be sober;
- L. has never heard of any animal injuring anybody in Fort Liard at any time.

[41] In cross-examination L. testified that:

- L. was in Grade 8 in October of 2015;
- He was in school in Fort Liard;
- He had also been in school in Fort Nelson;
- He and D. were cousins and good friends;
- They would hang out every couple of days;
- E. was from Fort Simpson. Her family had moved to Fort Liard at the beginning of the school year;
- E. had been his girlfriend for about a month. She had broken up with him a couple of months before October of 2015. However, they were still friends;
- He would message her on Facebook and they still would hang out together in school. They would also hang out together outside of school;
- He had not drunk alcohol before October of 2015. This was because he was a kid. He knew that kids could not drink alcohol. He did not know that there was a rule that you could not drink alcohol unless you were nineteen years of age or older;
- He did not know it was dangerous to drink alcohol;
- He knew that you could get sick if you drank alcohol. He knew that people do silly things sometimes when they drink alcohol. He knew that people can fall down when they drink and if they fall down they can get injured;
- He knew that people could fall asleep if they had been drinking. However, he did not know that they could not be woken up;
- He knew that no alcohol was allowed in his Aunt Shirley's place. However, she did not explain to him that it was dangerous to drink;
- He doesn't remember if at school he was told that he was not supposed to drink. It was only a couple of months after October of 2015 that he was told about alcohol being dangerous. He was told only that drinking and driving was dangerous;
- He was told to always have a friend with him when they drank. They talked about drugs as well;
- He only took the DARE class in Fort Nelson after October of 2015;
- He had seen people who were very drunk before;
- His parents were often very drunk in the home. Some of his siblings and other relatives would be very drunk while in the home;

- It was quite common to see people in Fort Liard who were very drunk while he was growing up;
- He never noticed people not being able to speak properly. He did notice that people could not walk straight. However, he never saw anybody fall before October 2015;
- He did not see people not being able to walk after they had been drinking. Usually they would go to sleep “Like, pass out or something and wake up a couple hours later”;
- The only time he ever saw people vomiting as a result of alcohol consumption was when they were hungover. He could tell the difference between someone who was drunk and hungover;
- He knew people could black out. His parents would black out. They would have no memory of what had happened when they were intoxicated.
- He has only seen people vomit when they were hungover – although not necessarily the next day;
- He never saw anyone vomit while they were passed out;
- There was never an occasion when he tried to wake up a drunk person unsuccessfully;
- Such an incident did not happen with C. at some point;
- With C. it was when he used drugs. L. was able to wake him up;
- C. was half awake when he was making gurgling sounds;
- L. was not really worried that he would choke on his vomit;
- He put him on his side because his mom told him to. She did not explain why;
- This incident occurred after October of 2015;
- L. has never seen people passed out outside in Fort Liard. He has heard of it, but he has never seen it himself;
- He does not know if they could not be woken up. People would say that people were laying in the ditch or trail. This was because they were drunk;
- People would not really want to be sleeping outside. They would be doing so because they could not be woken up;
- He now realizes that on those occasions when he saw his parents sleeping after consuming alcohol, they were passed out;

- They would drink a lot, fall asleep and stay asleep until the next morning. L. never tried to wake them up;
- They would go to sleep at around 10:00 p.m. and stay asleep until later in the morning. L. would never try to wake them up;
- However, if they were not drinking, he would sometimes try to wake them up. But never if they had previously been drinking;
- He never called the RCMP when his parents were drunk. He does not remember in February 2017 calling the RCMP because there was no one sober in the home to take care of the children;

[42] L. was referred to photographs of his home that were taken during the execution of a search warrant. He identified a number of items present in the photographs. He went on to testify that:

- On the date in question he drank from a bottle of liquor;
- It was his bottle;
- He had hidden the bottle under the porch because he did not know what to do with it;
- He had found it about a week earlier. He had hidden it because he knew that if a grownup found the bottle, they would take it away from him. He knew that that was because kids are not allowed to drink;
- He had previously seen bottles laying in the ditch in Fort Liard. The bottle he found was a full bottle that had not been opened. He had never seen an abandoned bottle that was full before. Sometimes they were half full or three-quarters full;
- He had never picked up an abandoned bottle before. He picked this one up because it was full;
- He did not steal the bottle from his house;
- He did not take the bottle to school or show it to C.B.;
- On October 2, 2015, he decided that he needed to drink the bottle;
- He did not decide to invite E. before he invited D.;
- He does not remember exchanging messages with E. before he went to the Hamlet;
- He does not remember E. asking him, "Okay, who's coming?" and responding, "I'd like just me and you, I think."

- He does not think that he might have said that to E.
- He denies that she then said, “Okay” and that he replied “Come to the Hamlet”.
- However, he remembers telling her about D. coming;
- The plan was to drink the bottle that night. The plan was that the three of them would get drunk;
- He and D. had a sip at his grand father’s place;
- L. put the bottle in D. backpack because he had a bag. D. wanted to carry it;
- L. put the bottle of water in the backpack as well. He intended it to be a chaser;
- He knew that that was how you drink vodka. You take a shot and chase it with water;
- His grandmother worked at the Health Centre. He would visit there every couple of days;
- He knew that if someone was sick and needed a nurse, you would just go there. He knew that you could just pick up the phone and they would answer;
- He knew that he could get condoms at the health centre for free;
- He knew what condoms were for;
- He did not know if you had unprotected sex, the girl might get pregnant;
- He had heard of how to make babies. But he did not really think of that at the time;
- He would just play with the condoms when he used to grab them;
- He did not really know how to make babies;
- In October of 2015, he had no idea of how babies came into the world;
- He knew that condoms were to be used while having sex;
- He did not know it was to prevent having a baby or to prevent sexually transmitted diseases;
- He thought that you put a condom on your penis when you have sex. But for no reason;
- He knew they were to be put on his penis;
- On October 2, 2015, he did not take two condoms from the Health Centre. He did not show them to D.;

- He did not know what a sexual assault was. He did not know that having sex with a girl who was passed out or did not want to have sex was a sexual assault;
- He had never heard of girls or women being raped when they were passed out;
- He knew about sex;
- He did not know what sex was;
- He did not know how to have sex;
- He knew that to have sex you had to put your penis in the girls vagina;
- He had seen that on TV;
- That day he was messaging E. on MSN messenger. He asked her if she wanted to come out. She said yes. He told her to come to the Hamlet. She agreed. He said "Okay, I'm only waiting for twenty minutes". She replied "Okay, see you soon."
- It was a bit before 8:25 p.m. that he sent the messages;
- She showed up at the Hamlet about ten to fifteen minutes later;
- They drank no alcohol at the Hamlet. He asked them if they wanted to go for a walk. They had their first shot behind the Northern Store just twenty metres away;
- It would have been about seven minutes after E. arrived that they had the first shot. They just had one shot by the Northern and then moved to the log by the bank. They had no more to drink while at the log;
- When they had the first shot it was because it was L.'s bottle and he decided that he wanted to start to drink;
- He took the bottle from the backpack and took the first shot. He gave it to E. who took a shot, who then gave it to D.;
- He does not remember if at one point D. didn't want to drink anymore;
- He never told D., "Why are you going to come if you're not going to drink?"
- He does not remember if E. ever showed them that she had marijuana. He does not remember if he said "Let's smoke it." He does not remember her showing them a flashlight with marijuana in it. However, that might have happened;
- They never went to the harbour. They went to the log which was 10 meters away from the dip. The log was closer to the path than it was to the water;

- They had no shots when they were at the log and stayed there for five to ten minutes. He went to use the bathroom before they went to the dip. E. did not drink before they went to the dip other than the one sip they had earlier;
- When they walked to the dip, E. was not staggering. D. was not drunk. They went to the dip because L. thought it would be a good place to avoid being seen by adults who were walking by. It was L.'s suggestion to go there;
- They continued to drink for a couple of minutes after they sat down. They ended up drinking the full bottle. He does not remember D. throwing it in the river after;
- He does not remember if E. drank the most. He does not remember if she was the most intoxicated of the three;
- He does not remember if he gave her alcohol from the time that she first drank behind the Northern Store until she passed out;
- He does not remember a discussion about someone stopping drinking;
- He did not think that someone should stay sober;
- He does not know that when people drink they can fall and get injured;
- He does not know that someone could pass out and need someone to look after them;
- He does not know that someone can get raped if they pass out;
- He went to urinate twice. E. and D. never went;
- He agrees that usually when you are trying to find a place to urinate, you try to find a place where people will not see you;
- There were a lot of trees around the river bank. There were plenty of other spots where he could have urinated. However, the Northern was not that far away. He denies that there was no time that he left D. and E. alone;
- He does not know how much alcohol he had. He had about the same amount as E.;
- When he went to urinate, he was feeling really dizzy;
- He was staggering. When he sat back down everything was spinning;
- He felt nauseous and that he could be puking;
- However, he continued to drink and give E. and D. alcohol;
- However, he did not know that if E. drank too much she could be sick;
- He knew she could be hungover the next day and she could vomit;

