**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. Sylliboy*, 2022 NSSC 213

**Date:** 20220713
**Docket:** CRT 492051
**Registry:** Truro

**Between:**

Her Majesty the Queen

v.

Kevin Brian Sylliboy

Defendant

# DECISION ON SENTENCE

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| **Judge:** | The Honourable Justice Jeffrey R. Hunt |
| **Heard:** | At Truro, Nova Scotia |
| **Oral Decision:** | July 13, 2022 |
| **Written Release:** | July 25, 2022 |
| **Charge:** | That he, on or about the 1st day of April, 2018, at, or near, Millbrook in the County of Colchester, Province of Nova Scotia, did commit second degree murder on the person of James Blair contrary to Section 235(1) of the *Criminal Code of Canada.* |
| **Counsel:** | Patrick Young/Jody McNeill, Crown Counsel<br>Zeb Brown, Defence Counsel |

**By the Court (Orally):**

[1] Before the Court for sentencing this afternoon is Kevin Brian Sylliboy. Mr. Sylliboy has previously been found guilty of the second-degree murder of James Blair. There is only one possible sentence for murder.

[2] The ***Criminal Code of Canada,*** R.S.C., 1985, c. C-46, (the "***Code***") at Section 235 directs as follows:

> 235 Everyone who commits first degree murder or second-degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

[3] Also relevant is subsection 745(c), which states:

> 745. … the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be
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> > (c) in respect of a person who has been convicted of second-degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4...

[4] Section 746 of the ***Code*** directs that where the accused has been in custody continuously since arrest, the calculation of the parole ineligibility period will commence on the date the accused was taken into custody:

> 746. In calculating the period of imprisonment served for the purposes of section 745, 745.1, 745.4, 745.5 or 745.6, there shall be included any time spent in custody between

> (a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed...

[5] In accordance with the *Criminal Code*, Mr. Sylliboy will be subject to this mandatory punishment as directed by law. The true issue today is the minimum amount of time that Mr. Sylliboy will have to serve before he is eligible to apply for parole.

**Family of Victim**

[6] Before continuing on I want to say this to the family and friends of James Blair who are gathered together here today and who are continuing to deal with the pain and grief of losing their loved one. For the next while you are going to hear the Court speaking primarily about Mr. Sylliboy, his background, his upbringing and all the circumstances that brought him to this place and this sentencing. Please do not let yourselves think that all the focus on Mr. Sylliboy leads us to forget who the victim of this tragedy is. It does not. Jamie Blair's senseless death, your loss and your hurt, is never lost sight of by the Court. The nature of a criminal sentencing, however, and the law that governs the process, require a comprehensive and probing inquiry into the personal circumstances of the offender, as well as a thorough understanding of the offence. My trial decision, in

which I found Mr. Sylliboy guilty of second-degree murder [*R. v. Sylliboy*, 2022 NSSC 59], constituted the inquiry into the facts of the killing. This process today is the larger inquiry into the circumstances of the person to be sentenced.

**Position of Crown**

[7] The Crown accepts that, within the offence of second-degree murder, there can be a wide range of wrongful conduct, moral culpability, and appropriate levels of parole ineligibility.

[8] They accept that every sentencing is an individualized process that must be tailored to the circumstances of the offender and offence.

[9] They say that the appropriate range of parole ineligibility in this case is between 15 to 20 years. And within that range they specifically submit that the circumstances of this offence and this offender warrant that the period be set at 17 years. They say this number of years would send the appropriate message in terms of recognizing the harms done to the victim's family and to the wider community while at the same time being cognisant of Mr. Sylliboy's individual background and circumstances.

**Position of the Defence**

[10] The Defence submits that the appropriate period of ineligibility ought to fall between 10 and 12 years. This would place Mr. Sylliboy in the lowest range of ineligibility within the ranges referenced in caselaw, including in *R. v. Hawkins*, 2011 NSCA 7.

[11] They note that Mr. Sylliboy is still a relatively young man. They submit he is not beyond rehabilitation and ask the Court to impose a period of ineligibility that reflects the expectation that he can be a person who changes the trajectory of his life.

[12] It is further the position of the Defence that all parole ineligibility decisions which predate the decision of our Court of Appeal in *R. v. Anderson*, 2021 NSCA 62 ought to be approached cautiously as they pertain to the sentencing of racialized individuals.

