Court of Queen's Bench of Alberta

Citation: R v Mills, 2019 ABQB 683

Date: 20190904
Docket: 180434656Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Joshua Anthony Michael Mills

Accused

Reasons for Decision
of the
Honourable Mr. Justice M. David Gates

Introduction and Overview

[1] The Accused, Joshua Anthony Michael Mills ("the Accused") has entered a plea of guilty to the offence of manslaughter relating to the November 28, 2014, death of Douglas Miller. He was arrested on April 13, 2018, in relation to this matter and order detained by deWit J of this Court on July 26, 2018. He has been in custody since that date.

[2] The Accused was originally charged with second-degree murder, and was committed to stand trial on that charge following the completion of his preliminary inquiry on January 10, 2019. He made his first appearance in the Court of Queen's Bench on February 22, 2019, and entered a guilty plea to manslaughter on March 1, 2019. At the request of counsel, the Court directed the preparation of a ***Gladue*** Report, a Pre-Sentence Report and a FAOS report and set June 28, 2019, for the sentencing hearing. The matter was, unfortunately, not able to proceed on

that date and it was set over to July 26, 2019. At the conclusion of the sentencing hearing, I adjourned to consider the matter further. These are my reasons for decision.

Facts

[3] The facts relating to this offence are fully set out in an Agreed Statement of Facts prepared by the parties and filed as Exhibit #S-1 in these proceedings. I do not propose to repeat the contents of the Agreed Statement of Facts. I would, however, direct that a copy of the Agreed Statement of Facts, together with the Pre-Sentence Report, the ***Gladue*** Report, the FAOS Report, and a transcript of these Reasons be attached to the Accused's warrant of committal for the consideration of the correctional authorities charged with the proper administration of the sentence to be imposed today.

Sentencing Principles

[4] The Accused was convicted of manslaughter, contrary to s 236 of the *Criminal Code*. While the offence carries a maximum sentence of life imprisonment, no minimum sentence is prescribed.

[5] The principles of sentencing are set out in some detail in s 718 of the *Criminal Code*. The section reads as follows:

> s. 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> a) to denounce unlawful conduct;
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> b) to deter the offender and other persons from committing offences;
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> c) to separate offenders from society, where necessary;
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> d) to assist in rehabilitating offenders;
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> e) to provide reparations for harm done to victims or to the community; and
>
> f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community.

[6] It is a fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender

[7] I would note that s 718.2 is applicable in this instance:

> s. 718.2 A court that imposes this sentence shall also take into consideration the following principles:
>
> a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
>
> b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances…;

> d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;
>
> e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[8] These principles guide and direct courts in what is for most judges one of the most difficult judicial tasks: crafting a fit and proper sentence for an offence and an offender.

[9] Manslaughter is an offence that potentially covers a broad range of unlawful conduct. Given the serious nature of the offence, invariably involving the loss of life, there is a large body of case law dealing with the applicable sentencing principles. The Court of Appeal's decision in ***Laberge*** provides significant guidance in categorizing manslaughter cases for sentencing purposes.

[10] The Court of Appeal in ***R v Swampy***, 2017 ABCA 134, offers a helpful summary of the Court's earlier decision in ***Laberge***. At para 10, the Court held:

> In *Laberge*, the Chief Justice, writing for the Court, set an analytic roadmap for sentencing in cases of unlawful act manslaughter based on objective categorization of the degree of moral culpability of the offender. The Court observed that unlawful act manslaughter cases have two common requirements: (1) conduct which caused the death of another and (2) fault short of intention to kill. Despite these common elements, the offence covers a wide range of cases from near accident at one extreme to near murder at the other. Different degrees of moral culpability attach to each act along that spectrum, so that sentences range from a suspended sentence to life imprisonment. The sentencing court "must determine for sentencing purposes which rung on the moral culpability ladder the offender reached when he committed the prohibited act…to ensure that the sentence imposed fits the degree of moral fault of the offender for the hard done". (*Laberge* at para 6ff)

[11] In ***Laberge***, Fraser CJA, explained that evaluating an offender's degree of moral blameworthiness for sentencing purposes extends beyond an examination of the accused's mental state at the time of the commission of the offence. At para 8, she stated:

> …for sentencing purposes, a court is not limited to evaluating moral blameworthiness in terms of an offender's mental state. Indeed, it would be quite wrong to engage in that kind of a contextual analysis. That is because the offender's level of moral culpability will be influenced by other factors. In the case of unlawful act manslaughter, the most important of these will be what the unlawful act itself involved. The nature and quality of the unlawful act itself; the method by which it was committed and the manner in which it was committed in terms of the degree of planning and deliberation are all relevant to this inquiry.