- He knew she could pass out if she had too much to drink;
- He denies that he wanted her to pass out so he could have sex with her. He denies that he had condoms with him;
- He does not remember if at one point E. said that she was cold. He was wearing a long sleeved top and a windbreaker. She only had a sweater;
- He does not think that the weather was too cold for how E. was dressed;
- He does not remember that D. gave her his sweater to put on. However, it is possible;
- He never gave E. his jacket;
- He came back to the dip after urinating. He was feeling dizzy and not walking straight and starting to feel nauseous. He drank more and that's when everything started spinning. He lay down on the ground where he was sitting. He stood up trying to walk it off. He could not walk it off, so he sat back down. He was sitting beside his friends when he blacked out;
- From that point on he does not remember anything;
- He does not remember E. waking up. He does not remember her not being able to wake up. He does not remember that she was wearing his jacket when she passed out. He does not remember her starting to vomit;
- He does not remember telling D. not to let E. puke on his jacket;
- He does not know if this is possible. He does not remember giving her his jacket;
- L. does not remember D. saying that they should take her back to K.'s or L. saying, "No it's okay."
- He does not remember telling D. that it was his only chance to have sex with E.;
- He does not remember knowing that she would not know they had had sex with her because she was passed out;
- He does not remember knowing that she would not wake up;
- He does not remember having sex with E.;
- He does not remember telling D. to be a look out for him while he was having sex with E.;
- He knows that his DNA along with E.'s DNA was found on one of the condoms;
- He understands that he had sexual intercourse with E. that night;

- He was blacked out when that happened;
- He does not remember also putting an object other than his penis into E.'s vagina;
- He does not remember throwing away the condom, telling D. that it was his turn, giving D. a condom, acting as a look out for him, or observing him apparently having sexual intercourse with E.;

[43] Crown counsel put a number of suggestions to L. on what happened that evening following the point in time when he said that he had passed out. In each case he said he could not remember what happened. He went on to testify that;

- He had never heard of animals injuring anyone in Fort Liard. There are stray dogs in Fort Liard. However, he has never heard of people bitten by stray dogs. He had never heard of the possibility of people being bitten by stray dogs;
- There were no notices in town about wildlife being in town;
- He does not remember telling D. to roll E. on her side so she would not choke on her puke. He does not remember if he knew that something like that could happen if people drink too much;
- He does not remember leaving her there and never getting help for her;
- He knew that if he got help for her that adults would know they had been drinking;
- He does not know that if he got help, adults would know that he had sexually assaulted her;
- He does not remember taking her phone. However, he had her phone in his jacket when he woke up;
- On his way back home, he would have walked by the RCMP station. He would have walked by the nursing station although there would have been two ways to get back to his house;
- The way he usually walks home would not necessarily have taken him by the police detachment or the nursing station;
- He knew how to contact the RCMP. He did not know he could ring the bell;
- He does not remember seeing or talking to his mother when he got home;
- He met E. around 8:45 p.m. He drank until he passed out;

- He cannot remember if E. drank from that time until the bottle was almost finished;

[44] During re-examination L. stated:

- When he was thirteen years old, he did not know of anyone injuring themselves falling down while they were intoxicated;
- He still knows of nobody who has been injured falling down;
- As far as people being passed out outside, he had heard from his uncle or others that somebody had passed out. He had heard nothing else;
- The reason that L. went to the warehouse to urinate when he could have urinate behind the trees was because he felt shy and did not want to urinate close to the D. and E.;
- He started to feel a little sick after he had come back from urinating the second time. He cannot remember if he gave E. any alcohol afterwards.

ii) W.M.'s Evidence

[45] The next witness to be called was L.'s father, W.M. W.M. testified that:

- L. is his second-oldest son;
- He has eight children. His oldest child is N., who is 20 followed by C. who is 19;
- He and his wife, Virginia, have been together for 23 years. Right now all of his children except N., his wife, and his son's girlfriend live in half of a duplex located in Fort Liard;
- L. did not always live with W.M. W.M. has a drinking problem. They had been dealing with Social Services until October of 2015. In fact their last dealings with social services were about a month ago;
- The first time L. was taken away from him was a long time ago. Sometimes L. would be taken away for months while his wife and he went to programs. However the treatment was never successful in the long term and L. was bounced around;

- With all of the children, life was hectic. W.M. and his wife's drinking problem compounded the issues;
- Their drinking problem was bad. It got to the point that they could not function or take care of their children;
- When L. was in care, there would be visitations. However, they still consumed alcohol and L. would see it;
- When W.M. was drinking, a typical day would begin with him and his wife trying to find another drink to get over their hangovers and to stay drunk. They would continue to drink when they passed out. They would wake up and continue;
- W.M. worked in British Columbia at a gas plant for fourteen years when L. was growing up. He would work on a two weeks in two weeks out basis;
- When he was at work, his wife would continue to drink. There were numerous times he was called by social services. He would come into town to deal with the matter. During those times L. was removed from the home on quite a few occasions;
- W.M. has drunk all of his life. At the time of testifying he had not drunk for eight months. His wife continues to drink;
- L. was removed from the home on at least six occasions and probably double that number;
- L. was never privy to anyone passing out and dying from drinking;
- W.M. never talked to L. about drinking. He cannot say if his wife did or did not;
- W.M. cannot recall anyone ever having been injured by drinking. He cannot recall anyone being taken to the hospital or medevac'd for anything like that.

[46] In cross-examination W.M. stated:

- In terms of people L. would have seen drinking in his home, there was W.M., his wife, friends associates, family members, and extended family;
- He does not know when C. started drinking. He thinks he would probably have been roughly eighteen years of age when he first noticed it;
- The first time he saw N. drinking she would have been nineteen;

- W.M. is aware that if people drink too much they may vomit. He is also aware that people can fall and injure themselves and that they can pass out and lose consciousness;
- He does not think that L. saw anything like that - other than he and his wife getting sick when they were hungover;
- He and his wife are alcoholics. Other people have been in the home drinking heavily. They never vomited when W.M. was around;
- He had seen people slipping and tripping but does not know if L. saw that;
- Numerous people passed out at his house. L. would have seen that;
- He does not know when L. started drinking. He assumed he never touched a drop. He does not know who told him not to drink;
- He and his wife never talked to him about drinking. However, he was not allowed to drink when he was at W.M.'s house living with him;
- The rule was never communicated to L. by W.M. because it never crossed his mind;
- He never discussed sex with L. He did not discuss using condoms with him or where babies come from;
- There were never any questions from L. or discussions concerning where any of his younger siblings came from when they were born;
- W.M. has heard of sexual assaults having occurred in Fort Liard. However, he tends to stay out of things that are not his business;
- He never discussed the topic of sexual assault and how to stay safe with their children. He did not discuss how to behave with women if they were drinking.

[47] The defence called no more evidence. The trial was adjourned and counsel filed written submissions, which were followed by verbal submissions.

3. Analysis

a) The Facts

[48] The only direct testimony as to what transpired between L. and E., came from D. and L. Neither of these witnesses are adults. While, the evidence of children must ultimately be held to the same standard of proof as the evidence of

adult witnesses, it must be examined differently. The failure to recall certain details or recall them in the order that they happened should not necessarily result in the same finding of credibility or reliability as would apply in the case of an adult.

[49] However, I found the evidence of L. to be problematic in a number of respects. L. was reluctant to admit in any way that he was aware that the consumption of alcohol could lead to people becoming injured or dying. Some of his claims were highly unlikely.

[50] L. attempted to paint himself as being unfamiliar with the effects of excessive drinking, even though he had grown up with excessive alcohol consumption in the home for a large part of his life. He claimed not to know that consuming alcohol could make someone vomit unless they were hungover.

[51] I noted that when it came to the topic of alcohol and nausea, he was even inconsistent in describing the effects that consuming alcohol had had on him that evening. He said at one point that he had become nauseous as a result of consuming the alcohol before the time when he claims to have blacked out. He said he felt nauseous and as if he might vomit after he went back to the dip after urinating the second time. However, he later said that the first time he felt like puking that evening was when he later woke up at his grandfather's place early in the morning.

[52] During cross examination, he admitted that on the evening in question, he began to feel nauseous but continued to drink and gave E. and D. alcohol afterwards. However, he denied that at that point he knew that E. might become sick, stating that she would only vomit if she was hungover. Later during re-examination by his lawyer he stated that he could not remember if he had given E. alcohol after he had begun to feel sick himself. He appeared very alive to the issue of his awareness that alcohol could make somebody vomit. However, his evidence on the point was inconsistent and unbelievable.

[53] Early in cross-examination, he admitted that he knew that people can fall when they are drinking and that as a result they can experience bodily harm. However, later on when it was suggested to him that when people drink they can

fall and become injured, he denied the possibility. He went so far as to deny knowing of anybody who has ever become injured while falling down.