**Additional Relevant Provision of Criminal Code**

[13] In addition to the Code sections reviewed above, the following provision sets out the specific considerations the Court must undertake in determining the period of parole ineligibility.

[14] In determining whether parole ineligibility should be 10 years, or some greater amount up to and including 25 years, section 745.4 states:

> 745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who was convicted of second-degree murder, the judge who presided at the trial of the offender ..... may, **having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission,** and to the recommendation, if any, made pursuant to section 745.2, by order substitute for 10 years a number of years of imprisonment (being more than 10 but not more than 25) without eligibility for parole, as the judge deems fit in the circumstances." (emphasis added)

[15] In deciding what period of parole ineligibility would be fit, judges are guided by what periods of parole ineligibility have been imposed on similar offenders in similar circumstances of second-degree murder convictions. It is the understandable need for a degree of consistency between the periods of parole ineligibility for similar offenders in similar circumstances that drives this inquiry into what is the "acceptable range" of parole ineligibility. This is often a challenging factor to apply given that no two offences and no two offenders are ever truly the same.

[16] Caselaw suggests that the appropriate way to proceed is to first identify the "acceptable range" of parole ineligibility. A "fit" or reasonable period of parole ineligibility can then be selected as the specific period for a particular offender.

[17] In *R. v. Cromwell*, 2005 NSCA 137 the Nova Scotia Court of Appeal had the following to say about the "fitness" of a sentence and how the "range" of reasonable sentences is determined:

> 26 In my opinion the range is not the minimum to maximum possibilities for the offence, but is narrowed by the context of the offence committed and the circumstances of the offender ("... Sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." Per MacEachern, C.J.B.C. in R. v. Mafi, (2000) 142 C.C.C. (3d) 449 (CA)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

[18] More recently the Court of Appeal has provided further direction on the subject of determining the appropriate period of parole ineligibility: *R. v. Ward*, 2011 NSCA 78; and, *R. v. Hawkins*, 2011 NSCA 7.

[19] In *Hawkins*, Beveridge J.A. stated at paras. 16 and 17:

> 16 Although the criteria specified by s. 745.4 references but three factors (the character of the offender, the nature of the offence, and the circumstances surrounding its commission), it is plain that these factors are not to be narrowly construed. For example, in R. v. Shropshire, Iacobucci J., after enumerating the three statutorily prescribed factors, announced that denunciation can be considered under the criterion "nature of the offence" and concerns over the possible future dangerousness of the offender under "character of the offender" (para. 19). Indeed, since parole ineligibility is part of the "punishment" and thereby an element of sentencing policy, deterrence is also relevant in justifying an order under s. 745.4 (paras. 21-23).
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> 17 Following the release of the Supreme Court's decision in R. v. Shropshire, Parliament amended the Code by introducing ss. 718-718.2 "Purpose and Principles of Sentencing". These sections, in effect, codified many of the principles established by decades of case law, but also clarified the approach to be taken by the courts in exercising their discretion in imposing sentence. It is useful to set them out. They are:
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> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(iii) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iv) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(v) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(vi) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[20] To recap, the starting point is a 10-year period of parole ineligibility. To consider substituting a different number of years, the Court must consider the factors in section 745.4 (character of the offender; nature of the offence; circumstances surrounding the commission of the offence; and any jury recommendation made pursuant to section 745.2, this final element has no application in this particular case, as it was a judge alone trial).

[21] The Court must also weigh sections 718 - 718.2 of the Code. Having done so the judge will be in a position to assess where, within the range of acceptable periods of parole ineligibility, the specific offender should be placed, that is: in the 10 - 15 year range; the 15 - 20 year range; or the 20 - 25 year range.

[22] I also want to note the following. Although sections 718 - 718.2 of the Code are relevant to this process (see *Hawkins*, supra, para 47), "specific deterrence" has no place in this decision (*Hawkins*, supra, para 39-41). Further "denunciation and deterrence" are not of "paramount significance" in cases of second-degree murder because the sentence provides for a minimum period of parole ineligibility (see *Hawkins*, supra, para 42).

[23] There is still a role for considering denunciation and to promote general deterrence. Denunciation can be considered under the criterion of "nature of the

offence" and concerns over possible future dangerousness of the offender under the criterion of "character of the offender" within those section 745.4 factors (see *Hawkins*, supra. para 16).