[12] The Chief Justice went on to identify three broad categories into which unlawful act may be divided for the purpose of examining the offence of unlawful act manslaughter. At paras 10-12, she stated:

> Unlawful acts may be divided into three broad groups: those which are likely to put the victim at risk of, or cause, bodily injury; those which are likely to put the victim at risk of, or cause, serious bodily injury and those which are likely to put the victim at risk of, life-threatening injuries. Only when the offender's proven mental state at the time of commission of the event is evaluated in the context of the crime itself, in other words in terms of its relative degree of seriousness, is it possible to classify for sentencing purposes the degree of fault inherent in the crime committed.
>
> To complete the moral blameworthiness picture had to ensure that an offender is properly situated in terms of sentencing vis-à-vis others convicted of the same offence, the court must also have regard to those personal characteristics of the offender which would mitigate or aggravate culpability.
>
> It will be apparent that numerous permutations and combinations of these relevant factors will be possible. In an individual case, all must be blended and balanced as part of the court's assessment of the offender's degree of moral culpability for the crime committed. [Emphasis in original]

[13] In this instance, the Crown and the Defence agree on the categorization of this case in terms of the **Laberge** categories. As such, the Defence concedes that the acts of the Accused in this instance were, viewed objectively, likely to put the victim at risk of life-threatening injuries. The proper characterization in terms of the ***Laberge*** framework is a critical element in the assessment of the Accused's moral blameworthiness for this offence.

Victim Impact Statements

[14] Victim impact statements prepared by various members of the family of Douglas Miller were presented to the Court during the course of the sentencing hearing and were marked as Exhibits S-2 to S-5, respectively. Specifically, we heard from Joan Stumpf, the deceased's wife; Douglas Miller Jr, the deceased's son; Jennifer Miller, the deceased's sister; and Emily Manz, the partner of Douglas Miller Jr.

[15] All of these impact statements contained expressions a profound grief and loss over the senseless death of Doug Miller. I extend my thanks to all of the members of Mr. Miller's family for sharing with us the impact that this crime has had on their lives. It is very clear to me that, notwithstanding the passage of nearly 5 years since this tragic event, the members of his family are filled with deep sadness and anger that the person they loved has been taken away from them as a result of the act of Mr. Mills and Mr. Stewart.

[16] As I told the members of Mr. Miller's family during the July 26th sentencing hearing, there is nothing that the Court can do to give them what they want most, the return of their loved one. Sadly, that is simply not possible. While the sentencing process welcomes the participation of individuals who have been affected by a crime through the presentation of victim impact statements, the focus of a sentencing hearing is necessarily on the individual who has been found to be responsible for the crime.

[17] In ***R v Browne***, [0022] OJ No 900 (Ont SCJ), Watts J (as he then was) outlined (at para 6) the role of a judge in sentencing an individual found guilty of a homicide:

> The criminal law does not restore life. The objectives, principles and factors that govern the imposition of sentence are not meant to represent the value of the life that has been unlawfully taken away. They are designed to reflect the moral blameworthiness of the person who commits an offence and the gravity of the offence, so far as the law is concerned, that he or she has committed.

[18] The victim impact statements that have been part of this sentencing hearing provide you, Mr. Mills, with clear expressions of the impact of your crime on the loved ones of Doug Miller. I hope that these statements will serve as a very powerful and enduring message to you of the consequences of your actions on the lives of so many. You will have to live with this knowledge for the rest of your life.

The Personal Circumstances of the Accused

Criminal Record

[19] The Accused has a criminal record dating back to 2012. The most recent convictions were entered in June 2017. He has 5 previous convictions for failing to comply with court orders, either breach of recognizance, breach of probation, or failure to attend court. In addition, he has prior convictions for assault causing bodily harm, possession of stolen property over $5,000, possession of a Schedule I substance, and possession of a weapon for a purpose dangerous. The only significant jail term he has spent related to his 2012 assault causing bodily harm conviction where he received a sentence of one day in jail after having served 158 days in pre-trial custody. I take these previous convictions into account in determining a fit and proper sentence in this instance.

Pre-Trial Custody and Conditions of Release

[20] The Accused was arrested on April 13, 2018, and has, as such, spent 16.5 months in pre-trial custody. At the request of the Defence, I would give the Accused enhanced credit for this period of pre-trial custody at the rate of 1.5 to 1. As such, the Accused has, effectively, spent 24.75 months in pre-trial custody.

Gladue Report/Pre-Sentence Report/FAOS Assessment

[21] Christine Goodfellow prepared a ***Gladue*** Report in advance of the sentencing hearing. This report, together with the Pre-Sentence Report prepared by Tryphena Lai and a FAOS Assessment prepared by Dr. Yuri Metelista of Alberta Health Services, provide a great deal of information relating to the Accused's family of origin and his history and background.

