SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Whynder*, 2024 NSSC 196

Date: 20240618
Docket: CRH-502660
Registry: Halifax

Between:

His Majesty the King

v.

Ricardo Jerrel Whynder

DECISION ON DANGEROUS OFFENDER DESIGNATION

Judge:	The Honourable Justice Joshua Arnold
Heard:	June 18, 2024, in Halifax, Nova Scotia
Oral Decision:	June 18, 2024
Written Decision:	June 28, 2024
Counsel:	Robert Kennedy and Adam McCulley, for the Crown Trevor McGuigan, for Ricardo Whynder

Overview

[1] Ricardo Jerrel Whynder was charged with the second-degree murder of Matthew Sudds. He was convicted of the included offence of manslaughter by a jury on May 5, 2023. After his conviction the Crown advised that it would be making a dangerous offender application. The Crown and defence have instead now put forward a joint recommendation:

- That the Court designate Mr. Whynder to be a dangerous offender pursuant to s. 753(1) of the *Criminal Code*;
- That the Court impose a determinate sentence for the manslaughter offence of an additional four years in a federal penitentiary (for a total custodial sentence, including credit for remand time, of 14 years and 11 months), followed by a ten-year Long Term Supervision Order pursuant to s. 753(4)(b); and
- Two ancillary orders: section 109 firearms prohibition order – for life; and DNA order – as a primary designated offence.

[2] On June 18, 2024, following the reading of the Victim Impact Statements and submissions of counsel, I gave the parties my bare-bones, bottom line decision, with reasons to follow. These are my written reasons.

Facts

[3] Section 724 of the *Criminal Code* states:

> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
>
> Jury
>
> (2) Where the court is composed of a judge and jury, the court
>
> (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
>
> (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[4] In accordance with s. 724(2), as the trial judge I am required and entitled to make my own findings of relevant facts, so long as they are consistent with the jury's verdict. Having heard the trial evidence, including the testimony of the civilian witnesses, police witnesses, and expert witnesses, and having seen the video evidence, I find the relevant facts for determining the appropriate disposition for Mr. Whynder to be as follows:

> Ricardo Whynder is originally from Halifax but had his main residence in Ontario in 2013. In early October 2013 he was staying in Halifax. He and Mr. Sudds had known each other for many years.
>
> For several weeks leading up to October 9, 2013, Ricardo Whynder and Devlin Glasgow, and Ricardo Whynder and Matthew Sudds, had been communicating via cell phone and in person.
>
> On October 9, 2013, Devlin Glasgow bought a plane ticket at the last minute and flew from Vancouver to Halifax. Ricardo Whynder picked him up at the Stanfield International Airport in Halifax on October 10, 2013, in a rented black Dodge Charger. Mr. Glasgow and Mr. Whynder spent much of the day together. Mr. Whynder had telephone communication with Mr. Sudds through the day. Arrangements were made to meet Mr. Sudds in the Burger King parking lot located off Young St. that night.
>
> Sometime after 8:30 PM, Mr. Sudds arrived at the Burger King parking lot with a friend via taxi. He was not expecting to be long. He got into the front passenger seat of the Charger. Mr. Whynder was the driver and Mr. Glasgow was in the back seat. No one else was in the vehicle. Mr. Whynder drove Mr. Sudds and Mr. Glasgow directly to the Africville Road (which is a very secluded part of the city). Sometime during that short drive, or upon arrival at the Africville Rd., Mr. Sudds suffered blunt force injury to his head. Matthew Sudds ended up outside of the car and was shot in the arm and neck, and was also shot in the head, with a 40 calibre Smith and Wesson pistol. He died as a result of the gunshot to his head.
>
> Mr. Glasgow and Mr. Whynder left Mr. Sudds's body in the brush on Africville Road, where it was unlikely to be discovered right away. The next day, October 11, 2013, Mr. Glasgow and Mr. Whynder had airline tickets purchased for them and together they flew out of Halifax at approximately 6:00 PM. In Toronto they deplaned together and were captured on video hugging each other and shaking hands before they parted ways. Mr. Whynder stayed in Toronto and Mr. Glasgow continued along to Vancouver. They continued to communicate and have contact for a period of time after the shooting.
>
> Several years later, Mr. Whynder called Crime Stoppers in relation to Mr. Sudds death. Both Mr. Whynder and Mr. Glasgow were eventually arrested and charged with second-degree murder.

> Mr. Glasgow was convicted by a jury of second-degree murder for either shooting Mr. Sudds or being a party to Mr. Sudds's shooting and being aware that Mr. Sudds would die as a result of being shot. Mr. Whynder was convicted by a separate jury of manslaughter in relation to Mr. Sudds' shooting death.

Matthew Sudds

[5] Matthew Sudds was 24 years old when he was shot and killed. He lived with his mother, Darlene Sudds. They had a very close relationship. Mr. Sudds was involved in the drug trade and had served time in custody with Mr. Whynder. In and around the time of the murder, Mr. Sudds and Mr. Whynder were spending time together. There was no clear motive for the shooting.

Victim Impact Statements

[6] A number of victim impact statements were provided to, and/or read to, the court. They were both sad and helpful. Some excerpts include the following:

> **Darlene Sudds**
>
> What they say is true grief never goes away. I am still lost and hurt and angry.
>
> Dealing with this loss has made me a strong women. Matthew has left me here to fight for justice and peace for him and I will not stop. My life goes on everyday – even though my pain and anger and loss will never leave me.
>
> I am a stronger person now but I am a different person I feel empty I miss my child more then anything in this life – as any mother would understand. These last 3900 day 10.5 years have been extremely hard for myself and my family. And we will never go back to what we had before, when we had life with Matthew.
>
> After 3900 days 10.5 year I pray this is finally Justice. As no amount of time anger or I am sorry will ever bring my son back.
>
> More than anything I want my mama's boy back I want my Mattie.
>
> **Sandra Nash**
>
> Over the past 9 years that I have known Darlene it is apparent the anguish, grief, anxiety and depression that she suffers with daily. I worry about her mental state a lot as we are very close. Her day to day is filled with ups and downs and I can tell when she is anxious and depressed as she is unable to hide her feelings and I do my best to comfort her. Words cannot describe her emotional state, it's hard to put down on paper, you would have to witness it. My heart breaks for her.
>
> **E. Wayne Sudds**
>
> Although our parents provided assistance, Darlene raised Matthew on her own and loved and cared for Matthew as much as any mother could. They were

exceptionally close and Matthew cared for and was fully committed to his mother in return. Watching Darlene struggle with Matthew's death was especially hard for the family. Even now, after so many years after Matthew's death Darlene continues to struggle and grieve with the memories of Matthew's disappearance and death. Arresting, charging and convicting a person for this death was a long process and ultimately helped with, at least, some closure but we must not forget that Darlene lost her son and she will never fully recover from this loss.

…

We ask the court to consider the impact that the needless murder of Matthew Sudds had on Darlene, our mother and the entire family. No mother should lose their child at any age and no grandmother should watch her daughter struggle with the loss of her child.

Kim Currie

Hello my name is Kimberly Currie. I am Matthew Sudds Godmother, and Darlene Sudds Best friend for over 40 years. I am reading this impact statement today to let the courts know how the death of Mathew Sudds has had a tragic impact on me. For the last 10 years, my mind has been haunted with nightmares, cruel thoughts, and imagining how Mathew was killed and how he felt the minutes even seconds befor he died.

But the biggest impact on me Is living the last 10 years watching my Best friend Darlene go through life everyday without her only child Mathew.

Watching her cry herself to sleep, waking her from her horrible nightmares, hugging her tight, or just sitting with her through her constant panic attacks. My heart hurts everyday for 10 years knowing I have lost someone so young, that ment the world to me.

I am hoping today that Justice will be served.

Thank you

Kyle Sarka

And for me, there has been tremendous anger turned to sorrow, which has eventually turned to emptiness. So much has happened in my life that I would have loved to share with Matthew. He was the keeper of my thoughts, the guardian of my closest secrets. People always thought when we were younger that we maybe brothers, and although we were not, we were the closest you could ever get to it. There is a void in my life that was once solidly filled by Matthew that will ever remain gaping, a constant reminder of what may have been…there is no replacing Matthew Sudds.

Tammy Sudds

After Matthew passed away you could feel his presence was missing at our Christmas Eve get together. Easter Dinners and any family gathering we had. One thing we continued to do was keep his presence alive by talking about all the

> memories we each had of him. Like the time he was holding my daughter Cassidy and thought she could walk and put her down on her feet and she fell right to floor. I can hear him saying now. "Oh no I thought she could walk is she ok". We all had a good chuckle out of that.
>
> Then there are the hard times where you have to see your family grieve. Being a Mother I can't even imagine to have to grieve the loss of my child and grandmother having to deal with the loss of her grandson. Nobody should have to go through that.
>
> …
>
> Matthew did not deserve to die and our family have been left to grieve a missing piece of our life that can never be filled.
>
> [As appears in originals.]

Sentencing Provisions

[7] Section 236 of the *Criminal Code* details the broad range of sentences available in relation to a manslaughter conviction, up to life in prison:

> **236** Every person who commits manslaughter is guilty of an indictable offence and liable
>
> > **(a)** where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
> >
> > **(b)** in any other case, to imprisonment for life.

Joint Recommendations

[8] Appellate courts have consistently directed trial judges to follow joint recommendations unless they are contrary to the principles of justice. In this case, the parties have presented a joint recommendation following the conviction by the jury, negotiated in advance of the dangerous offender application.