**Circumstances and Character of the Offender**

[24] Mr. Sylliboy is currently 29 years old. The offence traces to when he was 25. He identifies as a mixed-race individual – Aboriginal and Black. He reports his mother as indigenous and his biological father as African Nova Scotian. His family upbringing was characterized by violence, sexual abuse, poverty, the effects of racism and serious substance abuse. He became a child in permanent care of the Department of Community Services. While in the system he began down the road to a serious substance abuse issue. He began to engage in criminal activity.

[25] The full extent of the absolutely deplorable conditions of his early years is found in the contents of two reports before the Court. We have had the benefit of a very comprehensive and specialized report known as an Impact of Race and Culture Assessment (“IRCA”). This Report has provided the Court with a review of the impact on Mr. Sylliboy of his social, cultural and racial identity development. It is sobering reading.

[26] In addition, the Court has a Gladue Report dated March 2, 2020. Although this report is a bit older than the IRCA, all parties agreed it continues to be helpful and relevant in that it explores, also in substantial detail, the destructive legacy of generations of historic injustice and racial discrimination. The results include community dislocation and cultural damage which has resulted in systemic over representation of aboriginal and racialized individuals in correctional institutions.

[27] I have received submissions from the parties with respect to the proper application of the principles of *R. v. Ipeelee*, 2012 SCC 13 (as it pertains to aboriginal offenders) and *R. v. Anderson*, supra. (as it pertains to African Nova Scotians). The law is very clear that the fact an offender is Aboriginal or racialized, on its own, does not justify a different sentence. However, the uniqueness of such offenders can justify individualized treatment in appropriate circumstances. Further, as stated in *R. v. Ladue*, 2011 BCCA 101at para. 45, "... there is no automatic Aboriginal discount" of a sentence, and the more serious the crime, the more reduced role the systemic factors play in crafting a sentence. Also, as the British Columbia Supreme Court wrote in *R. v. Sam*, 2014 BCSC 1267 at paragraph 21

> ... That is not to say, however, that being of Aboriginal heritage gives an offender a stay out of jail card or an automatic discount, but the systemic factors can sometimes operate in subtle ways that are difficult to discern.

[28] Therefore, the objective is not to favour racialized offenders over other offenders; rather background and systemic factors are considered for all offenders (thereby in some cases justifying variation in sentences (see *R. v. Pangman*, 2011 MBCA 64)). While rehabilitative and Gladue objectives need to inform a fit sentence, they do not automatically trump other sentencing objectives and sometimes public safety is paramount (see *R. v. Cisneros*, 2014 BCCA 154; see also *R. v. Kidlike*, 2013 ONCA 332).

[29] Highly aggravating factors leave little scope for a reduction of a sentence based on the offender's Aboriginal heritage (see *R. v. Thorn*, 2013 NWTSC 8). Separation, denunciation and deterrence retain their relevance for the most serious of offenders and offences (see *R. v. Jacko*, 2010 ONCA 452; *R. v. Blind*, 2013 SKPC 168). Section 718.1 of the Code still requires that a sentence be proportionate to the gravity of the offence, regardless of whether the offender is Aboriginal or non-Aboriginal (see *R. v. Paul*, 2014 BCCA 81).

[30] Of critical importance in this process are the following comments of the Nova Scotia Court of Appeal in *Anderson*, supra. The guidance provided in this case represents the current state of the law in Nova Scotia on these sentencing issues:

> 114 Taking account of IRCA evidence ensures relevant systemic and background factors are integrated in the crafting of a fit sentence, one that is proportionate to the gravity of the offence and the moral culpability of the offender. In its factum, the ANSDPAD Coalition quoted from Professor Maria Dugas' article, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" where she discussed the role IRCAs are designed to play in sentencing:
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> > IRCAs operate from the assumption that a person's race and culture are important factors in crafting a fit sentence. They provide the court with necessary information about the effect of systemic anti-Black racism on people of African descent. They connect this information to the individual's lived experience, articulating how the experience of racism has informed the circumstances of the offender, the offence, and how it might inform the offender's experience of the carceral state.55
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> 115 Sentencing is an inherently individualized process. It is a fundamental duty of a sentencing judge to pay close attention to the circumstances of all offenders in order to craft a sentence that is genuinely fit and proper. What is required in the sentencing of Indigenous offenders applies to offenders of African descent who are also entitled to "an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences...".
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> 116 Sentencing judges play a significant role in how offenders are punished and rehabilitated through the criminal justice system. As in the case of Indigenous offenders, they decide whether an offender of African descent is incarcerated or receives a sentence that can play "a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime". Notwithstanding that sentencing judges are far downstream from the forces that have contributed to bringing offenders before them, they are influential at a critical juncture: they determine if incarceration and separation from society is the course to be followed or if a remedial option can serve the objectives of sentencing and achieve a just outcome.