[54] He went so far as to deny that someone can be raped if they pass out. However, he also admitted that he had done precisely that to E.

[55] L. agreed that people could fall asleep all of a sudden if they were drinking alcohol. He denied knowing that people who had passed out as a result of drinking alcohol could not be woken up. He stated that he had never tried to wake up his parents after the many occasions when they had fallen asleep after consuming alcohol. He said that he let them sleep because he knew they had been drinking. He admitted waking up his parents on occasions when they had not been drinking but never attempted to do so after they had been drinking.

[56] I find this testimony to be extremely unlikely. It leads me to conclude that L. was lying about his knowledge of the bodily harm that could befall an intoxicated person. I find that he was doing so in an effort to exculpate himself from the crime he committed.

[57] L.'s testimony was also contradictory and unbelievable on his knowledge of sexual intercourse. He then said he had no knowledge of how babies came into the world when the incident happened. He said that he knew what condoms were for. He then said that he did not know that if he had unprotected sex, the girl might get pregnant. However, he contradicted himself and also said he had heard of how to make babies but that he did not think of it at the time. He said he just played with condoms when he had obtained them in the past.

[58] He then said that he knew what condoms were for. However as stated, he had said he did not know where babies came from. There is, in fact, evidence that not only did he know what condoms were used for he knew why they were used. Even if I were to discount the evidence of D., there is evidence that his DNA along with E.'s was on one of the condoms that was found at the scene. There is strong circumstantial evidence that he was wearing one when he raped E.

[59] I also find it highly improbable that L. found a full unopened bottle of alcohol on the street. I also find it suspiciously convenient that L.'s memory

blackened out while he, E. and D. were still in the dip shortly before E. passed out and L. raped her.

[60] Additionally, L. portrays himself as having been grossly intoxicated at at least one point during the evening. However, when he ultimately returned home shortly after 11:00 p.m., his own mother, who was still awake watching the television, did not observe him to be intoxicated when she told him both him and D. where to go to bed.

[61] When I examine the contradictions as well as the improbabilities in L.'s evidence, I find it to be devoid of credibility.

[62] At the end of the day, I reject L.'s testimony. I do not accept it except where it dovetails with those parts of D.'s testimony that I do accept. It is unbelievable. Moreover, it does not raise a doubt on the salient points having to do with his knowledge of the risks associated with excessive alcohol consumption. I similarly reject his evidence on the route that the three walked prior to proceeding to the dip, how they were seated while at the dip, where and when the alcohol was being consumed and how it was being passed around.

[63] In coming to this conclusion, I have considered the evidence of W.M. He admitted that when L. was growing up, he and his wife had a severe drinking problem, which led to L. being apprehended by social services on a number of occasions. He admitted that the problem was so bad that they could not take care of themselves or his children.

[64] He stated that L. would have seen many people drinking in the home. At first he denied that anybody vomited, fell and injured themselves or passed out in his home due to alcohol consumption – other than he or his wife getting sick when they were hungover. He said that during that entire time, people were often drinking heavily in the home, but that they never vomited when L. was around. However, he later contradicted himself conceding that people passed out in the home and that L. would have seen that.

[65] I find the contradiction in W.M.'s evidence concerning whether people had passed out from the consumption of alcohol in his home when L. was present to be noteworthy. I also find it quite odd that during the years of very heavy drinking

that occurred in the family home, there was never an incident when anybody vomited as a result of alcohol consumption – other than as a result of being hungover. The fact that W.M.'s evidence corroborates L.'s on certain points such as this is not surprising when one considers the fact that W.M. is L.'s father and that, although legally entitled to do so, he had viewed the entirety of L.'s testimony immediately before testifying himself. I find that to some extent W.M. was attempting to help his son and corroborate the testimony he had just heard.

[66] As stated, at the end of the day, I reject L.'s testimony. On material points, I do not believe anything he says, except as I have said, where his testimony is consistent with that of D. His evidence does not leave me with a reasonable doubt that what he says may be true.

[67] I found D. to be a credible witness. There were certainly some challenges to his evidence. He was an accomplice of L.'s at the time that the sexual assaults on E. were carried out. He also gave certain prior statements that were inconsistent with each other and which were inconsistent with his testimony on certain details.

[68] D. testified on a number of key points that differed from L.'s testimony. His testimony as to the length of the time it took to consume the alcohol and where it was consumed differed from L.'s. His evidence as to the route taken to the dip also differed. So too did his evidence concerning how the alcohol was being distributed among the three while at the dip. One cannot say that D.'s evidence differed from that of L.'s in the time frame that occurred shortly before E. fell asleep at the dip, her passing out, the sexual assaults that occurred, and what happened afterwards, since L.'s testimony was that his memory of those details had been blacked out.

[69] I do not find that the inconsistencies between D.'s various statements to the RCMP and between his testimony, seriously undermine the credibility of his testimony. Constable Gagnon interviewed him very shortly after D. found E.'s body. He was observed to be emotionally distraught at the time. What's more, Constable Gagnon ended the statement when, as a result of what D. was telling him, he determined that D. was a suspect. That being the case, it is not surprising that D. would have omitted telling Constable Gagnon certain details.

[70] D. admitted that when he gave his first statement to Constable Bancroft almost a year following the incident, he was not being completely honest with him. He was ashamed about what had he had done and what people would think about him.

[71] In the third statement, he did not initially tell the truth. However after being confronted with the fact that two condoms had been found, he admitted his sexual assault on E. The suggestion put to L. that he did not ultimately tell Constable Bancroft the truth in that third statement when he said he could not remember where the condom came from, must be considered in light of the fact that very shortly after saying so, he responded to a further question admitting that he had put the condom on. Also earlier in the statement he had said that L. had had the two condoms and that D. had put on one of them after L. gave it to him.

[72] I find that when testifying, D. was doing his best to tell the truth and that his rendition of events given at trial is accurate. He testified to certain things for which he would have no motive to lie. He admitted that he chose the dip as the spot where they should drink. He admitted that he acted as look out for L. when L. was raping E. He admitted to simulating sexual intercourse with E. He stated that he along with L. had left E. after she had been throwing up. I see no possible motive for him to lie on these points since they paint him in a bad light. He also said that L. directed that E. should be placed on her side in order to prevent her from choking on her vomit. I see no motive for him to lie about this point as well, since in some ways it shows that L. had at some, albeit minimal, concern for E.'s safety and suggested doing at least something to help E., that D. himself had not considered.

[73] In assessing his credibility, I have taken into account that D. was an accomplice of L. However, I have noted that his evidence is consistent with much of the physical evidence that was found at the scene. A condom was found at the scene that had both L.'s and E.'s DNA on it. Another was found with only E.'s DNA but no male DNA. This agrees with his account of L. having intercourse with E. and himself simulating intercourse with her afterward.

[74] Defence counsel questioned D. at some length on the whether or not E. had been vomiting and whether she had been rolled on her side. D. was adamant that

she had in fact vomited and been rolled on her side. What possible motive would he have to lie on the point? He said he found her face down when he came the next day. He said he rolled her over when he found her the next morning lying face down.

[75] I note that, as pointed out by Crown counsel, although she was found to be lying on her back when the police first observed the crime scene, E. had leafy debris stuck to the left side of her face consistent with that side of her face being on the ground at some point and with her being found faced down as well as her having been earlier rolled on her side.

[76] I find that she was indeed left on her side in the position described by L. I also find that she moved from that initial position into a face down position following the point in time when she was left there.

[77] I have taken into account that no vomit was found at the crime scene. However if, as would have been quite possible, the vomit were in liquid form, this would not be surprising. In my view, the fact that vomit was not smelled at the scene would also not be surprising.

[78] All of that said, I have some concerns with some of D.'s evidence concerning the timing of when the alcohol was consumed. I agree with the Crown that he appeared hesitant in providing estimates of the amounts of time that elapsed between certain events when he, E. and L. were together and I treat the estimate of forty to forty-five minutes between the time that they started drinking behind the Northern and finished the bottle that was suggested to him in cross examination and which he adopted as being "about right". I note that immediately prior in his testimony when he was asked to estimate that period of time on his own, he said that he was not too sure.

[79] In my view, young people often have difficulty in accurately estimating the passage of time. As noted, in by the Supreme Court of Canada in *R. v. W.(R)*, [1992] 2 SCR 122: "Since children may experience the world differently from adults, It is hardly surprising that details important to adults, like time and place may be missing from their recollection". I think that the same thing can be said for the time estimates provided by someone concerning events that happened more than two years earlier when he was a young adolescent.