[9] In *R. v. Anthony-Cook*, 2016 SCC 43, Moldaver J., for the unanimous court, discussed plea agreements and joint submissions:

> 25 It is an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty. Agreements of this nature are commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large. Generally, such agreements are unexceptional and they are readily approved by trial judges without any difficulty. Occasionally, however, a joint submission may

> appear to be unduly lenient, or perhaps unduly harsh, and trial judges are not obliged to go along with them (*Criminal Code*, R.S.C. 1985, c. C-46, s. 606(1.1)(b)(iii)). In such cases, trial judges need a test against which to measure the acceptability of the joint submission. The question is: What test?
>
> …
>
> 32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.
>
> 33 In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56, when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

[10] As noted by the parties, this is not a traditional joint recommendation since Mr. Whynder was convicted of manslaughter by a jury. However, as noted by Mr. McGuigan, and agreed to by the Crown, because of the nature of a dangerous offender application, there was real *quid pro quo* involved in coming to a joint recommendation, which is analogous to a negotiated plea. Mr. McGuigan states:

> **The Joint Submission and *R v Anthony-Cook***
>
> This is not a classic joint-recommendation as described in *R v Anthony-Cook*, [2016] S.C.J. No. 43... That is, Mr. Whynder did not enter a guilty plea in exchange for a joint recommendation. However, the quid pro quo in this case has the same hallmarks of a negotiated plea as described in *Anthony-Cook* and should attract a similarly stringent test for rejection.
>
> Mr. Whynder and the Crown have both have attempted to maximum certainty in result but have given something up in exchange. Mr. Whynder could have contested the Crown's application for a dangerous offender and sought a lesser penalty. He has reasonable arguments in this regard, but there is also significant risk. Likewise, the Crown could have reasonably sought an indeterminate sentence. The potential outcome following a lengthy and contested hearing with complex evidence and issues was uncertain.
>
> The joint submission in this case is an outcome that is reasonably available based on the evidence and the law, and reflects counsel's effort to achieve a fair result that minimizes uncertainty and is consistent with public interest considerations.

> The Defence submits that essential features of a true joint-recommendation are present, and the Court should not reject proposal unless it brings the administration of justice into disrepute or is contrary to the public interest.

Proposed Joint Recommendation

[11] The Crown and defence jointly recommend the following disposition:

- An order pursuant to s. 753 of the *Criminal Code* designating Ricardo Whynder to be a dangerous offender;
- Credit for time served in pre-trial custody of 3987 days = 10 years and 11 months
- The imposition of a term of four (4) years in custody going forward (for a total custodial sentence of 14 years and 11 months);
- The imposition of a Long-Term Supervision Order in accordance with s. 753(4)(b) of the *Criminal Code* for ten (10) years following his term of imprisonment;
- Section 109 firearms prohibition order for life; and
- DNA order as a primary designated offence.

Criminal Record

[12] Mr. Whynder's criminal record is as follows:

Sentence Date	**Province**	**Charge**	**Charge Description**	**Youth**	**Sentence**
September 11, 2000	Nova Scotia	CDSA 4(1)	Possession of Substance	Yes	Probation duration: 12 months
January 22, 2001	Nova Scotia	CC 145(3)	Violation of Recognizance	Yes	Probation duration: 9 months; Community

					service hours: 20
March 14, 2001	Nova Scotia	CDSA 5(2)	Possession for the purpose of trafficking	Yes	Open Custody Duration: 3 weeks concurrent continuous custody at a provincial facility; Probation duration: 12 months
September 13, 2001	Nova Scotia	CDSA 5(1)	Trafficking Cocaine	Yes	Open Custody Duration: 3 months consecutive continuous custody at a provincial facility
September 13, 2001	Nova Scotia	CC 145(3)	Escape/Being at Large	Yes	Open Custody Duration: 3 months concurrent continuous custody at a provincial facility
September 19, 2001	Nova Scotia	CC 264.1(2)	Uttering Threats	Yes	Open Custody Duration: 1 month concurrent continuous custody at a provincial facility

November 14, 2001	Nova Scotia	CC 145(3)	Breach of Recognizance	Yes	Open Custody Duration: 30 days concurrent continuous custody at a provincial facility
July 24, 2002	Nova Scotia	CC 145(3)	Escape/Being at Large	Yes	Probation duration: 6 months
July 24, 2002	Nova Scotia	CC 266(a)	Assault	Yes	Probation duration: 6 months
December 30, 2002	Nova Scotia	CC 268	Aggravated Assault	Yes	Open Custody Duration: 7 years, 9 months concurrent continuous custody at a federal facility
June 22, 2004	New Brunswick	CC 268	Aggravated Assault	No	2 years consecutive to sentence serving
January 23, 2007	Ontario	CC 270(1)(a) x2	(1) Assault a peace officer (2) Assault a peace officer	No	(1) 60 days consecutive to sentence serving (2) 30 days consecutive to sentence service
October 28, 2009	New Brunswick	CC 463(b)	Accessory after the fact to commit indictable offence	No	4 months consecutive to sentence serving
March 28, 2014	Nova Scotia	CDSA 4(1)	Possession of Substance	No	Fine: $500.00

					Probation duration: 12 months
November 3, 2014	Nova Scotia	CC 145(5.1)	Fail to Comply with Condition of an Undertaking	No	Secure Custody Duration: 30 days concurrent continuous custody at a provincial facility; Victim Surcharge: $100.00

Institutional Records

[13] Mr. Whynder's institutional records are significant and reveal significant uncharged incidents of violence, as well as additional convictions (which are also detailed above), during his time in custody. As detailed by the Crown, these include:

Date	Description	Sourcing
August 27, 2003	Atlantic Institution – Whynder stabbed another inmate 5 times with a shank (Guilty plea to aggravated assault and sentenced to 2 years' consecutive)	CSC Records, Tab 4, pg 38
October 28, 2006	Millhaven Institution – Whynder, with other inmates, is angry with correctional officers during metal detection, threats made and then attempts to assault correctional officers (convicted and received 90 days consecutive)	CSC Records, Tab 4, pg 72
March 6, 2010	Atlantic Institution – Whynder's cell mistakenly opened and Whynder enters another inmate's cell and assaults him; officer observed	CSC Records, Tab 15, pg 223
May 23, 2017	CNSCF - Fight with another inmate including using a broom as a weapon; caught on CCTV	NS Correctional Records, Vol 1, Tab 4, pgs 196-197 and 204

March 1, 2018	CNSCF – Fight with another inmate; caught on CCTV	NS Correctional Records, Vol 1, Tab 5, pg 624
May 4, 2018	NNSCF – Whynder attacked by a group of other inmates after words exchanged; direct observation by officer	NS Correctional Records, Vol 1, Tab 5, pg 858
November 11, 2018	CNSCF – Whynder enters another inmate's cell and assaults him; caught on CCTV	NS Correctional Records, Vol 1, Tab 5, pg 990
January 9, 2019	CNSCF – Whynder assaults another inmate in Whynder's cell; caught on CCTV	NS Correctional Records, Vol 2, Tab 6, pg 1021, 1024 and 1028
February 13, 2019	CNSCF – Whynder and others assault an inmate inside a cell; caught on CCTV	NS Correctional Records, Vol 2, Tab 6, pg 1032
April 27, 2019	NNSCF – Whynder joins in assault with other inmates; officer observed	NS Correctional Records, Vol 2, Tab 6, pgs 1434, 1436 and 1481
April 21, 2021	CNSCF – Whynder pushes past officer and enters another inmate's cell and assaults him; officer observed	NS Correctional Records Vol 3, Tab 8, pg 2432 and 2438
May 8, 2021	CNSCF – Whynder and another inmate enter another inmate's cell and an assault occurs – CCTV and officer observations	NS Correctional Records Vol 3, Tab 8, pgs 2444 and 2448-2450
July 19, 2021	CNSCF – Whynder pretends to help another inmate and assaults him, leaving him unconscious on the floor; CCTV confirmed however not guilty of breach based on a technicality	NS Correctional Records Vol 3, Tab 8, pgs 2516-2533, 2538 and 2540-2542
June 1, 2022	CNSCF – Whynder enters another inmate's cell and assaults him and after leaving the cell assaults the same inmate in the common area; captured on CCTV	NS Correctional Records Vol 3, Tab 9, pgs 2679, 2681, 2686-2687, and 2696-2697

June 14, 2022	CNSCF – Whynder enters a cell with another inmate and assaults him; captured on CCTV	NS Correctional Records Vol 3, Tab 9, pgs 2723-2728
June 21, 2022	CNSCF – Whynder assaults another inmate; captured on CCTV	NS Correctional Records Vol 3, Tab 9, pgs 2738-2739, 2744, 2748-2752, and 2758-2761
June 25, 2022	CNSCF – Whynder accompanies two other inmates to another cell and participates in an assault; captured on CCTV	NS Correctional Records Vol 3, Tab 9, pgs 2764-2767, 2774, and 2777-2789
October 16, 2022	NNSCF – Whynder assaults another inmate in his cell over meal tray disagreement; CCTV and officer observations	NS Correctional Records Vol 3, Tab 9, pgs 2894, 2908-2914, and 2919

Forensic Psychiatric Assessment

An extremely comprehensive Forensic Psychiatric Assessment Report dated January 23, 2024, was prepared by Dr. Grainne Neilson, forensic psychiatrist, for the purpose of the dangerous offender application. It should follow Mr. Whynder to every institution where he serves his sentence or wherever he is released on community supervision.