[31] In terms of other caselaw on these issues I want to say that I adopt the very thoughtful views of Justice Campbell in *R. v. Gabriel*, 2017 NSSC 90 as they pertain to issues of considering and applying factors of cultural and racial background. These include the observations at paragraph 43 through 57. His comments predated the decision of the Court of Appeal in *R. v. Andersen* but, in

many ways, were a precursor to the guidance provided by that Court on the treatment of mitigating cultural and systematic background circumstances.

[32] Both Crown and Defence accept that Mr. Sylliboy's racial, social and cultural reality have had a significant negative impact on him and his personal choices. In a very real way, he has not been able to escape the ravages of his upbringing. Does that excuse his actions? No, it does not. Does it help us understand why he has come to this point? The answer to this is clearly yes.

[33] There is no doubt that Mr. Sylliboy's traumatic childhood would have been devastating to anyone who had experienced it. There can also be no doubt that those experiences, taken together with the historic and continuing racism that his community, and that he himself has experienced, have all contributed in a very real way to the tragedy of this killing. We all have to acknowledge and attempt to understand these factors.

[34] I want to highlight a number of elements of personal circumstances which I extract from the Reports:

- His parents were addicted to alcohol and drugs and their relationship was marked by domestic abuse.
- His birth parents separated very early in his life.

- His father was incarcerated and eventually moved away

- Mr. Sylliboy went into care at an early age before eventually returning to his mother's care and then returning to permanent care of the Minister of Community Services at age nine.

- For a time in the household of his mother he was subjected to what has been accepted to be extreme abuse from a then stepfather who targeted him. There was physical and sexual abuse. The physical abuse fell into the more extreme end. The Reports are very upsetting to read. These facts come not from just the accused or his family but from outside sources such as youth workers of the time.

- At approximately age 12 Mr. Sylliboy went to the Reigh Allen Center. This is when he began most heavily to move into the world of alcohol, drugs and, increasingly, crime.

- He began to go in and out of Waterville Youth Center. He was not getting any real schooling. When not in Waterville the alcohol, drugs and crime would continue to spiral. He was running with an older crowd and working to fit in by stealing and selling drugs.

- Things only continued to get worse over time. With no real schooling and a criminal record his options were extremely limited. He continued to return to old patterns and old habits. The substance abuse was now essentially a permanent feature. A confluence of mental health issues and substance abuse brought him to the point of attempted suicide. He continued to engage in criminal behavior that led to incarceration.

[35] Of course, to properly consider the character and circumstances of the offender, within the meaning of the Code, we have to weigh any relevant criminal record. The Court has had placed before it the criminal record of the Defendant. While it is proper to place the youth record before the Court, it has to be

considered cautiously. It does contain crimes of violence and non-compliance with court orders as a youth.

[36] I am more concerned however by his adult record which is in evidence. He has past convictions for serious crimes of violence including an adult sentence for assault with a weapon. There was additionally an even more serious conviction and sentence for being unlawfully in a dwelling house, possessing a firearm while prohibited and use of a firearm during an offence. The global sentence for these was just under 4 years.

[37] Following release from this custody there were continuing convictions and sentences for assault (5 months sentence), a section 129 offence (resisting/obstructing) and being unlawfully at large, for which he received further custodial sentences.

[38] In summary, with respect to the record:

- Mr. Sylliboy has a record for violence.
- This has resulted in significant time in custody.
- Following prior releases, he has been unable to stay out of the system.

- Prior orders prohibiting him from possessing firearms have been unsuccessful in actually preventing him to refrain from possessing and using these weapons.

[39] Before moving on, I want to summarize the major mitigating factors relative to the condition and circumstances of the offender:

1. There is the statutorily mitigating factor of his indigenous status coupled, in this case, with his mixed-race status as an African Nova Scotian;
2. He has mental health issues which are significant in nature and arise out of a devastated family background and upbringing.