[22] The Accused is Metis. His father is half African and half German, while his mother is non-status from the Enoch Cree First Nation, part of the Treaty Six Confederacy. The Accused's maternal grandfather has status with the Enoch Cree Nation, though his wife, the Accused's grandmother, is Caucasian. The Accused's mother reported that her father attended residential schools.

[23] The Enoch Cree First Nation controls two reserves: one on the western edge of Edmonton, with a second located south of the town of Barrhead. There are 2,404 band members and approximately 1% of the population speak the Cree language. At this point in time, the Accused has not applied for a status card with the Enoch Cree First Nation.

[24] Band members who attended residential school were frequently sent to the Blue Quill Indian Residential School, formerly known as the Sacred Heart Indian Residential School/Saddle Lake Boarding School/Blue Quill Boarding School run by the Roman Catholic Church. The school opened in 1898 and closed in 1931. The school relocated to St. Paul until it closed in 1970. Enoch Cree band members were also sent to the Edmonton Industrial School run by the Methodist Church from 1919 until 1960.

[25] The Accused's parents never married. He has 10 siblings, though 3 of those siblings have a different father. The Accused's mother reported that she consumed alcohol while she was pregnant with the Accused. The Accused's father was in jail when the Accused was born.

[26] The Accused grew up in Edmonton. He was in and out of foster care while growing up, beginning when he was a one year old. His mother had a serious problem with both alcohol and gambling. His father had addiction issues with alcohol, crack cocaine and cocaine. The on-going involvement of Child and Family Services arose as a result of parental substance abuse, neglect and physical abuse within the home. The Accused reported that he lived in fear as a child as a result of the physical abuse he suffered at the hands of his father, and also as a result of his father's anger issues and his constant yelling.

[27] The Accused was diagnosed with ADHD as a young child and was prescribed medication that his father refused to permit him to take. He struggled to concentrate in school and was placed in special education classes due to his behaviour. He also reported that he was a very angry child and has constantly involved in school fights starting when he was in kindergarten.

[28] The Accused reports that he suffered while in foster care and can only remember one foster home where he was well treated. On occasion, he was locked in his bedroom, food was withheld, and he was subjected to harsh punishment. He recalls years in foster care when neither Christmas nor his birthday were celebrated.

[29] When he was 11 years of age, the Accused's mother arranged for him to go and live with his grandparents in Airdrie. The Accused's mother feared for his safety given the frequency and increasing violence of the beatings received from his father. His parents separated shortly thereafter and the Accused's mother moved to Airdrie as well.

[30] At the age of 12 years, the Accused was sent to a group home in Airdrie due to his negative behaviour. After 6 months at the group home, he was sent to a secure treatment facility for troubled youth. He spent 4 months at this facility and was then sent to Woods Homes for 11 months before being returned to his mother's care when he was approximately 14 years of age. By the time he was 15, he was asked to leave his mother's home because he refused to go to school. He had also begun to associate with negative peers and became involved in alcohol and drugs. After a year "couch surfing" at the homes of friends, he returned to his mother's home, found employment and returned to school on a part-time basis.

[31] At the age of 17 years, the Accused decided to go and live with his father in Edmonton, but returned to Calgary to live with his mother a short time later. He moved to his own home at the age of 18 years and worked full-time with a moving company.

[32] The Accused met Kelsey around this time. They were together for approximately 5 years and had a son together, but separated when the child was 6 months old. The Accused reported that they had a negative relationship involving substance abuse. On the date of separation, Kelsey stabbed him with a knife and he physically assaulted her. He was convicted of assault and

sentenced to a period of imprisonment of 11 months. According to the Accused, Kelsey is still incarcerated at the Calgary Remand Centre, though it is not clear whether this is in relation to the stabbing incident or some other unrelated matter. In the Pre-Sentence Report, it is reported that he has not seen his son since he separated from Kelsey in 2011, and that she "tricked" him into giving up his parental rights. However, in the ***Gladue*** Report, the Accused stated that he has not seen his son in 2 years.

[33] The Accused also told the author of the Pre-Sentence Report that he was in a romantic relationship for approximately 11 months in 2016 and 2017 with a woman named Shady. The Accused described this relationship in very positive ways and that her murder in 2017 had a profound impact on him.

[34] The Accused has maintained relationships with his mother and father, as well as his siblings and grandparents. He referred to his mother in positive terms and reported that he no longer fears his father and they now see "eye-to-eye".