[80] However, certain facts established by the evidence indicate a period of time that is at least close to the figure adopted by L. It is an agreed fact that E. left K.'s residence at approximately 8:45 p.m. and later texted K. saying that her auntie wanted her to cut moose meat. It had been approximately 8:00 p.m. when L. and D. left L.'s grandfather's house - presumably to go to the Hamlet. It was 11:05 p.m. when L. and D. ultimately returned to L.'s grandfather's home. It is clear that a period of well over two hours transpired between the time that E. joined L. and D. and L. returned to his grandfather's house.

[81] According to D.' testimony, the three met up on the steps of the Hamlet. This would have only been a few minutes after E. left K.'s. They walked behind the Northern, went to the harbour and then to the dip. They drank while they were walking to the dip. While walking from the harbour to the dip E. and L. were already showing signs of gross intoxication. According to D.' testimony, they were both staggering and almost falling down at this time. It is apparent that by this time they had already consumed a considerable amount of alcohol. After the three proceeded to the dip and consumed more alcohol, E., ultimately went to sleep. When D. could not wake her, L. raped her for a period of time that D. estimates to have been 10 minutes. L. then sexually assaulted her simulating intercourse. L. estimates that this lasted for a period of about 5 – 7 minutes. He said that E. then began to vomit and that from the time she became sick until the time they left it would have been a period of 20 – 25 minutes. The two then walked home, which, based on what I have seen of Fort Liard's layout as presented in the evidence, would have taken no more than 10 minutes.

[82] It is likely that the three would have began their walk no later than 9:00 p.m. and that the first of the alcohol that E. would have been consumed behind the Northern Store would have been no later than 9:10 p.m. L. and D. arrived at L.'s mother's place at 11:05 p.m. According to D.'s testimony 55 minutes would have been the maximum amount of time between the sexual assault occurring and he and L. returning home. It would appear that E. quit drinking and fell asleep very soon before L. raped her. It would also seem that 10 minutes would be a very ample time estimate for that period of time. If one deducts 65 minutes from the time that elapsed between the 9:10 p.m. and 11:05 p.m., that leaves a period of 50 minutes or so that they were consuming alcohol. However, in my view a period of

at least 50 minutes is the most likely. I also find, as recounted by D., that E. was consuming alcohol constantly from the point when they had proceeded behind the Northern Store until she had her last drink at the dip. As stated, she was already exhibiting signs of gross intoxication before arriving at the dip.

[83] At the end of the day, I am satisfied that D.' version of events is accurate. Not only do I find it to be accurate, I find that it has been proved beyond a reasonable doubt that:

- L. was in possession of the bottle of alcohol prior to the events of October 2, 2015;
- L. was controlling the bottle of alcohol while they were walking to the dip and would tell them to drink when it was their turn.
- E. was staggering before she reached the dip;
- L. continued to control the bottle while they were at the dip;
- All three were facing the river with L. in the middle. He would provide it to D. and E. and tell them to drink when it was their turn;
- When L. or E. had taken a sip, they would hand the bottle back to L., who would then control to whom the bottle was then given;
- E. consumed alcohol for a period of time of at least 50 minutes;
- L. had obtained the condoms that were used from the local Health Centre;
- When E. passed out, D. tried to rouse her by shaking her and tapping her face;
- D. then suggested taking her to her friends place;
- L. replied by saying things were "okay".
- The two talked some more and L. then said that this was D.'s chance;
- L. then took a condom out of his pants, put it on and raped E.;
- L. told D. to keep watch. D. did so;
- E. was on her back while L. had intercourse with her;
- After L. had finished, he told D. to touch E. on her chest. D. did so;
- L. then told D. that it was his turn. He gave D. a second condom;
- D. put on the condom and sexually assaulted E. simulating sexual intercourse with her;
- D. genitals made contact with E.'s genitals. However, he did not penetrate her;

- E. was still on her back;
- When L. asked him if he was done, D. got off of E.;
- E. began to make noises and vomit;
- D. again tried to rouse E. unsuccessfully by shaking her;
- L. asked D. to help him pull up E.'s pants;
- D. lifted E.'s upper body while L. pulled up her pants;
- D. did not want to leave E., because it was cold and he was worried that animals or people might come by;
- L. said that she would be okay;
- L. took back his jacket that he had given to E. earlier.
- Prior to leaving E., the two rolled her over on her side after L. suggested that they should do so to prevent her from choking on her vomit;
- The two then proceeded back to L.'s grandfather's place;
- E., was still alive at the point that she was left at dip;
- She bled on the stick the police found under her buttocks during the time immediately after L. injured her vagina and the time when she was rolled on her side. She continued to bleed on her pants after they were pulled up;
- She was alive when she bled on her pants after they were pulled up by L. and D.;
- At some point after L. and D. left her, E. rolled from her side into a face down position; there is no evidence that she was rolled so that she was face down prior to L. and D. leaving her.

[84] There are certain other elements that I find have been proven beyond a reasonable doubt. I conclude that notwithstanding his denials, L. was aware of how babies were made. His evidence on the point was inconsistent. Prior to having sexual intercourse with E., he put on a condom. He did so either in order to prevent her from becoming pregnant or to protect himself against STDs or both. Given, that he left his condom at the scene, he did not do so in order to eliminate the possibility of DNA or other forensic evidence being left at the scene. In either case, he had knowledge of sexual intercourse that went beyond what he was prepared to admit during his testimony. He also gave D. a condom before encouraging him to have intercourse with E.

[85] I find that given what L. said to D. about the possibility of E. vomiting and given what he did to prevent her from choking, L. knew that if he left E. in the state she was in, there was a risk that she could choke on her vomit and suffer bodily harm or die.

[86] I find that he knew she could fall down and injure herself if she became too intoxicated. It is clear that he knew people could stumble if intoxicated. If they could stumble, they could fall. If they could fall, it only stands to reason that through doing so, they could suffer an injury and that such an injury might be of a nontrivial nature;

[87] I also find that L. knew full well, that if somebody drank too much, they might be rendered unconscious and unrousable for an extended period of time. As I said earlier I find it unbelievable that given the many occasions in his childhood that he saw people who had become unconscious after drinking alcohol, he never tried to rouse any of them and only did so when they had not been drinking. At one point in his evidence he in fact testified to the contrary when he said that it was never a problem for him to wake up his parents after they had fallen asleep from drinking.

[88] I find that when L. told D. “This is your chance.”, he knew that E. would not be able to wake up due to her intoxicated state and that he knew that in part from his prior knowledge of the effects of alcohol. I find that his statement to D., is strong evidence as to this knowledge.

[89] He also knew that if people drank to the point of unconsciousness and being unrousable, they would be vulnerable to suffering bodily harm as a result of what other people or animals might do to them if they were found in such a state. The fact that he took the opportunity to rape E. and encouraged D. to do is telling.

b) The Law

[90] Earlier in this case I rendered a written decision refusing defence counsel’s application for a directed verdict on the within count of manslaughter. In that case, I referred among other things, to the necessary elements of the offence of manslaughter through an unlawful act and manslaughter through criminal

negligent. I find it unnecessary to repeat in detail what I have already stated concerning those elements.

i) Unlawful Act Manslaughter

[91] The elements of unlawful act manslaughter in cases where the predicate offence is a provincial/territorial offence of *strict liability* are:

1) Actus Reus

- a) that the accused commit an unlawful act pursuant to a federal or provincial territorial court statute ;
- b) which is objectively dangerous; and
- c) which causes the death of the deceased.

2) Mens Rea

- a) that there be a marked departure from the standard of a reasonable person; and
- b) a reasonable person would have foreseen that a risk of bodily harm that is more than transitory or trifling would result from the unlawful act in question.

3) Capacity

If both *actus reus* and *mens rea* are found to have been proved beyond a reasonable doubt the court must then determine whether or not there exists evidence concerning the accused's personal characteristics that gives rise to a reasonable doubt that he had the capacity of appreciating the risk flowing from the unlawful act he committed.

[92] Certain of the foregoing elements are objective rather than subjective in nature. Whether the accused's actions in committing the offence were objectively dangerous, whether they constituted a marked departure from the standard of a reasonable person, and whether bodily harm was reasonably foreseeable are all objective standards. Defence counsel has argued that when determining whether or not the foregoing elements are made out, the trier of fact must look at the objective elements from the perspective of a reasonable thirteen year old. Crown counsel on the other hand argues that the Supreme Court of Canada's decision in

R. v. Creighton, [1993] 3 SCR 3, makes it clear that the standard of a reasonable adult applies and that that is so even in the case of a young person.

[93] While I think that there may well be merit to the position of the defence, it is unnecessary to determine whether or not the standard is that of a reasonable adult, thirteen-year-old, or, as argued earlier by the defence, a reasonable thirteen-year-old with the same traits, and experience as L. I find that regardless of which standard applies, the elements I have referred to are made out.