**Nature and Circumstances of the Offence**

[40] The Code requires the Court to proceed to consider the nature and circumstances of the offence. In many second-degree murder sentencings, the finding of guilt will have been made by a jury, so the Court is required on sentencing to make detailed factual findings, as these can not be derived from a bare jury verdict alone.

[41] This case was a judge alone proceeding and the Court rendered a written decision containing its relevant findings and conclusions. It would do little good to repeat all those here. They form the foundation of this sentencing proceeding. I will touch on a number of relevant points. James Blair was shot and killed in the early morning hours of April 1, 2018. He died from a single gunshot wound to the

upper torso. This occurred on the front porch of the home at 905 Willow Street, Millbrook, Nova Scotia. Kevin Sylliboy has been found guilty of second-degree murder in his death.

[42] This was a tragic and senseless crime. Jamie Blair and Kevin Sylliboy did not actually have a meaningful history of real personal animosity. The killing was not for profit. It was not truly out of passion. Like so many convictions for this offence it arose out of a dispute and set of circumstances that should never have escalated to the point it did.

[43] It was ultimately an impulsive act. That is not to take away of course from the fact it was an intentional act. It obviously was. And acting on impulse, he did have to take steps to act on the impulse.

[44] The Crown says there are aggravating factors to be assessed relative to the nature and circumstances of the offence itself. They say the murder required deliberation within the meaning of *R. v. Beaver*, 2014 NSSC 10. This factor is a complex one in this case, as it is in many. Mr. Sylliboy acted on an impulse. However, acting on that impulse he had to take steps such as shouting for the victim to be sent out of the residence at 905 Willow.

[45] The Crown asks that I consider it aggravating in the circumstances that once he shot the victim, he never called 911. I find that a difficult one to weigh. Clearly Mr. Sylliboy knew there were other adults at the scene at 905 Willow. If he thought about it at all, he would have known that multiple other persons at the home would be calling immediately for help.

[46] The Crown asks that, when weighing the circumstances of the offence, I consider the fact that the shooting was within a few meters of a dwelling house. That was a terrible and upsetting event for the homeowners Mallory Mitchell and Mitchell O'Toole. We know they would have been horrified for their children. Shocking as it was, however, I have to be mindful that Mr. Sylliboy did not drive up and indiscriminately spray the scene with bullets. He acted with intention to target one person with one shot. One critical and fatal shot. While I recognize what the Crown says about the risks always inherent in the discharge of any weapon, the circumstances here can be distinguished from a 'drive by' scenario. This does not take away at all from the shock and horror experienced by all present at the scene. There was plenty of tragedy here without it being a drive by.

[47] It is certainly the case that the *Criminal Code* provides that the use of a firearm in the commission of an offence is an aggravating factor on sentencing.

**Victim Impacts**

[48] We heard read today two victim impact statements and the Court has considered two others which were filed in written form. Jamie Blair's sister, Susan Dalrymple, and mother, Peggy Blair, read their statements. The others were read and considered by the Court as filed.

[49] They poignantly express the terrible sense of loss and pain that has been left in the wake of this killing.

[50] Children have lost a father and a wider family and community have lost a loving son, brother and friend. Mere words seem to be inadequate to describe the pain that they have expressed. I have seen the real agonizing impact of this killing on these family members who have attended the trial throughout. Their loss is never going to be healed.

**Range of Sentence**

[51] Section 718.1 of the Code directs that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The period of parole ineligibility forms part of the sentence and must respect these principles. Whatever weight the Court ultimately puts on the various objectives

and principles in the Code, the resulting sentence must take account of the fundamental principle of proportionality (see *R. v. Ipeelee*, supra, para 37).

[52] The parties have referred me to many cases pertaining to what other sentencing courts have done in parole eligibility hearings. I have reviewed all of the cases referenced by counsel and others. I will refer to some of these in particular.

[53] In *R. v. Hawkins*, 2011 NSCA 7, the Court of Appeal reduced to 15 years a 20-year period of parole ineligibility originally handed down by the trial judge. The accused had broken into the victim's home in order to commit a robbery and killed the owner of the home in the process. The victim was stabbed to death and strangled. The victim was also noted to be mentally disabled. The accused had demonstrated a consistently strong work ethic but had a significant substance abuse problem. He also had only one prior conviction of a violent nature.