[35] The Accused enjoys a particularly close and supportive relationship with his older brother Jeremy. Jeremy Mills attended the sentencing hearing on July 26, 2019, and has maintained regular contact with his younger brother since he was taken into custody. Jeremy currently lives in Calgary with his wife and two children. As outlined in the ***Gladue*** Report, Jeremy chose a "different path" for his life after having seen the destructive patterns associated with his childhood and youth. Jeremy's input into the ***Gladue*** Report is particularly helpful in that he not only confirms much of the Accused's life-narrative, but also provided some valuable insights into his brother's early life and character.

[36] Jeremy Mills confirmed that he and his siblings had a very negative upbringing marked by parental substance abuse, domestic violence, and frequent contact with the foster care system. He reported that his father was physically abusive, while his mother was verbally, mentally and emotionally abusive of her children. At p 9 of the ***Gladue*** Report, Jeremy is reported to have stated "he and his siblings were never provided guidance, taught morals, values or life skills from their parents…they basically kept us alive and that was it". He related that their mother was addicted to crack cocaine and that their father ran a "drug house" leading to a conviction for drug trafficking and a penitentiary sentence. Jeremy described the Accused as an impressionable individual who is loving and caring, but also lost and confused and, as such, prone to make poor life decisions. Jeremy believes that Accused was mirroring the actions of their father when acting out in aggressive and violent ways.

[37] While currently single, the Accused had a serious relationship with a woman named Victoria for a period of approximately 9 months. While the Accused was incarcerated in 2017, she passed away from a drug overdose. While there was substance abuse in the relationship, the Accused reported that there was no domestic violence.

[38] The Accused has two children, a son, Zachery, aged 8.5 year, and a daughter aged 10.5 years who he has never met. He only found out about the existence of his daughter approximately 4 years ago.

[39] The Accused completed Grade 10 at high school. While at school, he experienced racism and discrimination on account of his Metis status, but stated that his brothers were targeted more than him due to their more prominent Aboriginal appearance. The Accused told the author of the

Pre-Sentence Report that he continues to struggle with his cultural identity in part due to these early childhood experiences, and the fact that his ancestors come from such diverse backgrounds.

[40] The Accused reported that he has worked as a general labourer, forklift driver, crane operator, mover, construction type jobs, and as a shipper/receiver. Prior to his arrest on the current charge, the Accused was employed with a temp agency in Edmonton. In terms of the future, the Accused expressed interest in returning to school to complete his high school education and then pursuing training in the field of the culinary arts.

[41] The Accused started drinking at the age of 9 years, and started to experiment with marihuana at the age of 11 years. He has used marihuana on a daily basis until his arrest in April 2018. He turned to cocaine when he was 15 years of age and last used in 2018. At the age of 16 years, he started using ecstasy and continued for 4 years. He used crystal methamphetamine off and on for the past 10 years. He started using opiates when he was 19 years of age and last used in 2018. His preferred drug is crystal methamphetamine and he reported daily use for approximately 10 years beginning at the age of 18 years. He reported that he first used fentanyl when he was 22 years of age and that he has used it well over 100 times, including most recently in April 2019 while incarcerated. He often sold drugs to make money and to support his own drug addiction.

[42] The Accused has never attended residential drug treatment, but expressed an interest in doing so. He completed a 3.5-week detox program at Alpha House in 2018. He reported that he has abstained from alcohol for the past 4 years. He also attended some substance abuse counselling in Edmonton prior to his arrest. It seems clear from the various reports filed in this hearing that the Accused has some real understanding of the negative impact that drugs and alcohol has played on his life and the lives of other members of his family. He also appears to appreciate that his addictions have impacted his relationships with other people.

[43] Since the Accused's arrest, he has attended the Elizabeth Fry Anger Management program, as well as the Self-Evaluation Program through Alberta Health Services Addictions.

[44] The Accused reported that he attempted suicide as a teenage, but this was mostly a cry for help and attention. He reported that he struggles with grief and loss. He also wonders if he may suffer from PTSD that has never been diagnosed. At p 13 of the ***Gladue*** Report, the author notes: "[W]hen asked if he feels a sense of hope for his future, Josh became very emotional and stated, "I feel hopeful sometimes. I feel depressed and sometime feel like I want to give up".

[45] At the age of 11 years, the Accused sustained a significant head injury as a result of a skateboarding accident. When he was 15 years old, he was involved in a motor vehicle accident and sustained a serious head injury that led to the discovery of a large tumour growing at the back of his skull. While the tumour was removed, he reported that he continues to struggle with headaches and memory issues. The Accused's mother, Genny Weeks, reported to the author of the Pre-Sentence Report that the Accused's behaviour changed dramatically after this surgery.