S. 77 of the Liquor Act

[94] In this case, the Crown relies on s. 77 of the *Liquor Act* of the Northwest Territories. Section 77 of the *Liquor Act* provides:

77.(1) Except as provided in this Act or regulations, no person shall

(a) sell liquor to a minor; or

(b) supply liquor to a minor

(2) This section does not apply to supplying liquor to a minor

(a) in a residence, if the person supplying the liquor is the minor's parent;

(b) for sacramental purposes; or

(c) for medicinal purposes, if the liquor is prescribed or administered by a medical practitioner or nurse practitioner.

[95] For the reasons I previously provided in my earlier decision in this case, I a.m. of the view that s. 77 clearly creates an offence of strict liability.

[96] L. breached s. 77. He provided the alcohol to both E. and L. E. was under nineteen years of age a fact that he obviously knew. Regardless of his own age, L. committed the offence. He had possession of the alcohol and provided it to the two other young people. Moreover, he maintained control over the bottle throughout the time that E. was drinking from it. He took it out of D.'s pack-sack and put it back. When the three were at the dip, when E. or D. took a sip, they would hand it back to L. Defence counsel has described the conduct of the three as

“sharing a bottle”. While one might characterise what occurred that way, it does not change the fact that it was L. who was providing the alcohol to the others. Whether or not he had found the bottle earlier, it was for all intents and purposes his at the time E. and L. were drinking from it.

Objective Dangerousness

[97] L.’s actions in providing the liquor to E. were objectively dangerous. I find that this would have been so even to a 13-year-old as opposed to an adult. E. was 12 years old at the time. He supplied her with a great deal of alcohol over a relatively short period of time. He continued to supply her even after she showed obvious symptoms of heavy intoxication including a lack of balance, motor impairment and reduced coordination.

[98] A reasonable thirteen-year-old would also have been able to foresee that a twelve-year-old would pass out and be unrousable for an extended period of time as a result of the alcohol that L. supplied to E. In my view, someone who has been rendered unconscious and unrousable for an extended length of time has suffered bodily harm that is more than trifling. I note that the definition of bodily harm provided in the *Criminal Code* requires only that the bodily harm be more than *either* transitory *or* trifling. That said, my opinion is that rendering someone unconscious for a period of time of more than a few of minutes would also not be transitory. I conclude that in cases where it is foreseeable that certain conduct, involving the ingestion of substances, might render one unconscious for an extended period of time – for example more than several minutes - such conduct is objectively dangerous. There is a risk of bodily harm that is both not trivial and not transitory.

[99] I also find that L. would have known this to be the case. As I have said, I have accepted it as proven beyond a reasonable doubt that L. told D. “It’s your only chance.” soon after E. passed out. I find that it has therefore been proven that L. knew that the excessive consumption of alcohol could render E. unconscious and unrousable for an extended period of time.

[100] In addition, I find that he knew that she might become intoxicated to the point that she could choke on her vomit. He put her on her side to prevent her from doing so. As I have stated, this shows that he was aware of the risks of

excessive alcohol consumption. I also believe that a reasonable thirteen-year-old would be aware of such a risk.

[101] As I have also said, he would have been aware that she might lose balance, fall down and injure herself in a manner that was beyond transitory or trifling. Once again, I find that a reasonable thirteen-year-old would be aware of the risk.

[102] He would have also been aware that bodily harm might befall someone who was rendered unconscious and unrousable for an extended period of time and was thus in a vulnerable state. The fact that he quickly committed an assault on E. after she was in such a state is a strong indication that he must have realized this risk. I also think it clear that a reasonable thirteen-year-old who had thought out the situation, would also be aware of the risk.

[103] In my decision on defence counsel's no evidence motion, I went on at some length reviewing the facts of *R. v. Maybin*, [2002] 2 SCR 30. *Maybin* makes it clear that the route to foreseeable bodily harm does not have to be direct. While *Maybin* was a case that examined foreseeability from the perspective of the reasonable adult, I find that all of the risks I have reviewed, while not necessarily direct, would have been foreseeable to a reasonable thirteen-year-old.

[104] Clearly, providing the alcohol to the twelve-year-old E. in the manner which L. carried out was objectively dangerous. In my view it was objectively dangerous regardless of whether one applies the standard of a reasonable adult, a reasonable thirteen-year-old, or a reasonable thirteen-year-old with the same personal characteristics and experience as L.

Causation

[105] Causation is not an issue in respect of unlawful act manslaughter. There is no doubt that it was the alcohol that L. provided to E. that ultimately caused her death.

Marked Departure from the Standard of a Reasonable Thirteen-Year-Old

[106] I find that L.'s conduct in supplying the alcohol to E. constituted a marked departure from the standard of a reasonable thirteen-year-old. Not only did he

provide a large quantity of alcohol to a twelve year old child, but he continued to do so after she began to exhibit signs of gross intoxication such as obvious impaired balance and coordination. The fact that his own alcohol consumption may have impaired his own judgment offers him no excuse.

[107] For the reasons I have already provided, I also find that his conduct was reckless in that he knowingly ran the risks that I have referred to. His own consumption of alcohol may have contributed to him being more willing to take the risk that he did when he continued to provide E. with alcohol after she became heavily intoxicated. However, his knowledge of the risk was not eliminated by his intoxicated state. I am of the view that L.'s conduct constituted a marked departure from the standard of reasonable thirteen-year-old with the same personal characteristics and experience as he possessed at the time.

Reasonably foreseeability of Bodily Harm.

[108] I have determined that L.'s conduct in providing liquor to the twelve year old E. was objectively dangerous and constituted a marked departure from the standard of a reasonable adult, thirteen-year-old, or thirteen-year-old with the same characteristics and experience as he had. As a result of the same factors and for essentially the same reasons I find that bodily harm, beyond that which was transitory or trifling, was foreseeable regardless which one of the foregoing standards is applied.

Capacity

[109] L.'s counsel argued that due to L.'s background, he was unable to appreciate the risk associated with his conduct and therefore lacked the requisite element of capacity. I am of the view that his position is ultimately that if one's personal experiences are such that one does not know a risk of bodily harm exists in relation to certain conduct, one does not have the capacity to appreciate that risk. In other words, if one does not appreciate a risk it is because one does not have the capacity.

[110] Such a deterministic analysis results in a completely subjective standard. Clearly, this was not what Justice McLaughlin intended when at page 278 of *Creighton* she said the following on the subject of capacity:

[. . .] the practical as well as the theoretical concerns of the criminal law in the field of penal negligence are best served by insisting on a uniform standard of conduct for everyone, subject to cases where the accused was not capable of recognizing and avoiding the risk attendant on the activity in question. Beyond this, the standard should not be individualized by reason of the peculiar personal characteristics of the accused. The purpose of Parliament in creating an offence of objective foresight, as in manslaughter is to stipulate a minimum standard which people engaged in the activity in question are expected to meet. If the standard is lowered by reason of lack of experience, education, or the presence of some other “personal characteristic” of the accused, the minimum standard which the law imposes on those engaging in the activity in question will be eroded. The objective test inevitably is transformed into a subjective test, violating and negating the wise admonition in *R. v. Hundal*, supra, that there should be a clear distinction in the law between subjective and objective standards, and negating the legislative goal of a minimum standard of care for all those who choose to engage in criminally dangerous conduct.

[111] Several paragraphs later she went on to say.

Mental disabilities short of incapacity generally do not suffice to negative criminal liability for criminal negligence. The explanations for why a person fails to advert to the risk inherent in the activity he or she is undertaking are legion. They range from simple absent-mindedness to attributes related to age, education and culture. To permit such a subjective assessment would be “co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual’ leaving “so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various” *Vaughan v. Menlove* (1837), 3 Bing. (N.C.) 468, 132 E.R. 490, at p. 475; see A. M. Linden, *Canadian Tort Law* (4th ed. 1988), at pp. 116-17. Provided the capacity to appreciate the risk is present, lack of education and psychological predispositions serve as no excuse for criminal conduct, although they may be important factors to consider in sentencing.

[112] From the foregoing passages it is clear that the lack of capacity required in order to excuse conduct that would otherwise constitute penal negligence, is something out of the ordinary; for example illiteracy resulting in the inability to read a warning label (see *Creighton* at pp. 389-390), or cognitive impairment so serious as to render one incapable of being able to understand a risk even if it were explained to them.

[113] The factors relied upon by defence counsel fall far short of the incapacity contemplated by the majority in *Creighton*.

[114] At the end of the day I am satisfied that there is no evidence concerning L.'s personal characteristics that gives rise to a reasonable doubt that he had the capacity to appreciate the risk of non-trivial bodily harm flowing from the unlawful act he committed.

[115] I would go further. As I have stated previously, I am satisfied that it has been proven beyond a reasonable doubt that he was in fact aware of that risk.

Novus Actus Interveniens

[116] L.'s counsel has argued that E.'s voluntary consumption of alcohol constituted an intervening act that relieves L. of criminal liability in her death. I have already discussed this topic in my earlier decision in this matter, dismissing L.'s no evidence motion and I find it unnecessary to repeat everything that I have already stated.