[54] *Hawkins* is also notable because it referenced the three general ranges of parole ineligibility for this offence:

1. **10 to 15 years** – reserved for those offenders for whom prospects of rehabilitation are good and little would be served by extending the period of parole eligibility other than to further the sentencing objectives of denunciation and retribution;
2. **15 to 20 years** – reserved for those who fall between range 1 and 3;

3. **20 to 25 years** – reserved for the 'worst of offenders' in the 'worst of cases' including offenders who commit brutal murders and who have a criminal record at the high end of brutality and violence such that the threat to public safety is evident.

[55] In the present case I note that the defence recommendation would place Mr. Sylliboy in the first range while the Crown position of 15 to 17 places him in the second.

[56] The Crown further refers to the case of *R. v. Ward*, 2011 NSCA 78. There the defendant was convicted of second-degree murder after beating the victim with a baseball bat resulting in his death. This was after a fight earlier. The Court of Appeal imposed a sentence of 13.5 years. However, the Crown notes the accused was found by the Court of Appeal to have a positive work history. His background suggested this crime was well out of character for him. He had a past history that was characterized more as a peacemaker than an aggressor. There were many aspects of his prior life that were noteworthy for their pro-social character.

[57] In *R. v. Hutchinson*, 2014 NSSC 155, the victim was the mother of two young children who was stabbed to death by the accused with whom she was in an intimate relationship. He had 71 prior convictions, most of which involved violence. The Court found that this had been a brutal and savage killing which had been committed by an accused with an increasing propensity for violence as

evidenced by his record. The Court ordered 21 years before he would be eligible to apply for parole.

[58] In the case of *R. v. Riley*, 2019 NSSC 92, the accused shot and killed a pizza delivery person. It would appear the victim had been chosen deliberately because of a dispute with the accused. The accused was 19 at time of murder and had 18 prior criminal convictions starting from the age of 14, some of which were for offences of violence. A 15-year period of ineligibility was imposed.

[59] In *R. v. Butcher*, 2018 NSSC 194, the accused killed the victim in her home by stabbing her repeatedly while she lay in bed. They had been in a relationship and there was some evidence that the victim was attempting to end the relationship. The Court ordered 15 years before eligibility for parole. I acknowledge there is a distinguishing feature with this matter in that Mr. Butcher had previously been a pro-social individual with no record for violence.

[60] In the case of *R. v. Garnier*, 2018 NSSC 196, the accused and the victim met at a bar and returned to his residence. During a sexual encounter, the accused beat the victim and strangled her, causing her death. The accused had no record prior to this incident. The Court ordered a 13.5 year period before the accused would be eligible to seek parole.

[61] In *R. v. Pelletier*, 2004 BCCA 264, the offender carried out a home invasion where an 81-year-old resident was beat to death by being stomped in the head. The accused was a 21-year-old aboriginal offender, with significant addiction issues and a criminal record. He was given a 15-year parole ineligibility.

[62] In *R. v. Boucher*, 2006 CarswellYukon 89 (SC), the beating of a 64-year-old man resulted in his death. The defendant subsequently disposed of his body. The accused had a criminal record for violent crimes. His parole ineligibility was set at 15 years.

[63] In *R. v. Ross*, 2018 MBCA 7, the victim was beaten by three co-accused and left unconscious. The accused then later returned and continued the assault, kicking him in the head, which lead to the victim's death. Again, a 15-year parole ineligibility period was set.

[64] In *R. v. Martin*, 1981 49 N.S.R. (2d) 361 (NSCA), the victim was set upon and robbed by two offenders. He was repeatedly kicked while he was on the ground and subsequently died of his injuries. The accused had a criminal record. The period of parole ineligibility was set at 14 years.

[65] In *R. v. Reitmeier*, 2016 ABCA 269, the two accused beat the victim, who was a stranger chosen at random, to death. The victim was assaulted in a back alley

on the street, knocked to the ground, and was kicked repeatedly. The accused in that case was given a 13-year parole ineligibility period.