Impact of Race and Culture Assessment (IRCA)

[14] A comprehensive IRCA was prepared about Mr. Whynder and it should also follow Mr. Whynder wherever he serves his sentence. With respect to Mr. Whynder's childhood, the report states:

> Before the court we have Mr. Whynder, an African Nova Scotian male that has a heavy weight of trauma that he has been carrying. Included in this trauma is the full list of adverse childhood experiences which can result in Mr. Whynder's significantly increased poor health. He has experienced sexual abuse at two different periods of his childhood/youth, apprehension from his mother's care, and regular exposure to guns and violence to point to a few of the indicators that have affected the path of his life trajectory. His childhood was extremely difficult. He experienced various abuse at home and did not always have his basic needs

met. The IRCA depicts a young Ricardo going to the local church and a friend's home to access his daily meals. In addition, his clothing was limited which resulted in him sharing his sister's clothes, and subsequent bullying from peers that teased him for wearing "girl clothes." In school, he found himself suspended or in trouble, culturally disconnected, attending programming that he was not gaining academic success, and he received a late Dyslexia diagnosis. Home life was not good, the school system failed him, and when he turned to the community he was welcomed by a web of drugs and violence. There appeared to be nowhere Mr. Whynder could go for refuge.

[15] The report also comments on Mr. Whynder's potential for rehabilitation:

> As each factor is addressed, removed, or he is provided with the tools to navigate space within their complexity, he will become more equipped to engage in a better quality of life. In examining the nature of rehabilitation for Mr. Whynder, he is in need of several intensive programs, resources and services to support his development of prosocial skills and abilities. His rehabilitation process should be implemented immediately, allowing adequate opportunity to work on his complex needs while incarcerated. These supports should follow him into the community as ongoing engagement, and be re-evaluated and reduced as he reaches success with each recommendation.
>
> It is important to note that some of the following recommendations can only be achieved in the community. With this understanding, Mr. Whynder should be connected with a support person to help him access and engage with resources in the community as his release date draws near.
>
> Additionally, Mr. Whynder has some family supports. His uncle Aaron is a positive influence and helped him with employment and stability. His mother has offered for Mr. Whynder to live with her should he want to relocate to Ontario. Mr. Whynder has concerns for his safety if he is released in Nova Scotia, and has expressed an interest in living in another province, namely British Columbia.
>
> All of the support and resources offered to him should be informed by his cultural position. Mr. Whynder would be best served from accessing services and resources that are culturally responsive. We offer the following specific observations and recommendations:

[16] The report also addresses counselling and other services going forward:

> **<u>Counselling</u>**
>
> - It is recommended that Mr. Whynder access culturally relevant counselling to address his extensive trauma and grief. He should receive services ideally from a Black therapist. His civil lawyer reiterated that it has been difficult for her to find a new therapist to work with Mr. Whynder while he is incarcerated. She strongly advocates that this

therapist specializes in working with victims of sexual abuse. The assessors concur that this would be ideal, but further emphasize the need for this therapist to practice from a culturally-informed lens.

- Below is a list of therapists or counselling clinics that indicate that they have expertise in working with trauma from a culturally-informed lens:
    - The Peoples' Counselling Clinic http://www.thepeoplescounsellingclinic.ca/
    - NuLeaf Consulting and Counselling https://nuleafcounselling.com/
    - Esinam Counselling Inc. https://www.esinamcounsellinginc.com/
- One of the assessors, Ms. Hodgson, who is a certified Black therapist, would also be available to provide these services. Ms. Hodgson is willing and has the availability to extend counselling support as online or tele-therapy. Recognizing this would enter Ms. Hodgson into a dual relationship with Mr. Whynder, it is challenging to avoid such interactions when the availability of culturally relevant services are limited. Ms. Hodgson specializes in working with people who have been involved in the criminal justice system and will be completing additional trauma-related training to enhance her specialization, specifically Eye Movement Desensitization and Reprocessing (EMDR).
- If Mr. Whynder resides in British Columbia when he is released there are Black therapists that he can access through: Healing in Colour https://www.healingincolour.com or Vancouver Black Therapy & Advocacy Foundation https://vancouverblacktherapyfoundation.com/home.
- If Mr. Whynder resides with his mother in Ontario when he is released there are several Black therapists and agencies in the surrounding areas. Some include: Sankofa Psychotherapy https://www.sankofatherapygroup.ca/ or Taibu Community Health Center https://www.taibuchc.ca/en/

Psychoeducational Testing

- Mr. Whynder and some of his collaterals have indicated that he had some significant academic barriers resulting in his temporary placement in special education programming. Whereas Mr. Whynder may have previously acquired a psychoeducational assessment as a child, it may prove beneficial to determine his areas of strengths and areas that may require attention, particularly as it has been indicated that Mr. Whynder was diagnosed with Dyslexia. Adults can benefit from psychoeducational

> assessments if they have experienced challenges and particular difficulties throughout their lives that have had an impact on the success in their educational journey or in social integration. Psychoeducational assessments can help identify the root cause of these difficulties and provide recommendations for treatment. This would help in his pursuit of post secondary education. It is suggested that Mr. Whynder receives this testing from a clinician that practices from a culturally-informed lens.
>
> **Education**
>
> - Mr. Whynder has benefitted from working with Ms. Cora Reddick, and as stated Ms. Reddick has noted an improvement in his education skills. It is recommended that Mr. Whynder continues to be provided with the support to complete his GED and explore opportunities to pursue post-secondary education.
>
> **Life Skills and Programs to Support Rehabilitation**
>
> - It will be beneficial for Mr. Whynder to participate in various programming while incarcerated. These can be programs to help develop life skills, coping/de-escalation strategies, and other foundational skills that will be necessary to support positive reintegration.
>
> **Black Male Mentor**
>
> - 902 ManUp https://902manup.ca/ is an excellent resource for Mr. Whynder to be connected with to find a positive Black male mentor. This organization works with many Black men who have been in conflict with the law or exposed to community violence.
>
> **Black Men's Health**
>
> - It is strongly recommended that Mr. Whynder be connected with the Nova Scotia Brotherhood Initiative (NSBI) https://www.nshealth.ca/nsbi This organization specializes in providing primary medical care to Black men, wellness navigation and mental health support. Mr. Whynder has expressed concerns of possible PTSD. Given his significant trauma history, this is likely, and could be further explored through the NSBI.

[17] The sentencing principles that normally are applicable regarding an IRCA are less relevant when dealing with a dangerous offender because the paramount concern regarding a dangerous offender is the protection of the public. The Court of Appeal considered the role of IRCAs in sentencing in *R. v. Anderson*, 2021 NSCA 62:

> [118] The "method" employed for sentencing African Nova Scotian offenders should carefully consider the systemic and background factors detailed in an IRCA. It may amount to an error of law for a sentencing

judge to ignore or fail to inquire into these factors. A judge does not have to be satisfied a causal link has been established "between the systemic and background factors and commission of the offence..." These principles parallel the requirements in law established by the Supreme Court of Canada in relation to Gladue factors in the sentencing of Indigenous offenders. As with Indigenous offenders, while an African Nova Scotian offender can decide not to request an IRCA, a sentencing judge cannot preclude comparable information being offered, or fail to consider an offender's background and circumstances in relation to the systemic factors of racism and marginalization. To do so may amount to an error of law.

…

[121] As the ANSDPAD Coalition asked this Court to recognize, the social context information supplied by an IRCA can assist in:

• Contextualizing the gravity of the offence and the degree of responsibility of the offender.

•Revealing the existence of mitigating factors or explaining their absence.

• Addressing aggravating factors and offering a deeper explanation for them.

• Informing the principles of sentencing and the weight to be accorded to denunciation and deterrence.

• Identifying rehabilitative and restorative options for the offender and appropriate opportunities for reparations by the offender to the victim and the community.

• Strengthening the offender's engagement with their community.

• Informing the application of the parity principle. "Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e)".

• Reducing reliance on incarceration.

[122] The Crown's roadmap analysis aligns with the ANSDPAD Coalition's holistic application for IRCAs. It is an approach this Court endorses. IRCAs can enrich and guide the application of sentencing principles to Black offenders. The systemic factors described by the IRCA in Mr. Anderson's case and his experiences as an African Nova Scotian navigating racism and marginalization are not unique. IRCAs should be available to assist judges in any sentencing involving an offender of African descent. IRCAs can ensure judges, when engaged in "one of the most delicate stages of the criminal justice process in Canada", are equipped to view the offender through a sharply focused lens.

[18] The Crown notes that an IRCA has limited relevance to a dangerous offender hearing. The Ontario Court of Appeal commented on this issue in *R. v. Tynes*, 2022 ONCA 866, where an IRCA had been admitted as fresh evidence on the appeal:

> 91 Second, I also accept that the content in the IRCA is relevant to the sentence appeal, albeit not for all the reasons asserted by the appellant. To begin, I agree that the IRCA is relevant to understanding the appellant's moral culpability for his criminal antecedents. In R. v. Morris, 2021 ONCA 680, 159 O.R. (3d) 641, this court recognized that systemic anti-Black racism can impact offenders in a way that bears on their moral responsibility: at para. 123. The connection between racism in the offender's community and the offender's background and circumstances can be borne out by social context evidence: Morris, at para. 123. This connection does not need to be causal, but there must be "some" connection in place: Morris, at paras. 96-97.
>
> 92 I am satisfied that such connection has been established in the IRCA. In R. v. Anderson, 2021 NSCA 62, the Nova Scotia Court of Appeal described IRCAs as reports which offer "insights not otherwise available about the social determinants that disproportionately impact African Nova Scotian/African Canadian individuals and communities": at para. 106. Furthermore, the IRCA in this case directly links these social determinants with the appellant's personal life, which aids in mitigating the appellant's moral culpability for his criminal behavior.
>
> 93 The appellant also submits that the IRCA is relevant because it addresses his amenability to treatment, and expresses concerns about the predictive value of actuarial and other risk assessment tools for racialized people. I do not agree with these two arguments, as they take the IRCA beyond its intended scope and purposes. Mr. Wright's discussion at the end of the report about the appellant's risk of reoffending is not part of the main thrust of the IRCA. I cannot see how this collateral evidence is relevant to the sentence appeal, nor how it can be used to undermine the psychiatric assessments — especially since Mr. Wright is not a trained psychiatrist. Consequently, to the extent that the IRCA discusses the appellant as a dangerous or long-term offender, I find that this portion of the report is inadmissible.
>
> …
>
> 95 Finally, the content in the IRCA, as it relates to the appellant's moral culpability, could reasonably be expected to have affected the result. Côté J. in Boutilier explained that nothing in the wording of s. 753(4.1) "removes the obligation incumbent on a sentencing judge to consider all sentencing principles in order to choose a sentence that is fit

> for a specific offender": Boutilier, at para. 63. While Parliament has decided that the protection of the public is an "enhanced sentencing objective" for individuals designated as dangerous, this does not mean that the objective operates to the exclusion of all others: Boutilier, at para. 56. Consequently, moral culpability and other sentencing principles, including the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders, remain important considerations in the sentencing process for dangerous offenders: Boutilier, at para. 63. As such, the IRCA meets the cogency requirement because it provides social context evidence which bears on the moral culpability of the appellant.