[117] Notwithstanding E.'s voluntary decision to drink the alcohol that killed her, the fact that L. initially provided it to her and continued to do so, remained acts, which constituted a marked departure from the standard of a reasonable thirteen-year-old, and were causes of death outside the *de minimis* range.

[118] Regardless of how he obtained the alcohol, it was effectively L.'s at the time he provided it to E. She consumed it while she was in his presence. He was controlling the bottle and telling her when to drink. He could at any time have prevented her from continuing to consume it. It remained reasonably foreseeable that bodily harm could befall E. throughout the time that she was being supplied with the alcohol and consuming it. Under all the circumstances, L. remained morally responsible for E.'s death after she chose to consume the alcohol.

[119] In arriving at this conclusion I have also considered that E. was twelve years of age at the time. As I noted in my earlier decision in this case, the "defence" of *novus actus interveniens* is treated far more robustly in the United Kingdom than it is in Canada. However, even in cases where the defence would apply in the case of an adult deceased, it may not apply in the case of a young person. In *R. v. Kennedy*, [2007] UKHL 38, the House of Lords answered the question "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A drug, which is then freely and voluntarily self-

administered by the person to whom it was supplied, and the administration of the drug then causes his death?” by stating, “In the case of a *fully-informed adult*, never.” [Emphasis Mine]

[120] In my view, the fact that E. was very young and not in a position to make a fully informed choice is something that must be taken into account.

ii) Criminal Negligence Causing Death

[121] The elements of Criminal Negligence Causing Death are as follows:

- 1) An act by the accused or omission by the accused where he is under a legal duty to act;
- 2) which constitutes a marked and substantial departure from the conduct of a reasonable person;
- 3) and which causes the death of the deceased; and
- 4) a reasonable person in all the circumstances would have foreseen a risk of bodily harm which was neither transitory or trifling.

a) L.’s Supply of Alcohol to E.

[122] If one focuses on L.’s supply of the alcohol to E. and compares the foregoing elements of criminally negligent manslaughter to those of unlawful act manslaughter in a case where the unlawful act is one of strict liability, the only additional element required is a *marked and substantial departure* from the conduct of a reasonable person as opposed to a *marked departure* from that conduct.

[123] I will once again, assume the standard of a reasonable thirteen- year-old and a reasonable thirteen-year-old with the same basic traits and experience as L. for the purposes of my analysis.

[124] As I have already found that all of the foregoing elements were present and that there was a “*marked departure*” from the standards, it is only necessary to determine whether L.’s conduct was also a “*marked and substantial departure*”. In

order to constitute a marked and substantial departure from the standard of care, the impugned conduct must be significantly more than a *marked* departure from the standard. The marked departure requirement is in itself that of gross negligence and significantly more than simple negligence, which is made out through any mere departure from the reasonable standard of care.

[125] The standard is objective in that the standard remains that of a reasonable person or, as I will assume for the sake of analysis, a reasonable thirteen-year-old.

[126] As noted in *R. v. J.F.* [2008] 3 SCR 60:

[9] On the count alleging criminal negligence, the Crown was bound to show that the respondent's very same omission represented a *marked and substantial departure* (as opposed to a *marked departure*) from the conduct of a reasonably prudent parent in circumstances where the accused either recognized and ran an obvious and serious risk to the life of his child or, alternatively, gave no thought to that risk: *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1430-31; *R. v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.).

[Emphasis Mine]

[127] The Court also cited with approval the reasoning in *Sharp*, (*supra*) in which the court held:

This was a case where the putting of the Code definition of criminal negligence to the jury with little more in the way of elaboration would have been sufficient. Proper elaboration would make clear to the jury the necessity for the driving to amount to a marked and substantial departure from the standard of a reasonable driver in the circumstances (which, as indicated earlier, was properly done in this case) and that the driver *either recognized and ran an obvious and serious risk to the lives and safety of others or, alternatively, gave no thought to that risk*.

[Emphasis Mine]

[128] The foregoing portions of *J.F.* and *Sharp* specify that criminal negligence is made out through a marked and substantial departure from the reasonable standard and either knowingly running an obvious and serious risk of bodily harm or not giving any thought to the risk.

[129] I have already reviewed the factors that have caused me to find that L.'s conduct in supplying the alcohol he possessed to E. was objectively dangerous and

constituted a marked departure from the standard of a reasonable 13-year-old. I find that that departure was so pronounced as to also constitute a marked and substantial departure from that same standard. I also find that he recognized the obvious and serious risk to E.'s safety that he was running. The fact that he was knowingly engaging in behaviour that involved a risk to his own well-being does not change this conclusion.

b) L.'s Failure to Provide E. Assistance.

[130] I agree with Crown counsel's submissions that L., after having supplied the alcohol to E. that initially rendered her unconscious, had a duty to provide assistance to her.

[131] Section 219 of the *Criminal Code* defines criminal negligence as follows:

219 (1) Every one is criminally negligent who

(a) in doing anything, or

(b) *in omitting to do anything that it is his duty to do,*

shows wanton or reckless disregard for the lives or safety of other persons.

Definition of *duty*

(2) For the purposes of this section, *duty* means a duty imposed by law.

R.S., c. C-34, s. 202.

[Emphasis Mine]

[132] Ordinarily, the law requires a positive act in order for there to be criminal responsibility. A simple omission is typically not enough to fulfill the requirement of an *actus reus*. As pointed out by Don Stuart, *Canadian Criminal Law*, Carswell 7th edition 2014 (at page 95), in a situation where D watches, V, who is completely blind, walk over a cliff, D, will not be held criminally responsible even though D could easily have stopped V. But what of a case, where the accused's action created the risk that he later did nothing to lessen?

[133] Professor Stuart states that the problem of determining responsibility for an omission may be legitimately avoided by characterizing the omission as an act of commission on the basis that there was an earlier positive act and the conduct should be continuous. So in the above hypothetical, had V asked D for directions and as a result was walking toward the cliff, D's subsequent inaction could well be viewed as an act of commission on the basis that D had a subsequent duty to act.

[134] One of the classic cases dealing with when an omission can legitimately be viewed as an act of commission as a result of an earlier act is that of *Miller*, decided by the House of Lords in England: [1983] UKHL 6. In *Miller* the accused had returned to a house where he had been squatting. He fell asleep after having lit a cigarette and then awoke to find the mattress he was laying on smoldering. His response was to move to the next room and go back to sleep. The fire spread and Miller was charged, under ss. 1 & 3 of the *Criminal Damage Act 1971*. Miller argued that there was no *actus reus* coinciding with *mens rea*. And that although his reckless inattention to the fire could be said to constitute *mens rea*, it was not associated with the *actus reus* of setting the fire. Nevertheless, Miller was convicted. He appealed his conviction.

[135] At the House of Lords, Lord Diplock, on behalf of the court, stated.

I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence.

I cannot see any good reason why, so far as liability under the criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged; *provided that at the moment of awareness, it lies within his power to take steps either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.*

[136] While it is apparent, that the House of Lords dealt with the problem it faced by treating the offence in question as an ongoing offence which had not yet been completed until the accused had neglected to act and again fallen asleep, it is also quite clear that the Court held that the accused had a duty to act when he realized the mattress he had been sleeping on was smoldering.

[137] The foregoing approach of determining whether an ongoing offence occurred will not strictly apply in a case of criminally negligent homicide. In the case of criminally negligent homicide, if the situation gives rise to a duty to act, the actus is complete as soon as there is a marked and substantial departure from that duty. The question in this case is to what extent the previous actions of the accused gave rise to a duty to act. As was the case in *Miller*, where the accused contributes to a danger, a duty to act may arise.

[138] In the *Criminal Code* there exists no general section on omissions. However, s. 219(1)(b) recognizes that there will be certain situations in which a duty to act will arise and that failure to fulfill that duty may result in criminal negligence.

[139] Unfortunately, the section refers to a duty without defining it. Nevertheless, there is now ample authority that the duty referred to in s. 219(1)(b) can arise either at common law or by statute. For example, in *R. v. Coyne* (1958), 124 CCC 176 (NBCA), a case involving firearms, Mr. Justice Ritchie held:

The “duty imposed by law” may be a duty arising by virtue of either the common law or by statute. Use of a firearm, in the absence of proper caution may readily endanger the lives or safety of others. Under the common law anyone carrying such a dangerous weapon as a rifle is under the duty to take such precaution in its use as, in the circumstances, would be observed by a reasonably careful man.

(See also: *R. v. Fortin* (1957), 121 CCC 345 (NBCA); *R. v. Popen* (1981) 60 CCC (2d) 232.)