[46] The Accused was raised in the Christian faith, though reported that his father introduced him to Indigenous culture. He expressed respect for these cultural traditions and indicated that he was interested in learning more about his culture. In the Pre-Sentence Report, the author reported that the Accused participated in smudging, attended sweat lodges and went to Pow Wows with his neighbours while he was growing up. The Pre-Sentence Report also indicated that the Accused's paternal grandfather, Kenneth Pappins, was the head chief of the Enoch Band and that

the Accused tried to learn the Cree language from his grandfather when he was growing up. Finally, the Accused reported that he met with an Elder while in custody in Edmonton and that he found this to be a spiritually fulfilling experience.

[47] The Accused told the author of the ***Gladue*** Report that he considers himself to be a "survivor" and likes the fact that he is resilient.

[48] The Accused told the author of the Pre-Sentence Report that he did not mean to kill Douglas Miller, and that he felt great relief when he confessed his involvement in the incident to the police. He expressed deep remorse for his actions and reported that he understood the consequences of his actions and how they affected the family of the victim as well as himself. He also expressed a desire to make amends to the victim's family.

[49] In describing the events surrounding the death of Mr. Miller on November 28, 2014, the Accused reported to Dr. Metelista, the author of the FAOS Report, that he consumed both alcohol and methamphetamines throughout the day prior to the incident. He also used up to approximately 5 grams of cocaine.

[50] On the basis of testing and clinical interviews conducted in conjunction with the FAOS Assessment, Dr. Metelista concluded that the Accused's mental difficulties could best be described as Polysubstance Use Disorder. He also found that the Accused met the diagnostic criteria for Antisocial Disorder with significant temper control issues. He also confirmed an earlier diagnosis of ADHD.

[51] Dr. Metelista reported that the Accused recognized his need for treatment and an accompanying willingness to undertake such treatment while in custody and also following his ultimate release. In terms of the risk of re-offending, the FAOS Report offers the following conclusion (at p 7):

> Despite some minimization and justification of his actions during the index offence, he appeared to be sincerely remorseful and expressed deep sadness related to harm his behaviour has caused. It also appears that he is open for participation in pertinent treatment programs aiming to deal with his addictions and also to develop effective coping strategies.
>
> Given the above-indicated considerations, it is my professional opinion that **the risk of violent re-offending in this case should be rated as high to moderate**. It should be noted that in Mr. Mills's case his participation in pertinent treatment and education programs may likely significantly reduce risk of re-offending. (Emphasis in original)

Aggravating Circumstances

[52] I find the following aggravating circumstances are present in this instance:

a) The Accused has a criminal record that reveals some previous involvement in offences of violence, as well as offences that reveal a lack of respect for court processes;

b) The prior relationship between the Accused, Stewart and the deceased. The deceased had a longstanding relationship with Stewart and members of Stewart's family. The Accused also knew the deceased and his family, though did not have quite the same

personal connection as Stewart. It seems clear that both Stewart and the Accused had attended the Miller home on a number of occasions prior to this incident for social purposes. The deceased's familiarity with the Accused and Stewart doubtless led him to agree to meet at a very remote location to complete the drug transaction when he very likely would not have done so under different circumstances. The Accused and Stewart took advantage of their friendship with the deceased to further their own criminal intentions. In my view, there is an element of betrayal in the actions of the Accused, particularly in his continued contact with the family after the incident when they were obviously not aware of his involvement in the death of Mr. Miller;

c) The attack involved the use of a weapon, a metal wrench-like object brought to the scene and then used by Stewart to savagely beat the deceased on numerous parts of his body. The contents of the Agreed Facts document the very significant injuries sustained by Mr. Miller during what must have been a prolonged and vicious attack. The victim, Mr. Miller, was unarmed and took no action that could be characterized as the least bit provocative prior to the assault. Further, this was a situation where two people, the Accused and Trevor Stewart, ganged up on the deceased;

d) The agreed facts confirm that there was a plan to rob the deceased in an isolated location, a deserted parking lot. As such, this was not a spontaneous incident, but rather involved some advance planning on the part of the Accused and Stewart to lure the deceased to this remote location ostensibly to sell him drugs, as well as the formulation of the plan to rob him. While the plan was not elaborate or detailed, it did require the Accused to turn his mind to the role he was to play in the incident and the probable or likely consequences to Mr. Miller;

e) The beating was gratuitous or unnecessary as the robbery could have easily been accomplished without violence. The Accused and Stewart were both younger, and both physically larger than the deceased, and could have easily achieved their objective through intimidation and the threat of violence without actually resorting to violence. All that was obtained from the robbery was the deceased's cellphone and a small amount of cash, $140;

f) No efforts were made to seek help for Mr. Miller, either through rendering aid directly or seeking aid through a third party. Rather, they left the unconscious man in an isolated location on a frigid cold November night. I agree with the Crown that an objective foresight of death from freezing to death was very high in these circumstances even if the beating alone did not kill him.