[19] Similarly, the relevance of Gladue reports on dangerous offender hearings has been commented on. In *R. v. M.D.G.*, 2023 ABKB 201, the court said:

> 77 I recognize that the Offender's life has been marred by many Gladue factors, which are outlined above. However, because the paramount principle in the dangerous offender regime is public safety, Gladue factors play a limited role at the designation stage. In Gladue, the Court identified two different considerations that must inform any sentence for an Indigenous offender: (1) the unique systemic or background factors that may have played a part in bringing the offender before the courts and, (2) the types of sentencing procedures and sanctions that may be appropriate in the circumstances for the offender because of his particular Indigenous heritage or connection: Gladue at para 66.
>
> 78 Gladue factors can be relevant to determining whether culturally sensitive programming might enhance an offender's prospects of rehabilitation and treatability: R v Moise, 2015 SKCA 59. Thus, Gladue factors should be considered at the designation stage in the treatability assessment. The impact of Gladue factors on an offender's moral blameworthiness must also be considered in the context of the offences committed, which also takes place at the designation stage. Given the focus on the future risk of an offender and the overarching public safety concern, Gladue factors, even significant ones, may not be sufficient on their own to avoid a dangerous offender designation or sentence: Boutilier at para 117.

Dangerous Offender Designation

[20] The Crown provided me with the following cases, which I have reviewed:

> *R. v. Lyons*, [1987] 2 S.C.R. 309
>
> *R. v. Jones*, [1994] 2 S.C.R. 229
>
> *R. v. Paxton*, 2013 ABQB 750

R. v. Boutilier, 2017 SCC 64

R. v. Starblanket, 2019 SKCA 130

R. v. Neve, 1999 ABCA 206

R. v. Dow, 1999 BCCA 177

R. v. Shea, 2017 NSCA 43

R. v. Marriott, 2024 NSSC 81

R. v. Tynes, 2022 ONCA 866

R. v. Smith, 2023 ONCA 575

R. v. Haley, 2016 BCSC 1144

R. v. Kopas, 2006 CarswellOnt 10063 (O.C.J)

R. v. S.M.J., 2023 ONCA 157

R. v. Pedden, 2005 BCCA 121

R. v. Sohal, 2023 BCCA 256

R. v. Bird, 2023 SKCA 40

R. v. Racher, 2011 BCSC 1313

R. v. JM, 2011 SKPC 109

R. v. Taylor, 2012 ONSC 1025

R. v. Downs, 2012 SKQB 198

R. v. Landry, 2016 NSCA 53

R. v. Nelson, 2023 ONCA 143

R. v. MJ, 2013 ONSC 6803

R. v. Casemore, 2009 SKQB 306

R. v. Innocent, 2009 CarswellOnt 4791 (S.C.)

R. v. G.L., 2007 ONCA 548

R. v. McCallum, 2011 BCSC 715

R. v. Bitternose, 2013 ABCA 220

R. v. Glasgow, 2023 NSSC 391

R. v. MDG, 2023 ABKB 201

R. v. Summers, 2014 SCC 26

[21] Having reviewed those cases, and the relevant *Criminal Code* sections, I agree that the conditions precedent for a dangerous offender application include the following:

> a. The accused has been convicted of a serious personal injury offence as defined in 752(a) or (b) or both;
>
> b. The Crown sought and obtained a remand for assessment pursuant to s.752.l(l);
>
> c. An assessment report was filed with the Court pursuant to s. 752.1 (2) or (3);
>
> d. The Attorney General's consent to the application has been obtained, pursuant to s. 754(l)(a); and
>
> e. A written Notice of Application has been filed with the court and provided to defence counsel at least 7 days before the hearing, pursuant to s.754(l)(b) and (c).

[22] The conditions precedent have been met.

[23] In *R. v. Boutilier*, 2017 SCC 64, the court set out a two-stage process for a dangerous offender application: 1) the designation stage and 2) the penalty stage.

Designation Stage

[24] Section 753 of the *Criminal Code* sets out the criteria for designating a dangerous offender:

> **753 (1)** On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied
>
> > **(a)** that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
> >
> > > **(i)** a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

Presumption

(1.1) If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

Time for making application

(2) An application under subsection (1) must be made before sentence is imposed on the offender unless

(a) before the imposition of sentence, the prosecutor gives notice to the offender of a possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and

(b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecutor at the time of the imposition of sentence became available in the interim.

Application for remand for assessment after imposition of sentence

(3) Notwithstanding subsection 752.1(1), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply.

Sentence for dangerous offender

(4) If the court finds an offender to be a dangerous offender, it shall

(a) impose a sentence of detention in a penitentiary for an indeterminate period;

(b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

(c) impose a sentence for the offence for which the offender has been convicted.

Sentence of indeterminate detention

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

If application made after sentencing

(4.2) If the application is made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, a sentence imposed under paragraph (4)(a), or a sentence imposed and an order made under paragraph 4(b), replaces the sentence that was imposed for the offence for which the offender was convicted.

If offender not found to be dangerous offender

(5) If the court does not find an offender to be a dangerous offender,

(a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or

(b) the court may impose sentence for the offence for which the offender has been convicted.

(6) [Repealed, 2008, c. 6, s. 42]

[25] In *Boutilier*, the majority described how to determine if an offender should be designated as "dangerous":

> [17] The Crown must demonstrate two elements to obtain a designation of dangerousness resulting from violent behaviour. First, the offence for which the offender has been convicted must be "a serious personal injury offence":

s. 753(1)(a). This first criterion is objective. There is no room for judicial discretion, since s. 752 defines the list of serious personal injury offences.

[18] Second, the offender must represent "a threat to the life, safety or physical or mental well-being of other persons". This second element, the requisite threat level, requires that the judge evaluate the threat posed by the offender on the basis of evidence establishing one of the following three violent patterns of conduct:

> **(i)** a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> **(ii)** a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
>
> **(iii)** any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint;

These subparagraphs are disjunctive — they provide three standalone grounds for finding that the offender is a "threat" under s. 753(1). [Emphasis in original.]

…

[26] In *Lyons*, Justice La Forest read the objective element of the designation — the requirement that the predicate offence be a "serious personal injury offence" — together with the subjective element — the "threat" assessment — and concluded that four criteria were "explicit" from the language of s. 753(1): (1) the offender has been convicted of, and has to be sentenced for, a "serious personal injury offence"; (2) this predicate offence is part of a broader pattern of violence; (3) there is a high likelihood of harmful recidivism; and (4) the violent conduct is intractable (p. 338). The last three criteria are part of the assessment of the "threat" posed by the offender. The last two of these are future-oriented, and Justice La Forest explained them as follows:

> Thirdly, it must be established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subparagraph of s. [688, now 753] is the requirement that

> the court must be satisfied that the pattern of conduct is substantially or pathologically intractable. [Emphasis added in *Boutilier*; p. 338.]

Convicted of a "Serious personal injury offence"

[26] According to s. 752 of the *Criminal Code*, manslaughter is a serious personal injury offence.

Patterns of behaviour

[27] As detailed in *R. v. Neve*, 1999 ABCA 206, three areas of evidence can be considered when assessing whether there is a pattern of behaviour requiring a dangerous offender designation:

> [123] Generally, there are three areas of evidence which will be considered in determining whether there is a pattern of conduct falling within the threshold requirements under s.753:
>
> 1. the offender's past criminal acts and criminal record;
> 2. extrinsic evidence relevant to those past acts and the circumstances surrounding them; and
> 3. psychiatric reports opining as to that conduct.

[28] There is no question, when considering Mr. Whynder's criminal record, along with his institutional records, that the most recent manslaughter conviction is part of a pattern of violent behaviour.

Persistently Aggressive Behaviour…Showing A Substantial Degree of Indifference – s. 753(1)(a)(ii)

[29] In *R. v. Tynes*, 2022 ONCA 866, the Court explained what is meant by persistent behaviour:

> [70] Unlike the "pattern of repetitive behaviour" in s.753(1)(a)(i), the jurisprudence has not interpreted this subsection to require similarities between the predicate offence and past offences. Instead, the past behavior must be "persistent" and coupled with indifference and intractability: see e.g., *R. v. Wong*, 2016 ONSC 6362, at para. 70; *R. v. Robinson*, [2011] B.C.J. No. 1001 (B.C. S.C), at para. 122; *R. v. Morin* (1998), 1998 CanLII 13883 (SK KB), 1998 SKQB 13883, 173 Sask. R. 101 (Sask. Q.B.), at para. 85.