[140] The English case of *R. v. Evans (Gemma)*, [2009] EWCA Crim 650, is of assistance in dealing with the facts of the case before me. The Court of Appeal for England and Wales was dealing with a situation where the accused gave some heroin to her sister which her sister then self-injected. The accused recognized the symptoms as being consistent with a heroin overdose. However, although the accused and her mother believed they were responsible for her care, they decided to not seek medical assistance because they feared that they, and possibly the sister would get in trouble. They remained in the house with her, checking her and sleeping in the same room as her. The next morning, the accused was woken by her mother who told her that her sister was dead. The cause of death was heroin poisoning. The appellant was charged with manslaughter.

[141] There was some dispute as to whether the accused had been concerned in the supply of heroin to her sister and at the end of the Crown's case submitted that there was no case to answer as the prosecution had failed to adduce evidence capable of establishing that she owed her sister a duty of care that required her to have done more to seek medical attention for her sister.

[142] The judge refused the nonsuit application on the basis that the accused was capable of owing a duty of care to her sister and that the jury should consider whether or not the sister did in fact owe her that duty on the basis that the sister had supplied the heroin. When summing up to the jury, the judge emphasized to them that before they could convict of manslaughter by omission, there had to be a pre-existing duty to act and that it was for the jury to decide whether the accused owed her sister a duty of care and that in the circumstances. On the evidence, the only way in which such a duty could arise was if it was found that Evans had supplied her sister with heroin. Evans was convicted.

[143] The Court of Appeal held, that for the purposes of "gross negligence manslaughter", if a person created or contributed to the creation of the state of affairs, which they knew, or ought reasonably to have known, had become life threatening, a consequent duty would normally arise on them to act by taking reasonable steps to save the other's life. They also found that if the accused had been involved in supplying the heroin to her sister; that fact, taken with other undisputed facts gave rise to a duty on the appellant to act and that the judges directions to the jury were therefore by and large correct.

[144] At paragraph 21 the court held:

21 When omission or failure to act are in issue two aspects of manslaughter are engaged. Both are governed by decisions of the House of Lords. The first is manslaughter arising from the defendant's gross negligence: *R v Adomako* [1995] 1 AC 171. The second arises when the defendant has created a dangerous situation and when, notwithstanding his appreciation of the consequent risks, he fails to take any reasonable preventative steps: *R v Miller* [1983] 2 AC 161. Gross negligence manslaughter and unlawful act manslaughter are not necessarily mutually exclusive: *R v Willoughby* [2005] 1 WLR 1880. The same applies to the aspects of manslaughter presently under consideration. Indeed care needs to be taken to avoid the risk of allowing the convenience of addressing the different circumstances in which manslaughter may arise to be converted into a compartmentalised, mutually isolated series of offences each inconveniently described by the same word, manslaughter.

22 Miller's duty to act arose after he fell asleep in a squat while holding a lighted cigarette. He woke up and found that his mattress was smouldering. He left the room in

which he had been asleep and went back to sleep in an adjoining room. He wholly ignored the smouldering mattress. The house caught fire. He was convicted of arson. In the House of Lords argument ranged over whether his omission to act engaged what was described as the duty theory espoused by Professor J C Smith or whether his reckless omission to rectify the consequences of his earlier unintended act attracted the continuing act theory supported by Professor Glanville Williams. It was submitted that there was no liability in criminal law for an omission unless there was a legal duty to act imposed by common law or by statute, and that no statutory provision imposed a duty neglect of which involved criminal liability, and no common law duty to extinguish an accidental fire or fire innocently started had previously been declared.

23 The decision of the House of Lords was expressed in the single opinion of Lord Diplock. Both theories, he said, led to an identical result. The continuing act basis for liability was not disavowed, but the duty theory was adopted only on the basis that it was easier to explain to a jury, provided the word responsibility rather than duty was used. In fact, the issue has continued to be addressed in the context of duty rather than responsibility, and we shall continue to do so. More important, however, Lord Diplock observed, at p 176, that he could see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. [. . .]

24 The *mens rea* necessary for arson was, and thereafter the analysis focused on, recklessness. But the reasoning in the decision does not exclude liability where a different *mens rea* is required. And if, for example, the result of the fire in *R v Miller* had included the death of a fellow squatter, it appears to us that Miller would properly have been convicted of manslaughter by gross negligence as well as arson: *R v Willoughby* [2005] 1 WLR 1880.

[145] Later on in the judgment after reviewing a number of prior decisions dealing with omissions the court stated:

31 These authorities are consistent with our analysis. None involved what could sensibly be described as manslaughter by mere omission and in each it was an essential requirement of any potential basis for conviction that the defendant should have failed to act when he was under a duty to do so. The duty necessary to found gross negligence manslaughter is plainly not confined to cases of a familial or professional relationship between the defendant and the deceased. In our judgment, consistently with *R v Adomako* [1995] 1 AC 171 and the link between civil and criminal liability for negligence, for the purposes of gross negligence manslaughter, when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the others life will normally arise.

[146] The court held that the trial judge had erred in advising the jury that if it determined that the accused had been concerned in the supply of heroin to her sister, it should then determine whether or not that fact gave rise to a duty of care to her sister. The Court of Appeal held that since the determination of the existence a duty of care is a question of law, the trial judge should have made the determination of whether or not the duty of care existed and advised the jury that such a duty existed in the event that the jury found the accused to have been involved in the heroin's supply.

[147] However, at the final paragraph of the judgment, the court held:

49 The important question however is whether his direction renders the conviction unsafe. It does not. On our analysis there was a plain case to answer. On the facts actually found by the jury on the supply issue, and the undisputed facts, in our judgment the appellant was under a plain and obvious duty to take reasonable steps to assist or provide assistance for Carly. The jury were sure, both in law and in fact on this point: so, as a matter of law, are we. The fact that the jury was sure as a matter of law may help to reinforce our conclusion, but in the ultimate analysis is irrelevant to it. The remaining ingredients of the offence were proved. Accordingly this appeal against conviction will be dismissed.

[148] I find that in the case before me, L. owed a duty to E. to get medical help for her. He was the person who obtained the alcohol that she was drinking. He was the one who was passing it to her. It was obvious that she had been rendered unconscious as a result of her consumption of alcohol. His companion D. had suggested that they get help for her. Instead L. raped her. He encouraged D. to do the same. After having had sex with her, he talked about making a fire for E. at a nearby location. However, he did not do so. He took back the jacket he had given her, even though it was around zero degrees Celsius at the time leaving her wearing only her pants and a hooded sweater.

[149] She was throwing up. He put her on her side rather than getting help for her. He knew she needed help and that by simply putting her on her side, he was not dealing with the problem as effectively as he otherwise might have. He knew there was a risk that very serious bodily harm would befall her. The duty to help her existed regardless of whether one applies the standard of a reasonable adult, a reasonable thirteen-year-old or a reasonable thirteen-year-old with the intelligence, personal attributes, and experience of L. When he left the scene, he violated that duty in a manner that was marked and substantial.

[150] L. knew she needed help. Even though obtaining help would have been very easy, he did not do so. I find that the reason he acted in this manner is very apparent. He did not want to be caught for the crime he had just committed.

[151] If one conservatively takes into account the passages of time provided by D., whose evidence I accept, even without taking into account the time that occurred between E. falling asleep and the time the sexual assaults began, the passage of time would have totaled forty minutes between the time she fell asleep and the time that D. and L. began to walk home. She was alive at the point that they left her. She had made noises after D. finished sexually assaulting her. She had thrown up. At some point after they left, she rolled from being on her side into a face down position. There was at least forty minutes during which she could have been helped. Had the chance to help her been taken when D. first suggested it, E. might well have survived.

[152] Instead L. took the opportunity to rape her. He decided to take a serious chance with E.'s safety instead of getting her the help she clearly needed. Additionally, when he and D. had finished, he did nothing other than putting her on her side. He left her where she was in order to prevent himself from getting in trouble.

[153] In omitting to help her, he robbed her of any chance she had of survival.

Causation

[154] As I said earlier, when dealing with the issue of causation in respect of the unlawful act of supplying alcohol to E., it is clear that causation is made out as it was that alcohol that killed her. Since I have found that the circumstances of L.'s supply of alcohol to E. constituted criminal negligence, causation is also not in issue relative to that act of criminal negligence. Accordingly I find that all of the elements of the offence of criminally negligent manslaughter have been established beyond a reasonable doubt.

[155] However, I have additionally said that L.'s omission in obtaining help for E. also constituted criminal negligence. When it comes to this aspect of L.'s conduct, the issue of causation is somewhat less straightforward.

[156] Dr. Brooks-Lin's evidence was that under the circumstances she could not say with any real degree of certitude that E. would have lived had she been taken to

the nursing station in Fort Liard. She said that her chance would certainly have been better.

[157] During cross-examination defence counsel made a number of suggestions to Dr. Brooks-Lin concerning the fact that E.'s blood alcohol was .4 milligrams percent at the time of death and the length of time the alcohol was consumed. He suggested that if E. had drank a quantity of alcohol sufficient to get her to that level in a short period of time, she would have died in a matter of minutes after passing out and that therefore her chances of survivability would not have been improved. Obviously, this would be especially so if E. had already died or was just about to die at the time she was taken to the nursing station. Dr. Brooks-Lin responded to these suggestions by stating that they were "reasonable".