[66] I am also aware of the decision in *R. v. Whynder,* 2019 NSSC 386, a case where a second-degree murder conviction for a shooting of an acquaintance resulted in a 17-year period of parole ineligibility. This was a case like this one where the defence argued that the offender fell into the lowest category and the crown argued for the middle range. The judge in the matter rejected the submission that the lowest range was appropriate. She stated that range was, in her view, more fitted to a first-time offender. While I might not restrict that range to first time offenders, I do believe that it would be most suited to those with a limited, dated or a largely non-violent record.

[67] The offender in *Whynder* had a major record for significant physical violence. The history and record in that case includes a prior shooting of an individual by the accused. That is a heavily distinguishing feature.

[68] The defence has submitted the case of *R. v. Bernard,* 2017 NSSC 129. In this case the offender had carried out an intense and directed attack on the victim using his hands and feet. He had a criminal record and was on probation. The Gladue Report produced in that case had a number of points which were similar to

the Reports here. Mr. Bernard had a terrible family history of abuse, addiction and involvement with the law. The parole ineligibility period was set at 14 years.

[69] I am also aware of the decision in *R. v. Gabriel*, 2017 NSSC 90. In this case a dispute over drug territory resulted in the victim being shot. Again, the IRCA before the court in that case contained a very grim account of the accused's background and upbringing. The accused was 22 years old at the time of the killing. He had a record for violence which I read as somewhat lessor than Mr. Sylliboy's. The Court set a parole ineligibility period of 13 years.

[70] I have reviewed the *Gabriel* case a number of times. I see the record in that case as lessor. His family supports were better and his prospects for rehabilitation were better than Mr. Sylliboy.

[71] I have also assessed other cases submitted by the Crown including:

> *R. v. Hartling*, 2011 NSSC 506
> *R. v. Gowen*, 2011 NSSC 249 (Joint Recommendation)
> *R. v. Chareka*, 2013 NSSC 320 (Joint Recommendation)
> *R. v. Beaver*, 2014 NSSC 10

I find the joint recommendation matters of less relevance as so many unknowns are at play in the negotiation process.

[72] After having assessed all the factors and caselaw, I have concluded that the 10 to 12 years referred to by the Defence falls below the proper range. But I have also concluded that the 17-year period sought by the Crown falls outside the range at the top end. Why do I find this to be the case?

[73] The 10-to-12-year range is reserved for those with the best prospects for rehabilitation. No one could seriously suggest that is the case here. The picture we see is simply too dangerous and too volatile. Even allowing for the impact of the IRCA and Gladue based considerations, the needle does not move to that extent.

[74] The 17-year submission of the Crown, while I understand it, does not in my view fully take into account factors such as that we see in operation in *R. v. Bernard* and *R. v Gabriel*.

[75] Mr. Sylliboy has some prospects for rehabilitation. It is not a great hope, but it can not entirely be written off. He is actually still a young man. Admittedly he does have lessor prospects and lessor supports than that seen in the *Gabriel* and *Bernard* cases discussed above. Without major changes in his life, there is a significant risk he will go on being a danger to others. And frankly, to himself. I accept that his mental heath struggles are very real. There is an ongoing risk of self harm.

**Conclusion**

[76] As I noted at the beginning of these reasons, the only sentence for murder is life imprisonment. And that is the sentence imposed by the Court. It is the recommendation of the Court that, during this sentence, he have access to specialized, culturally appropriate mental heath support. The writers of the IRCA Report believe this will be vital to his rehabilitation prospects, his counsel asked that this be commented on, and I agree.

[77] This conviction carries a mandatory DNA order and mandatory section 109 lifetime firearms prohibition order, and these are ordered. There will be a forfeiture order with respect to the firearm and ammunition.

[78] Attached to the Warrant of Committal will be copies of the IRCA and Gladue Reports.

[79] With respect to the period of parole ineligibility, it is the determination of the Court that Kevin Brian Sylliboy must serve a minimum period of 15 years before being eligible to apply for parole. I have concluded that this period is the proper expression of the relevant law and principles, including those drawn from *R. v. Ipeelee*, supra, and *R. v. Andersen*, supra.

[80] As was noted in *R. v. Hawkins*, supra, parole is always a possibility for this offence. Sentencing courts have to be cognisant of the fact that the National Parole Board, and not the court, is the body tasked with determining if and when the offender is at a suitable risk of re-offending such that a conditional release is possible. If he is released, it would only be on satisfactory compliance with whatever conditions the Board places on him to ensure compliance with the law and the safety of the public.

[81] Is there anything further counsel?

Hunt, J.