[30] As noted by Dr. Neilson at pp. 35 and 38 of her report:

> Throughout his life Mr. Whynder has displayed pro-criminal attitudes. He has demonstrated a pattern of involvement in a variety of antisocial activities both in the community and within the various institutions in which he has been incarcerated which reflects the persistence of antisocial attitudes and values. He has subscribed strongly to the "con code" in the community and in prison and has held anti-authority attitudes for most of his life. He continues to justify, rationalize, or minimize his past violent conduct.
>
> …
>
> Mr. Whynder's behaviour within the federal institutional setting has often been problematic, with evidence of violence and rule violations…has been involved in several violent incidents over the course of his incarcerations, some of which have resulted in new criminal charges.
>
> There has been no documented institutional violence since October 2022. This is a positive indicator. However, observations on this item may be artificially restricted due to the protective custody environment.
>
> Where a previous history of violence during institutionalization exists, there must be a significant decrease in the number and severity of violent institutional behaviours over a significant period of time before this risk area is deemed managed. Without discounting the positive change evidenced in the past year while on the protective custody unit, this improvement is relatively recent when compared to Mr. Whynder's lengthy history of institutional violence.

Indifference

[31] Dr. Neilson notes at p. 15 and 26 of her report that Mr. Whynder tends to blame others for his behaviour:

> Most of Mr. Whynder's serious violent offences have occurred in the company of others, both within the institution and in the community. Mr. Whynder believes that he was negatively influenced by the behaviour of others, and not the other way around. He described himself as a follower at times, especially when he was younger. However, at least some of his violent offending (e.g. the shooting of the taxi driver at age 17) was committed in the company of a younger male, and he was the apparent leader in that instance.
>
> Within the correctional environment, especially during his first federal sentence, Mr. Whynder reported that he was influenced by antisocial peers, describing himself as "gullible" and easily manipulated by his environment. He stated that when in the general population, "You have to follow the dayroom. There are prison rules you have to follow. You can't be yourself." Yet at least some of his violence in jail was committed alone. Mr. Whynder reported that his current environment in protective custody has been better for him because there is very little in the way of antisocial antics, and he is able to keep to himself. He said he

> does not currently socialize with anyone, because most of his fellow inmates on the protective custody unit are significantly older than him.
>
> …
>
> In recounting his past criminal behavior, Mr. Whynder acknowledged the offences that are on record, but his acceptance of responsibility was highly variable, as noted earlier in the report. He was noted to minimize, deny, mollify, or re-work previously agreed statements of fact. In a somewhat astonishing display of minimization regarding his aggressive conduct during his current remand he stated "In six years, I've only had 30 fights. I think that's pretty good". Similarly, speaking about his violent offending in the community, he stated "I've had 15 charges in my life. Ten are from my youth. The only violent ones are stabbings in prison", revealing a gaping blind spot in relation to his violent conduct both in and out of prison. In referencing the index offence, he asserts that he did not know what was going to happen and was just driving the vehicle. He also spoke about the unfairness of being charged with the crime after calling Crimestoppers.

Likelihood of Harmful Recidivism

[32] At the designation stage, treatability informs the offender's likelihood of recidivism as noted in *R. v. S.M.J.*, 2023 ONCA 157, where the court explained:

> [27] At the designation stage of the dangerous offender analysis, treatability informs the offender's likelihood of recidivism: *Boutilier*, at para. 45. In assessing the treatability of an offender, a sentencing judge may consider evidence including the applicant's amenability to treatment, treatment avoidance, and failure to follow through with previous treatment: see e.g., *R. v. K.P.*, 2020 ONCA 534, 152 O.R. (3d) 145, at para. 13; *R. v. G.L.*, 2007 ONCA 548, 87 O.R. (3d) 683, at para. 40; *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259, at para. 93. An offender's amenability to treatment is particularly important where treatment may be necessary to reduce or control future dangerousness: *R. v. Gibson*, 2021 ONCA 530, 157 O.R. (3d) 597, at paras. 205-206.

[33] The Crown states, and Mr. Whynder agrees:

> [99] Dr. Neilson noted that Mr. Whynder's community and prison misconduct is relevant because it reflects a persistence of antisociality. At page 35 of her report, Dr. Neilson states:
>
> *Throughout his life Mr. Whynder has displayed pro-criminal attitudes. He has demonstrated a pattern of involvement in a variety of antisocial activities both in the community and within the various institutions in which he has been incarcerated which reflects the persistence of antisocial attitudes and values. He has subscribed strongly to the "con code" in the community and in prison and has held anti-authority attitudes for most of*

> *his life. He continues to justify, rationalize, or minimize his past violent conduct.*
>
> [100] Dr. Neilson relied on the Violence Risk Appraisal Guide (VRAG) and determined that Mr. Whynder scored in the second highest possible category of risk (8 of 9 ascending categories). She noted that offenders in this category have a 58% change of engaging in violent recidivism in 5 years and 78% chance in 12 years (Report, page 33).
>
> [101] Dr. Neilson also relied on the Violence Risk Scale – second edition (VRS 2) which is used to assess risk of violence for offenders who are considered for release into the community after a period of treatment. Mr. Whynder scored a 64 out of 78 which placed him in the 92nd percentile. This characterizes Mr. Whynder's risk of violence at the "well above average" risk, noting an "entrenched criminal profile and quite severe and chronic criminogenic needs across psychological and lifestyle domains" (Report page 42).

Intractability

[34] In *Boutilier*, the majority explained what is meant by intractable conduct:

> [27] The language of s. 753(1), which led Justice La Forest to develop the four criteria outlined above, has never been amended since its enactment in 1977. Before designating a dangerous offender, a sentencing judge must still be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand "intractable" conduct as meaning behaviour that the offender is unable to surmount. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness.
>
> ..
>
> [46] In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct...

[35] The Crown has noted numerous factors that lead to a finding of intractability:

> [103] Dr. Neilson noted that Mr. Whynder served his federal sentence to warrant expiry. This usually indicates that a person has not taken programs or has not benefitted from them. As noted by Dr. Neilson at page 54 of her report:
>
> Mr. Whynder's federal sentence was characterized by significant behavioural problems, negative attitude, and violence.

…

While federally incarcerated Mr. Whynder attended very limited programming. However, in certain environments (where there are strict detention conditions and significant externally imposed structure), such as the SHU in 2007, and while at Donnacona in 2012 he seemed to behave better and was able to demonstrate some pro-social adaptation. However, this change was inconsistent, and not demonstrated over a sufficient length of time. In the result, he was detained by the PBC until his warrant expiry date.

[104] Also concerning, as noted by Dr. Neilson, is Mr. Whynder's use of substances, particularly cannabis as there is some correlation between cannabis use and violence (Report, page 39). In speaking to Mr. Whynder about his substance use, Dr. Neilson reports the following:

Mr. Whynder has a history of daily cannabis use since his mid teens and has intermittently used this substance while incarcerated. Mr. Whynder has been involved in the distribution of cannabis and cocaine since his mid- teens. In addition to cannabis use, he also used (prescribed) opiates for a prolonged period of time following a 2016 abdominal injury related to a shooting incident. There is no evidence of substance use in the recent past.

He reports that all his community violence, including the index offence has occurred in the context of cannabis use. (Report page 39, emphasis added).

[105] In demonstrating limited insight into the impact of substance use and violence, despite noting cannabis and it's relation to community violence, Mr. Whynder reported the following to Dr. Neilson:

Mr. Whynder reports that he intends to resume regular cannabis use when released from custody. This will need to be done through legitimate means and legal sources and could be a financial strain, depending on his consumption. Cannabis use was not reported to be a direct contributing factor to Mr. Whynder's violent offences although being a daily user, he was likely under the influence of cannabis for most of his violent offence in the community. Even so, in future Mr. Whynder will need to remain vigilant regarding his use of any mind-altering substances that have the potential to disinhibit behaviour or impair judgement. He will also need to remain distant from those involved in substance use or the drug trade. This may be comparatively easy in the present protective custody environment but will need to be maintained upon his release into the community. (Report page 40)

[106] Dr. Neilson notes that Mr. Whynder's motivation for treatment and programming was inconsistent over the years. (Report page 51)

> [107] In her report, Dr. Neilson diagnosed Mr. Whynder with antisocial personality disorder. (Report page 27).
>
> [108] Dr. Neilson also notes that he scores highly on the psychopathy checklist. She noted that some of the characteristics of psychopathy applicable to Mr. Whynder included affective and antisocial realms. (Report page 31)
>
> [109] Dr. Neilson noted that Mr. Whynder was unable to take the recommended multi-target programming while serving his first federal sentence because of the time he had spent in segregation. More recently, in 2020, after being transferred to Port Cartier in Quebec to begin his second federal sentence, he completed three sessions of the Non-Primer Multi-target Program before being returned to provincial custody after a successful appeal. (Report page 25)
>
> [110] In the provincial correctional system, Mr. Whynder has taken programming in relation to literacy, anger management and respectful relationships. Dr. Neilson noted that these provincial programs are "low-intensity" and not "high intensity" programming recommended by Dr. Neilson for someone who is high risk, like Mr. Whynder. These programs are not the end of the interventions Mr. Whynder requires, but simply the beginning. (Report page 58-59).

[36] Where an accused, like Mr. Whynder, satisfies the requirements set out in s. 753(1)(a)(ii), the court **shall** find the offender to be a dangerous offender. If the designated criteria are met, the designation is not discretionary.

[37] I agree with Crown and defence. Mr. Whynder is a dangerous offender.

Penalty Stage

[38] Section 753(4.1) of the *Criminal Code* states:

> **753 (4.1)** The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[39] Nonetheless, as noted by Campbell J. in *R. v. Marriott*, 2024 NSSC 81, there is no presumption of an indeterminate sentence for a dangerous offender:

> [290] There is no presumption of an indeterminate sentence that must be rebutted by offender. Section 753(4.1) has been described as a "starting point". *R. v. Downs*, 2012 SKQB 198, at para. 4. The qualification to the starting point is that if there is a reasonable expectation that a lesser measure will protect the public,

> the court must impose that lesser measure. Neither party bears the onus of proof at that stage. The Crown bears the onus of proving that the person is a dangerous offender but at the sentencing stage the offender does not have an onus of proving that a lesser sentence is inappropriate. The issue before the court is whether "based on the whole of the evidence" there is a reasonable expectation that a fixed penitentiary term followed by a long-term supervision order will adequately protect the public. *R. v. Taylor*, 2012 ONSC 1025, at para. 11.