[158] Much of the testimony Dr. Brooks-Lin's provided during cross-examination by defence counsel concerning the timeframe in which death could occur, assumed that all the alcohol was consumed within 30 minutes. However, Dr. Brooks-Lin also clarified on re-examination that what she had said to defence counsel concerning the time in which E. might have died was based on the assumption that E. consumed all of the alcohol, which she drank within thirty minutes.

[159] I have found that the period over which she consumed the alcohol was significantly longer. Therefore much of the hypotheticals found by Dr. Brooks-Lin to be "reasonable" are not applicable.

[160] I have already stated my findings of fact on how long E. was alive following the sexual assaults. I find that had she been taken to the nursing station immediately after passing out or as late as the time when D. suggested that they should take her to her friend's place, her chances of survival would have been increased substantially. Based on Dr. Brooks-Lin's evidence I find it is possible that she would have survived. She would have had a real chance. By leaving her where she was, L. and D. deprived her of that chance.

[161] To prove causation, the Crown must establish that L.'s failure to obtain help for E. was a contributing cause of death outside the *de minimis* range: *R. v. Smithers*, 1978] 1 S.C.R. 506.

[162] In determining scientific causation, the law has traditionally required that “but for” causation be established. In a case of homicide, the Crown must prove that “but for” the accused’s act or omission, the deceased would not have died. As well, the cause must be significant. As stated, it must play more than a trivial role.

[163] Given Dr. Brooks-Lin’s expert testimony, I am unable to come to the conclude that it has been proven beyond a reasonable doubt that had L. and D. gotten help for E. when she first passed out that she would have lived. I am unable to say that the “but for” test, as it has traditionally been applied, is made out.

[164] However, the Crown has referred to two trial level cases, dealing with allegations of criminal negligence causing death where the accused failed to obtain medical assistance for the deceased, which have adopted a modified approach.

[165] In *R. v. Alexander*, 980 ONSC 6839, the court stated:

58 Finally, the test for causation is not whether Miguel had a better than even or less than even chance of surviving if his mother had ensured that he received proper medical care. The test is whether the absence of any appropriate medical treatment for Miguel was a significant contributing cause to his death. It is not necessary for the Crown to prove that the treatment would definitely have saved Miguel's life. Those kinds of certainties simply do not exist in medicine, or in law. It is not even necessary for the Crown to prove that the lack of treatment was the primary cause of Miguel's death. The Crown is only required to prove that the lack of treatment played more than a minor, trivial, or *de minimus* role in Miguel's death. That test is easily met in this case.

59 I am satisfied beyond a reasonable doubt that the failure to get medical treatment for Miguel was a significant contributing cause in his death.

[166] In the earlier case of *R. v. French & Collins*, 2006 BCSC 1531 the court held:

100 Dr. Stephen was careful in giving his evidence. I find, based on his evidence and of the balance of the evidence that supports the conclusion, that had Ms. Pete received treatment immediately after she received the injuries, she would have survived. The real difficulty is determining whether the Crown has proven beyond a reasonable doubt that had she received treatment shortly after 10:00 p.m., or when she reached the apartment, that it *would have made a difference to her survivability*. In other words, whether or not

the fact that she did not receive treatment at that time contributed in a significant way to her death.

101 Considering all of the evidence and the circumstances, I am satisfied that on the balance of probabilities, *the fact that she did not receive treatment at that time contributed to her death in the sense that her chances of survival were reduced.* However, proof beyond a reasonable doubt is much closer to certainty than it is to the balance of probabilities. The Crown is not required to prove to a certainty that receipt of medical treatment would have made a significant difference to Ms. Pete. However, on all of the evidence, especially considering the amount of blood loss at the school itself and the length of time which had passed from the time of her injury and her semi-comatose state which would appear to have been caused by the progression of her injuries, *I am unable to say that I am sure it would have made a significant difference to her, after 10:00 p.m., when their negligence occurred.*

102 Therefore, I find that the Crown has failed to prove this essential element of the offence; that is, that the defendants' failure in their duty to Ms. Pete was a significant contributing cause to her death.

103 Therefore, I find the Crown has failed to prove the essential element of causation in this case and find the accused not guilty.

[Emphasis mine.]

[167] In other words, the court in *French & Collins* applied the same test as that in *Alexander*, but held that given the deceased's advanced state at the time that the negligence in not getting help for her occurred, it could not conclude beyond a reasonable doubt that the help would have made any difference to her survivability.

[168] Unfortunately, beyond these cases, there is very little guidance in the jurisprudence. The only appellate level manslaughter case I have found dealing with a failure to get help is that of *R. v. Knight*, [2002] A.J. No. 1022, which ultimately provides no assistance. In *Knight*, the deceased, who ultimately died from a subdural hematoma, had been assaulted on two occasions in the same day. The appellants were involved only in the second set of assaults during which the deceased was knocked out. During the assault, the accused was struck in the head. The deceased's clothing was removed and he was left on the ground overnight. The next morning he was taken to the hospital where he was determined to be suffering from hypothermia. The actual cause of death was the subdural hematoma. The trial judge concluded that the second assault contributed to the death in-so-far as "but for" the second assaults, he would not have died as soon as he did.

[169] The court of appeal found that the trial judge misunderstood the medical evidence and overturned the conviction. However, Paperny J. in dissent stated as follows:

26 On the evidence, it was reasonable for the trial judge to conclude that the repeated assaults by the appellants which resulted in the victim being left unconscious and unclothed by the railway tracks for a number of hours without medical attention was a cause, at least a contributing cause, of his death. Dr. Dowling also testified that early medical intervention would have been required to save Currie from the effects of a subdural. The actions of Knight and Hay, rendering him unconscious and knowingly leaving him in that condition did prevent such early medical treatment. *The trial judge stated, in my view, correctly, that he could also conclude that leaving the victim unconscious, after a severe and repeated beating could fairly be said to be a significant cause of death.*

[Emphasis Mine]

[170] On appeal, [2003] 1 S.C.R. 156, the Supreme Court of Canada stated in a very brief oral decision:

We agree with Paperny J.A. that it was open to the trial judge to conclude as he did that the severe assaults by the respondents caused the death of the victim.

[171] Unfortunately, the court declined to rule on the issue of causation in cases involving a failure to obtain medical aid. It continued by stating:

It is therefore not necessary in our view to reach any conclusion as to whether leaving the victim unconscious and unclothed by the railway tracks was a contributing cause of death.

[172] While there is no appellate authority to the same effect, I agree with the analysis set out in Alexander, (supra). The kinds of certainties that would be required to prove that treatment would have saved E. do not exist. Failure to obtain medical treatment will constitute a non-trivial cause of death in cases where it significantly diminishes the deceased's chances of survival.

[173] I find that the facts before me are quite distinguishable from those that existed in *Collins*. I conclude that had E. been given help when it first became apparent that she needed it, her chances of survivability would have been substantially increased. Put another way, the Crown has proved beyond a

reasonable doubt that “but for” L.’s omission, E. would have had a real chance at survival. I am satisfied that it has been proved beyond a reasonable doubt that by not getting her help, L. took away that chance. The Crown has established that L.’s failure to obtain help for E. was a contributing cause of death outside the *de minimis* range.

[174] The essential element of causation has therefore been proved to the requisite standard.

Capacity and Novus Actus Interveniens

[175] What I have also said on the topics of capacity and *novus actus interveniens* when dealing with unlawful act manslaughter apply equally to manslaughter through criminal negligence. The evidence does not raise a reasonable doubt as to L.’s capacity to appreciate the risk of non-trivial harm engaged by his supply of alcohol to E. *and* omission to get help for her once she passed out.

[176] Under all of the circumstances, L.’s actions in providing alcohol to the twelve-year-old E. and continuing to do so after she exhibited symptoms of gross intoxication, remained acts which constituted a marked departure from the standard of a reasonable thirteen-year-old, notwithstanding E.’s voluntary consumption of the alcohol. They also constituted a marked departure from the standard of a reasonable thirteen-year-old with L.’s characteristics and experience. They remained acts that were a cause of E.’s death outside the *de minimis* range.

[177] In relation to L.’s failure to obtain assistance for E., the doctrine of *novus actus interveniens* is clearly inapplicable.

3. Conclusion

[178] I find L. guilty of manslaughter on all three of the bases I have indicated. I also accept the guilty plea to sexual assault causing bodily harm and find him guilty of that count as well.

Robert D. Gorin, T.C.J.

Dated at Yellowknife, Northwest
Territories, this 11th day of
August, 2018

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and –

L.M.

**REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE ROBERT D. GORIN**

Restriction on Publication

Identification Ban – see *Criminal Code*, s.486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

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

Note: This judgement is intended to comply with the identification ban.