Mitigating Circumstances

[53] I find the following mitigating circumstances are present in this matter:

a) The Accused's guilty plea. While I have previously addressed the somewhat aggravating circumstance of the Accused's long silence and continued interactions with the family after the death of Mr. Miller, I agree with both counsel that this was an early guilty plea and, as such, represents a significant mitigating circumstance. Similarly, I agree that the Accused's cooperation with the police, once confronted, is a reflection of remorse on his part for his role in the death of Mr. Miller;

b) The Accused's pre-existing brain injury. It is clear from the various reports filed in this sentencing hearing that the Accused sustained two head injuries as a young man. The first occurred in conjunction with a skateboard accident when he was 11 years of age. The second occurred the Accused was involved in a motor vehicle accident when he was 15 years of age that led to the discovery of the large tumour on his brain. No medical evidence was presented on the impact of the tumour on the Accused's physical or mental health. Further, the author of the FAOS reports refers to the removal of the tumour in outlining the Accused's medical history, but does not refer to any long-term effects adversely impacting the Accused. However, Dr. Metelista does refer in his report to the fact that the Accused's mother relating that his behaviour "drastically changed" his behavior; that his coordination was adversely impacted; and that he become less patient and more physically aggressive. Ironically, the Accused reported to Mr. Metelista that he became "more calm" after the removal of the tumour, but that he experienced headaches and some loss of long-term memory as a result. I would simply add that the Accused provided similar information to the authors of the ***Gladue*** Report and the Pre-Sentence Report regarding the impact of the removal of the tumour on his memory. I am satisfied that the Accused's adolescent head injuries, and the fact that he was afflicted with a brain tumour for a period of time prior to its removal when he was 15 years old, is a somewhat mitigating circumstance in this instance;

c) ***Gladue*** Factors – As more fully described below, I am satisfied that systemic factors as well as the circumstances surrounding the Accused's childhood and adolescence are relevant to his moral culpability for this offence. In my view, the intergenerational traumas experienced by Mr. Mills reduce his moral culpability in the determination of a proportionate sentence in this instance.

The Position of the Crown

[54] The Crown submits that a proper sentence in this instance is 14 years imprisonment. In addition, the Crown seeks a 10 years firearms prohibition order, pursuant to s 109(2) of the *Criminal Code*, and a DNA order pursuant to s 487.051 of the *Criminal Code*. The Crown relies on the decisions in a number of cases, including ***Laberge***, ***R v Bird***, 1996 CarswellAlta 1181 (CA); ***R v Reid***, 2018 ONSC 7079; ***R v Varga***, 2000 ABCA 72; ***R v Bidesi***, 2017 BCSC 198, and ***R v Baldwin***, 2017 ONSC 5040.

The Position of the Defence

[55] The Defence, on the other hand, urges that a sentence of 9 years is a fit and proper sentence in this instance. The Defence concedes that a firearms prohibition order and a DNA order must be imposed. The Defence relies on a number of prior decisions, including ***R v Larson***, 2017 ABQB 79; ***R v Holloway***, 2014 ABCA 87; ***R v KKL***, 1995 ABCA 196; ***R v Gladue***, [1999] 1 SCR 688; ***R v Ipeelee***, [2012] 1 SCR 433; ***R v Bissonette***, 2012 ABPC 170; ***R v Swampy***, 2017 ABCA 134; ***R v Guitar***, 2001 ABCA 58; ***R v Isadore***, 2016 ABQB 83; ***R v Ma***, 2010 ONSC 4803; and ***R v Simpson***, 2019 ABQB 174.

[56] Before turning to examine the various authorities relied on by both the Crown and the Defence, I would observe that attempting to reconcile the various sentencing authorities

submitted by counsel is a very difficult task given the wide range of circumstances of offences and offenders. I agree with the observations of Yamauchi J in ***R v Jiang***, 2011 ABQB 182, (at para 43), that it is not the role of the court to "dissect" sentencing authorities in an effort to find the perfect fit. The sentencing process is not a mechanical process, but rather the delicate balancing of sentencing principles, the unique circumstances of both the case and the offender, and the application of relevant mitigating and aggravating circumstances. Yamauchi J went on to cite the decision of the British Columbia Court of Appeal in ***R v Chinneck***, 2005 BCCA 346, wherein the Court made the following observations:

> Although the cases cited by the appellant are relevant in a general sense, each case must be assessed on its particular facts. It is not useful to list and compare between cases the discrete aggravating and mitigating factors and to assign a sentence based on the presence or absence of one or more of them. To do so lends an unrealistic and unwarranted air of objective measurement to the process. That is not a proper approach. The sentencing judge in this case considered all of the relevant sentencing factors, aggravating and mitigating. He was entitled to weigh them and to give such weight to them in exercising his discretion as he saw fit. We may not interfere unless the sentence he imposed is demonstrably unfit. In this context, the appellant must demonstrate that the sentence is a marked departure from sentences imposed in generally comparable cases.