[40] There is a wide scope of sentences available for the predicate offence of manslaughter. In *R. v. Landry*, 2016 NSCA 53, Beveridge J.A. stated, for the court (some citations omitted):

> [63] The appellant argues that 14 years' incarceration is outside the acceptable range of sentence, and asks this Court to reduce it to one of 10 year's incarceration.
>
> [64] The range of sentence for manslaughter is necessarily broad. The offence covers unlawful acts causing death that are near accident to ones that are "near murder". It also covers conduct that is murder, but is reduced to manslaughter by the statutory defence of provocation.
>
> [65] For most cases of manslaughter in Nova Scotia where the circumstances are not near accident, sentences usually range between 4 and 10 years' incarceration. But that does not mean a higher sentence is outside the acceptable range.
>
> [66] In *R. v. Lawrence* (1999), 172 N.S.R. (2d) 375, 1999 NSCA 41, the offender was charged with first degree murder, but the jury convicted him of manslaughter. The offender's pride had been hurt. He persisted in confronting the victim with a firearm, and shot at the deceased seven or eight times. The trial judge sentenced the offender to the equivalent of 15 years' incarceration.
>
> [67] On appeal, the offender argued that the sentence was excessive as being outside the 4 to 10 year range. This proposition was rejected. Cromwell J.A., as he then was, writing for the Court reasoned:
>
> > [14] In my opinion, there is not a 4 to 10 year "range" for manslaughter if the word "range" is used to suggest that manslaughter sentences ought generally to fall within those limits. Cases from this and other courts of appeal emphasize that manslaughter is an offence that may be committed in an exceptionally wide variety of circumstances and for which the legal limits of possible sentences are very great… These factors combine to make it unusually difficult to establish any benchmark or range of fit sentences for such offences… As Kelly, J. said in *R. v. Smith*, [1986] N.S.J. No. 424, this Court has observed that the great majority of cases in fact receive sentences between four and ten years, but the Court has not held that manslaughter sentences should be restricted to or ought to fall

> within that range. The Court has, for example, upheld sentences of 20 years and 15 years respectively in *R. v. Julian* (1974), 6 N.S.R. (2d) 504 (C.A.) and *R. v. Gregor* (1953), 31 M.P.R. 99. **I do not accept the appellant's argument that 10 years sets the upper limit, or that the period of between 4 to 10 years defines the acceptable range for manslaughter sentences.**
>
> [15] While previous sentencing decisions here and elsewhere are helpful in considering the question of fitness, the principal focus on appeal must be whether this sentence, for this offender and for this offence, is unreasonable. **While sentences greater than 10 years constitute a small component of the total of all sentences imposed for manslaughter, there are numerous examples of such sentences**…
>
> [Emphasis added]

[68] These principles were affirmed in *R. v. Henry*, 2002 NSCA 33. The Crown appealed from imprisonment of two years' less a day to be served by way of a conditional sentence order. The offender had observed a man assaulting a young woman. He intervened and stopped the assault. The victim left. The offender followed. He tapped the victim on the shoulder. When he turned, the offender punched him once in the jaw. The blow caused the victim to fall. He died when his head struck the sidewalk.

[69] The appeal was allowed and a sentence of four years' incarceration imposed. With respect to the principles to be applied, Roscoe J.A., for the Court, wrote:

> [19] A significant distinguishing factor between cases where a low or non-penitentiary term is appropriate and those where a lengthy sentence is imposed for manslaughter is the moral blameworthiness or fault of the offender (*Creighton*, *supra*). The court, while of course giving due weight to all the principles of sentencing must assess the extent of moral blameworthiness in a particular case, and should consider where on the spectrum, from almost accident to almost murder, the particular offence falls. **Obviously, the nearly equivalent to murder offences will, in general, attract a sentence higher than the majority**, for example *Julian*, *supra*, and those closer to an accidental killing will generally fall below the average…
>
> [Emphasis added]

[41] In this case, the facts supporting Mr. Whynder's manslaughter conviction were at the higher end of the scale, approaching murder.

Reasonable Expectation Within s. 753(4.1)

[42] Section 753(4.1) of the *Criminal Code* states:

> **(4.1)** The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[43] As detailed below, there are a number of factors that can be considered when determining if an offender can be safely managed with a determinate sentence.

Personality Profile of Offender

[44] As noted in *R. v. Nelson*, 2023 ONCA 143, the presence of personality disorders can be a barrier to achieving control in the community:

> [31] We reject each of these grounds. First, the trial judge was not obliged to accept the opinion that Mr. Amsterdam's risk could be managed with an LTSO. The opinion that Mr. Amsterdam could be controlled in the community was based largely on the concept of "burnout" – men experiencing a decrease in aggression as they age. However, the trial judge was entitled to, as he did, prefer the competing expert evidence that it "was not possible at present to predict which specific individuals will demonstrate this decrease in offending behaviour or to what extent." In any event, the trial judge provided several other reasons why Mr. Amsterdam could not be controlled under an LTSO, including his anti-social personality disorder (which cannot be cured and which causes inconformity with social norms, increased aggression, impulsivity, and a reckless disregard for the safety of others); his high scores on a psychopathy test (rendering him less amenable to treatment); denial of responsibility for the predicate offences; and the evidence that Mr. Amsterdam's risk assessment had not changed since his 2006 long-term offender proceedings.

[45] Dr. Neilson has diagnosed Mr. Whynder with antisocial personality disorder, and he scored highly on the psychopathy checklist.

The Nature and Scale of the Change Needed to Manage Risk

[46] The larger the scale of difficult changes the offender needs to make, the less chance of control of the risk. As noted in *R. v. Casemore*, 2009 SKQB 306:

> [18] Where massive, wholesale changes need to be made, and sustained, by the offender in question, and there is little to no evidence to suggest that such a thing is realistic or likely, then it cannot be said that there is a reasonable possibility of eventual control of the risk in the community.

[47] Dr. Neilson found that Mr. Whynder is a high-risk offender and requires high intensity programming. As noted by the Crown:

> [115] At page 58 of her report, Dr. Neilson discusses Mr. Whynder's needs:
>
> Given the high level of risk and the complex and chronic nature of Mr. Whynder's criminogenic needs (as indicated on the VRS-2) he will most certainly require extensive correctional programming (in adequate intensity and dosage, and with appropriate accommodation) before any attempt at release into the community. He should be able to demonstrate concrete improvement in at least some of the risk domains noted above prior to any attempt at community management. One metric of success would include cascading to less secure settings over time as Mr. Whynder demonstrates incremental behavioural change. Mr. Whynder stated that this is a goal he espouses.
>
> It is possible that Mr. Whynder's learning disability and borderline intellectual functioning resulted in poor uptake of prior programming (i.e. he can understand the concepts being presented to him in the moment, but may lack the ability to generalize these skills and strategies across various and dynamically evolving high-risk situations). Therefore, clarification of his psycho-educational abilities and providing correctional programs that appropriately accommodate Mr. Whynder's learning challenges will be important in future.
>
> [116] In relation to the high-intensity programming required, Dr. Neilson states on page 59:
>
> High intensity "multi-target" programs are available within CSC, both within the institution, and in the form of "maintenance" programs in the community. These programs should be informed by Mr. Whynder's cultural identity. I am not aware of any equivalent high intensity multi-target programs that are available within the private or public health or social services system. The IRCA Report mentions some culturally appropriate counselling and trauma programs are available in the community. This is but one aspect of multi-target programming.
>
> [117] Dr. Neilson further notes that eventual control in the community requires the offender to be "*fully* involved in, consistently cooperative with, and honestly engaged in, their Correctional Plan, both within the institution and especially post-release". (Report page 60, emphasis in original)
>
> [118] In relation to community supervision, Dr. Neilson noted that for Mr. Whynder:
>
> In my opinion, in the first instance, he is likely to require intensive community supervision (e.g. residency requirement at a Community Correctional Centre or halfway house) over an extended period, focusing

> on monitoring for community safety, enhancing compliance, and strengthening treatment/service engagement, participation, and retention/practical application of concepts learned in treatment program. (Report page 59)

Genuine Motivation to Pursue Change

[48] Claims by the offender of being committed to change, without evidence of positive action, are meaningless. As Campbell J. stated in *Marriott*:

> [308] Talking the talk is not the same as walking the walk. There must be some evidence to support a claim of high motivation to change. Looking at a person's past statements about their motivation and whether they actually did anything provides some insight into whether that motivation is real. The follow through matters. *R. v. Pilgrim*, 2008 CarswellOnt 3298, para. 214.

[49] As noted in the IRCA and the Forensic Report, Mr. Whynder has expressed a desire to change. As noted by the Crown:

> [120] Dr. Neilson also notes the following in relation to Mr. Whynder's motivation:
>
> In terms of his motivation, according to the VRS-2 assessment, his 'stage of readiness' to change was rated in the "preparation" stage for most of the dynamic risk variables. In other words, he recognizes some of his problem areas and some behavioural changes are already evident; however, the changes are either recent compared to the duration of the problem behaviour(s) or are not yet demonstrated consistently over an extended time, or have not yet been tested in high-risk situations. In a few areas, he was noted to be in the 'action' stage. These changes are very positive, if they can be maintained. Mr. Whynder does have some identifiable strengths (such as good social skills, a stated desire to improve his lot in life, and stated willingness to accept correctional programming and supervision). These may help him to persevere in what will be a long and arduous path towards desistance from violent crime. (Report page 59)
>
> [121] Further, during discussions with Mr. Whynder, Dr. Neilson recorded that:
>
> Mr. Whynder understands that some of his past violence has been mediated by anger. He believes that his recent anger management programs have resolved his anger issues, and that he has the skills and ability to appropriately deal with anger in the future. With prompting, he was able to identify other risk-related areas (e.g. antisocial associates, lack of employment/pro-social structure, reverting to violent/antisocial lifestyle, use of weapons, impulsive decision-making etc) stating "I guess. When you put it to me like that, yes". When I asked him to consider the future circumstances in which he may be prone to aggression or violence,

> he was only able to identify self-defense and fighting back against perceived attacks on his person or his character. He has no understanding that his perception of threat may be influenced by his upbringing and his traumatic life experiences, or that his antisocial attitudes and values impact him still. Similarly, he did not identify peer influence as relevant. He continues to assert that he has a "right" to defend himself in situations in which he perceives personal or racial insult, or any threat to his physical or emotional integrity, and that he "will not be anyone's punching bag", in jail or in the community.
>
> Mr. Whynder expressed that he does not anticipate immediate release and realizes that he still needs to take therapeutic programming to address his difficulties. Mr. Whynder said that he plans to maintain a low profile if/when he returns to federal incarceration, aiming to cascade to a lower security level, not acquire any new charges, and attend whatever programs are recommended. He is aware that he will need to demonstrate change "…not just by my words, but by my actions". He expressed intent to use the parole supervision system to his advantage to help him access appropriate accommodations, therapeutic programs, support services, and employment that together will keep him out of trouble.
>
> Presently, he is not overly stressed about the future. He feels he is currently "on a good path" and is "…changing every day. I'm more positive now. I know I have a future. I don't give staff a hard time." He attributes his change in attitude to maturation, better understanding of the negative consequences of his behaviour, and having "more tools" to deal with his anger. He acknowledges that he "still needs more" help to manage when he is released into the community. (Report page 27)

[122] This left Dr. Neilson with the following opinion:

> Overall, I was left with the impression that although his insight into his violence risk is not robust Mr. Whynder nevertheless appreciates some of his problem areas and wants to address them. Additionally, he appears to recognize the need for external controls/support/supervision in this regard, although underestimates the entrenched nature of his attitudes/behaviours and the length of time that will be required to change them. (Report page 27).

[123] Dr. Neilson also spoke with some correctional officials who noted the following:

> Mr. Whynder is currently described by both staff (Deputy Superintendent Hawkins and CO Janice Bell) as having changed considerably compared to years previous (e.g. "He's done a complete 180"; "He's not like he used to be"). They reported that in the past (where both officers knew him from their previous employment at CNSCF) he "….had a lot to say", and "…thought too much of himself" and "…liked to run the dayroom" and

> "…didn't like to be told what to do" and "…you felt like you had to tread lightly around him". All that has changed. He was now described as "probably one of the best inmates here. He knows what is expected of him and doesn't get involved in anything".
>
> Currently he was described as not a security concern and "..easy to manage", and "… doesn't get involved with unit politics", and "….doesn't try to act like the unit spokesperson". He is noted to keep mostly to himself and not associate with other inmates "…probably because of their [sexual] charges". Yet he was still described as having a "presence" on the unit, and exerting "subtle control" over others, and that "other inmates know to stay away from him". (Report pages 24-25)

[50] Additionally, it should be noted that Mr. Whynder testified as a Crown witness in the murder trial of Devlin Glasgow, and squarely pointed the finger at Mr. Glasgow being culpable for the murder of Mr. Sudds. For an entrenched criminal who is incarcerated I take notice of the fact that testifying for the Crown will have a significant impact on Mr. Whynder's status within any correctional institution. Between testifying for the Crown, and jointly agreeing to a dangerous offender designation with a ten-year Long Term Supervision order, Mr. Whynder has created a situation for himself whereby he really cannot afford to commit further violent offences.

Presence or Absence of Pro-Social Supports and Skills

[51] Who the offender will be spending time with upon release is significant. As stated in *R. v. Innocent*, 2009 CarswellOnt 4791 (Sup. Ct.):

> **52** To begin with, it is clear that Mr. Innocent's criminal activity and particularly the violence involved, has occurred while he has been heavily intoxicated by drugs and alcohol. Drugs and alcohol combined with his anti-social personality disorder and his impulsivity produce the violence which has been characteristic of his criminal activity. To stop this cycle, as Dr. Gagné pointed out, would require a major change in Mr. Innocent's cognitive processes. If this is to happen it would presumably result from professional interventions in the penitentiary. Will this occur? There is no evidence before the Court that Mr. Innocent is interested in or willing to participate in such interventions. In all of his time in custody, through his criminal career, he has never participated in, or apparently sought, the benefit of any programs to address his serious addiction problems. It is entirely speculative as to whether Mr. Innocent's problems would benefit from or be exacerbated by the further period of custody that he is facing. I agree with Dr. Gagné's opinion that if Mr. Innocent's poly-substance abuse problem is not

effectively dealt with, further violence in the community is highly likely. The National Parole Board will be in a position to assess Mr. Innocent's progress in a penitentiary and will be in a far better position than this Court to assess whether his Axis I diagnosis has been effectively addressed.

53 Like Dr. Gagné, I acknowledge the possibility that the "burn out" phenomena will result in a reduction of Mr. Innocent's violent tendencies at some point in the future. However that is a general and non-specific phenomena and I am not persuaded, at least on this evidentiary record, that Mr. Innocent will, in effect, grow or mature out of his violent tendencies in the foreseeable future. If he were to be in the community in an intoxicated state, and with a gun, violence would be expected from this offender even if he was in his forties or perhaps older.

54 I was impressed with the evidence of Maude Bedard in terms of her sincerity. She works as an exotic dancer and secretarial assistant and was Mr. Innocent's girlfriend to a point prior to the predicate offences. She told the Court that she would like to make a life for herself with Mr. Innocent when he is eventually released. She also believes that on her prison visits in the last two years she has observed a real change in Mr. Innocent. He has taken up Christianity and has changed his demeanor and attitude and appears to be free of drugs. She would support and encourage his rehabilitation. However, I do not place great weight on her testimony. Her evidence at trial was more helpful on the issues at hand. She testified that over the course of the two years that she lived with Mr. Innocent, his behaviour became more bizarre and aggressive and featured heavy drug use to the point where she told him to leave and terminated the relationship some two months before the predicate offences. I also observe that during their relationship Mr. Innocent actively engaged in criminal activity, including some of the non-charged offences which were addressed in this hearing. Moreover, he had a regular relationship with another woman during the period they lived together and Ms. Bedard was unaware of this, even at the time of her testimony in the sentencing hearing. I conclude that while Ms. Bedard is likely a positive influence, she would be unable to significantly assist in the control of Mr. Innocent and she would likely be kept unaware of the full scope of his activities, as was the case in their earlier relationship.

55 The Court heard evidence that Mr. Innocent has developed a religious interest during his four years incarceration following his arrest for the predicate offences. Initially he was interested in the Muslim faith and more recently he has been baptized and has become a practicing Christian. This religious conversion may well be related to or may be a reason why he has only had one prison discipline offence (non-violent) in the last four years in contrast to previous periods of imprisonment in which his conduct was frequently violent toward other prisoners and staff. While I view this development as a positive, I would not consider it to be sufficiently significant to indicate a reasonable possibility that his violent tendencies will eventually be controlled.

> **56** Unfortunately there are a series of other considerations which would militate against a conclusion that there is a reasonable possibility of Mr. Innocent's violent tendencies being eventually under control if he is ultimately placed in community supervision. These are factors pointed out by Dr. Gagné and with which I agree. Antisocial personality disorder is difficult to treat and there is no history of Mr. Innocent seeking treatment or benefiting from it. Such prior therapy and imprisonment as he has experienced does not appear to have yielded any benefits. Mr. Innocent will likely have great difficulty finding employment because he has only elementary school education and has difficulty writing, among other limitations. He has no technical training although he is likely able to do manual labour and has worked occasionally as an upholsterer. He has long since severed any ties with his family and has no support network in any community. I have accepted the evidence which suggests that Mr. Innocent had a street gang affiliation, at least while living in Montreal, and there is a real possibility of him reestablishing these pre-existing anti-social relationships and returning to his career pushing drugs. Mr. Innocent also has low self esteem and in the past has displayed or spoken of suicidal ideation. I accept Dr. Gagné's evidence that this, when combined with his Axis II to diagnosis (ASPD) can often result in increased danger to others. Suicidal persons often harm others prior to or in the course of harming themselves.

[52] Mr. Whynder's mother, and Aaron Whynder, the uncle with whom he intends to stay upon release, downplayed Mr. Whynder's violence, both in and out of custody. Dr. Neilson stated:

> Moreover, I do not think that his identified community supporters would be able to supervise/control his activities in any meaningful or enforceable way or to hold him accountable —he had those same supporters during his last release, and this did not prevent the index offence. A Black male mentor as suggested in the IRCA Report may be helpful, but it would be out of the scope of that role to monitor or supervise. (Report page 59)

Past History in Complying with Court Orders

[53] As noted by the Crown, compliance with past court orders is a consideration:

> [59] Compliance with past court orders is a consideration when determining an appropriate sentence. A determinate sentence in conjunction with a long-term supervision order is a potential "lesser measure" pursuant to s. 753(4.1). It will require an offender to meet the conditions of the long-term supervision order. If an offender has a poor history of complying with court orders a determinate sentence is not appropriate. (*Casemore, supra*.)