Authorities Relied on by the Defence

[57] ***Larson*** involved a 23-year-old Indigenous offender who plead guilty to the offence of manslaughter and was sentenced to 5 years and 5 months with credit for pre-trial custody. In that instance, Larson stabbed the victim in the side of the chest with a kitchen knife. The accused grew up in an impoverished family and was diagnosed with ADHD and a learning disability at the age of 10 years. He left school after completing Grade 6 and started to work at the age of 14 years. The accused had a lengthy criminal record for offences of violence and had previously served a penitentiary term of imprisonment. The sentencing judge found that the stabbing was not planned and that the accused had not brought a weapon to the fight. It was also determined that the altercation was not spontaneous, but rather the culmination of aggressive acts on the part of the accused that had commenced earlier. The court found that the accused's act was not in and of itself life threatening, but that he was reckless and, viewed objectively, his acts were likely to cause serious bodily harm. Finally, the sentencing judge found that the victim was unarmed and that the accused offered no aid or assistance after the fact.

[58] In ***Holloway,*** the accused, a 22-year-old First Nations male, was convicted of manslaughter following a trial with a jury on a charge of murder. The offence took place on the Morley Reserve. The accused, and two others entered a home on New Year's Eve, after consuming alcohol, and killed Gino Powderface. They were apparently motivated by a prior incident in which Powderface has insulted and stabbed one of his assailants. The accused admitted that he hit the victim four to five times with a beer bottle, and also to kicking him four to five times while one of the other assailants repeatedly stomped on him. Towards the end of the assault, the accused obtained a butter knife and stabbed the victim once in the chest, penetrating the breastbone and the heart cavity. The stabbing took place after the victim had been rendered defenceless. The Court of Appeal found that the death was the product of a protracted violent assault. The accused had a record that included convictions for assault and assault causing bodily

harm and was rated a high risk to re-offend due to alcoholism. A majority of the Court of Appeal upheld the trial judge's sentence of 8 years with 1:1 credit for pre-trial custody. Berger JA, in dissent, would have reduced the sentence to 78 months and have given enhanced credit of 1.5:1 for the 27 months of pre-trial custody. The majority recognized that sentences in the 10-year range appeared to be emerging for cases in the most serious ***Laberge*** category. The majority found that this 10 year range generally involve such factors as group involvement, protracted brutality, use of weapons, or a vulnerable victim.

[59] In ***KKL***, a sentence appeal to the Court of Appeal, the accused was originally charged with second-degree murder but entered a guilty plea to manslaughter. The accused was in the process of changing the diaper of his nine-month old daughter. The baby was restless and, after having wriggled away three or four times, the accused grabbed her and put her down with such force that her head struck the floor. Realizing that the child might be in some distress, the accused regularly checked on the baby, ultimately finding that the child was no longer breathing. He attempted to call for help, but the telephone was not working. When the child's mother returned home from work, they rushed the baby to the hospital. The child suffered multiple skull fractures and lethal brain injuries. In sentencing the accused to a period of imprisonment of 3 years with a recommendation for early parole, the trial judge found that the accused had a very low tolerance level. He characterized the act of the accused at the second ***Laberge*** level. On appeal, the Court of Appeal increased the sentence to 4.5 years.

[60] In ***Bissonette,*** Redman PCJ sentenced the accused to a period of imprisonment of 4 years and 128 days following a guilty plea to the offence of manslaughter. A co-accused had previously received a sentence of 8 years in separate proceedings. The accused and his co-accused went to the victim's home as the accused wanted to confront the victim and threaten violence. The accused asked the co-accused to accompany him. The co-accused picked up a 2 x 4 on the way that he ultimately used to strike the victim's head in an attempt to awaken him. When the victim did not respond, the co-accused struck the victim twice in the leg. Again, receiving no response, the accused then grabbed the victim's head and punched him repeatedly. The accused claimed that he did not use the weapon and, moreover, that he had attempted to dissuade the co-accused from committing the assault. The co-accused, on the other hand, alleged joint planning and execution of the attack. The Crown sought a sentence of 6-7 years, conceding that the accused's involvement was less morally blameworthy than that of the co-accused.