[54] Mr. Whynder has a poor history of complying with court orders. That said, as noted by Dr. Neilson:

> Mr. Whynder does appear to be complying with his current (institutional) supervision. This is positive. He presently states that he is willing to comply with future staff recommendations (egg treatment and transfer planning) and parole supervision if this is imposed. However, it is yet to be seen how he will respond when necessary, limits are imposed and enforced (e.g. curfews, associates, living situations, etc.). (Report page 48)

Past History in Rehabilitative Measures and Programming and Impact of Untried Treatment Programs

[55] The offender needs to be committed to change and sincerity can be reflected in past efforts. Considering the amount of time Mr. Whynder has spent in custody, his history of rehabilitative programming is nominal. As noted by the Crown:

> [131] Dr. Neilson noted at page 25 that Mr. Whynder was recommended for multi-targeted programming while in federal custody but was unable to complete any programs, in part because he was in segregation.
>
> [132] While serving his federal sentence in 2020 at Port Cartier in Quebec, Mr. Whynder did begin some programming but was only able to complete three sessions because of his successful appeal and he was returned to provincial remand in Nova Scotia.
>
> [133] During the three sessions he attended at Port Cartier, it was reported:
>
> …he was noted to have a "very positive attitude", showed a lot of empathy, and was said to have a positive impact on the rest of the group. No program evaluations were available (since he did not complete the program). (Report page 25)
>
> [134] In terms of programming in provincial custody, Dr. Neilson also noted at page 25 that he has completed some anger management, relationship and literacy programs.
>
> [135] Mr. Whynder also received counselling in relation to the sexual abuse he suffered during his youth. (IRCA page 23)
>
> [136] It does not appear that Mr. Whynder has ever received culturally appropriate or focussed treatment. As noted in the IRCA, this too will be important for Mr. Whynder (page 32).

[56] If the offender has not responded positively to past treatment programs this can be some indicator as to future success in other treatment programs.

Historically Undiagnosed Disorders

[57] The Crown notes that in the IRCA, Mr. Whynder describes believing he has PTSD:

> [137] Mr. Whynder feels that he suffers from Post Traumatic Stress Disorder (PTSD). Mr. Whynder reported to Ms Hodgson:
>
> He feels overwhelmed by multiple traumatic experiences: "my cousin being shot, me being shot, and molested, and just everything in my life. I feel like I keep getting the shitty end of the stick". He stated he feels he has post traumatic stress disorder (PTSD) as "I jump when I hear loud noises…Loud noises are uncomfortable and doors slamming remind me of gunshots. I always have recurring dreams of Naricho being shot and his blood covering me." He admits to having had suicidal thoughts especially in relation to his cousin's death, "when my cousin first got shot, I wished I would have died with him". He last remembers experiencing suicidal ideation about a year ago, and he has never acted on any of these thoughts. (IRCA page 20-21)

[58] However, Dr. Neilson states that his PTSD diagnosis is complicated, at p. 39:

> Mr. Whynder has a complex PTSD diagnosis. He has experienced a plethora of traumatic and adverse life experiences, including: parental neglect/psychological abuse; parental criminality and substance abuse; separation from parents and CPS involvement; sexual abuse during his time at NSYF; witness to family and community violence: violent victimization in the community and the in the institution, etc. These were outlined in the IRCA Report. These experiences have left him with a distrust of authority, increased threat perception, poor emotional regulation, as well as unresolved anger, feelings of shame, and a perceived need to act when he experiences injustice.

Behaviour of Offender Pending Disposition

[59] Knowing that an indeterminate sentence is a possibility, has the offender been able to control their behaviour while awaiting the hearing? Mr. Whynder has not incurred any levels for violent behaviour within the institution since his manslaughter conviction.

Definite Timeframe to Manage Risk and the Resources Necessary to Manage Risk Presently Exist

[60] As noted by the Crown, the question of whether the offender can be meaningfully treated within the time frame of a determinate sentence is highly relevant:

> [63] Each of these sub-factors can be determinative, i.e., a failure for either sub-factor is sufficient to answer whether a reasonable expectation exists. Consider the Ontario Court of Appeal's comments in *R. v. Little*, 2007 ONCA 548 at para. 8:
>
> … the trial judge erred by declaring Little a long-term offender and imposing a determinate sentence in the absence of evidence either that Little could be meaningfully treated within a definite period of time, or that the resources needed to implement the supervision conditions that the trial judge concluded were necessary to eventually control Little's risk in the community were available, so as to bring Little's risk of future reoffending within tolerable limits.
>
> [64] In *Little*, at para 70, the Court noted that "*real world' resourcing limitations cannot be ignored*". Further in *R. v. McCallum*, 2011 BCSC 715 at para 55, the court noted that, while individual treatment or therapy was recommended, it was not generally made available in the community. In *R. v. Bitternose*, 2013 ABCA 220 at para. 37, it was noted, "*Nor is it enough to postulate that the necessary facilities might be created by the time of the respondent's release years in the future. The subsection says "is satisfied", and "is a reasonable expectation", using the present tense*."

[61] While Dr. Neilson says that Mr. Whynder has the capacity for prosocial adaptation, she also says that he will require prolonged and intensive supervision. The Crown states:

> [142] As noted earlier, Dr. Neilson also found that Mr. Whynder was at the preparation stage for most of the dynamic risk variables but also at the action stage for a few. (Report page 59)
>
> [143] Dr. Neilson further noted in the VRS 2 analysis section:
>
> Importantly, with respect to treatment, review of Mr. Whynder's 'pre-treatment stage of change' on the domains deemed to represent criminogenic needs mostly falls within the preparation stages—that is, he recognizes many of his problem areas and some behavioural improvements are evident; however, the changes are recent relative to the duration of the problem behaviour(s) and are not yet consistent over an extended time and have not yet been tested in high-risk situations. In some notable areas, such as institutional behaviour, interpersonal aggression, and emotional control, he is in the 'action stage" (i.e. is making progress towards sustained change). (Report page 43)

[144] Dr. Neilson further notes in her prognosis section:

> Successful desistance from criminal behaviour is typically the product of individual motivation, social and personal contexts, external supervision and monitoring as well as the meanings that offenders hold about their lives and their behaviours. For offenders like Mr. Whynder who have a persistent pattern of offending, external supervision and monitoring holds a very important role in keeping the person committed to the path of desistance. It may take considerable time for supervision and support to exercise a positive internal effect. At the present time, I am not convinced that Mr. Whynder is equipped to independently manage his violence risk factors in the community without significant external support, monitoring, and supervision.

[145] Dr. Neilson ends her report with the following:

> Predicting whether Mr. Whynder's risk can be managed in the community at some future point depends heavily on his response to treatments that are provided to him in the institution and the ability of CSC staff to work with him to devise a safe, suitable, and realistic plan for release, including appropriate maintenance treatment, monitoring, and supervision. The entire relapse prevention approach to the community management of high-risk offenders is predicated on the avoidance of, or appropriate management of, high-risk situations through the steps noted above. In my opinion, Mr. Whynder will require prolonged and intensive supervision (e.g. at a community correctional facility or other supported/supervised residence), focusing on monitoring for community safety, enhancing compliance with conditions, and ensuing continued engagement in maintenance programs and prosocial change.

Remand Credit

[62] The Crown states, and Mr. Whynder agrees, that there is significant remand credit time in this case:

[146] Mr. Whynder has been in custody since his arrest in British Columbia on March 10, 2017, including a short period when he served a sentence for second degree murder, before that conviction was overturned on appeal.

[147] In following the reasoning in *R. v. Summers*, 2014 SCC 26 [Tab 32], given that the time Mr. Whynder spent serving the sentence before having his conviction overturned will not count towards early release, all of Mr. Whynder's time in custody from March 10, 2017 to June 18, 2024 should be counted on a 1.5:1 basis.

[148] It is worth noting that Mr. Whynder has effectively been in custody for almost all of his 30s. He was 32 years old when he was arrested and will

be well into his 40s when he is released (turning 40 in November of this year).

[149] Defence has not requested as part of the joint submission to have any additional time credited to Mr. Whynder given harsh conditions while on provincial remand, especially considering Mr. Whynder was in custody and has been in custody throughout the Covid pandemic.

[150] The Crown submits this is also part of the *quid pro quo* in seeking a sentence of 4 years' go forward.

[151] Consequently, the time to be credited for Mr. Whynder is as follows:

a. March 10, 2017 to June 18, 2024 = 2,658 days (approximately 7 years, 3 months and 8 days)

b. 2,658 days x 1.5 (enhanced remand credit) = 3,987 days

[152] In relation to the conviction for manslaughter, the Crown argues that Mr. Whynder should be given credit for 3,987 days, or put another way, approximately 10 years and 11 months.

[153] In effect, Mr. Whynder will be receiving an almost 15-year sentence for manslaughter. This is in line with the authorities cited above and the acceptable approach on sentencing to go outside the normal range when sentencing a dangerous offender.

[154] The final sentence for the manslaughter conviction will be:

a. Total sentence = 3,987 days (pre-trial custody) + 1,460 days (4 years) = 5,447 days

b. Go forward sentence is 1,460 days from June 18, 2024.

[63] I agree with the joint proposal regarding credit for remand time.

Ancillary Orders

[64] Crown and defence also jointly recommend that Mr. Whynder should be subject to the following ancillary orders:

a. Section 109 firearms prohibition order – life; and

b. DNA order – primary designated offence.

Conclusion

[65] Mr. Whynder is designated a dangerous offender. He is sentenced to four years' additional custody, which, when combined with his remand time, is equivalent to a custodial sentence of 14 years and 11 months in jail. Following the four years in custody going forward, he will be subject to a ten-year Long Term

Supervision Order. Mr. Whynder will also be subject to the ancillary orders as described above.

Arnold, J.