[61] The court found some joint planning between the two assailants, but concluded that there were significant differences in their personal circumstances and also in terms of their respective roles in the commission of the assaults leading to the death of the victim. The court also noted that the accused had a less serious criminal record than the co-accused and that he was genuinely remorseful. In the result, the court found that the accused's actions were properly categorized at the first ***Laberge*** level, namely that his actions involved an objective risk of bodily harm to the victim.

[62] ***Swampy*** was a sentence appeal to the Court of Appeal. In that instance, the accused was convicted of manslaughter following a trial for second-degree murder. The accused and others, including his girlfriend and her best friend, were drinking. The accused got into an argument with his girlfriend, at which point the victim intervened to support the accused's girlfriend. The argument escalated to physical fighting with the accused and victim punching one another. The victim then stopped fighting and others present at the scene pulled the accused away from her. He then went to the kitchen and retrieved a steak knife and immediately returned to where the

victim was located and stabbed her in the abdomen. The knife passed through the left side of her liver and punctured her pancreas. The trial judge found that the stabbing was not sudden or impulsive and that the accused was angry with the victim at the time. The accused was considerably larger in stature and weight than the victim. Following the incident, the accused threw the knife out of the window and fled the apartment without taking any steps to call for medical assistance. While intoxicated at the time, the accused was later able to provide the police with specific details relating to the incident that were independently confirmed. The trial judge found that the offence was "near-murder" and placed it in the third ***Laberge***. The accused was sentenced to 8 years, less time served in pre-trial custody.

[63] The Court of Appeal concluded that the trial judge did not commit reviewable error in finding that the case fell within the most serious ***Laberge*** category. Having objectively assessed moral culpability, the Court of Appeal found that it was then necessary to consider the personal circumstances of the offender that either mitigated or aggravated culpability. That part of the analysis must also consider the potentially mitigating effect of ***Gladue*** factors (at para 20). While the Court of Appeal found that the trial judge had erred in his approach to the ***Gladue*** principles by failing to consider the accused diminished moral culpability because of his constrained circumstances as an Aboriginal offender, it upheld the sentence as being proportional to the gravity of the offence and the degree of moral culpability of the offender.

[64] In ***Guitar***, the Court of Appeal considered a sentence appeal by Guitar and his co-accused, Veinot, from a sentence of 14 years imposed following an 8-week trial. (From the reported decision, it is not clear whether the pair were initially charged with manslaughter or murder. Likewise, the court's reasons referred at one point to an 11 year sentence imposed at trial, while subsequently described the sentence imposed as being of 14 years duration.) The Court of Appeal's decision briefly described the circumstances of the offence as a brutal beating of the victim leading to his death. The sentencing judge initially placed the acts of the two accused in the highest ***Laberge*** category, but the Court of Appeal concluded that the sentencing judge subsequently found that the accused knew the foreseeability of some bodily harm was present, thus placing the case in the middle ***Laberge*** category. Guitar had a criminal record for violent offences, while Veinot was on release for other offences of violence at the time of this incident. The Court of Appeal allowed the appeal on the basis that the sentence imposed at trial, while appropriate for an offence falling in the most serious ***Laberge*** category was not a fit and proper sentence for an offence falling in the middle category. The sentences were reduced to 7 years taking into consideration credit for pre-trial custody amounting to 3 years.

[65] In ***Isadore***, the accused and his co-accused, Bergey, were convicted of manslaughter following a group beating that caused fatal injuries to the victim. Isadore was also sentenced in relation to an additional charge of break enter and assault arising from the same event. The victim was asleep when Isadore broke a window and entered the victim's bedroom. While the court was not able to identify which of the accused committed the specific acts leading to the victim's death, it was clear that one or both of them jumped on the victim's head, that the victim was also kicked in the head, and struck with a 2 x 4. Isadore was found to have been highly intoxicated at the time of the offence. He had a record for various property related offences, but no prior convictions for offences of violence. He was, however, on parole and absent without permission from a treatment centre at the time of the incident.

[66] Both Isadore and his co-accused were of Indigenous descent. Isadore was raised in circumstances of severe poverty, family violence and addiction. In the case of Bergey, he was the

victim of sexual abuse and had serious addictions issues. He had a lengthy criminal record, including convictions for assault and robbery. While he refused to take responsibility for the crime, he expressed remorse for the victim's loss of life. He also participated in extensive counselling programs during his period of pre-trial custody, including programs related to his Indigenous heritage. He enjoyed the strong support of one of his caseworkers that attended the sentencing hearing and offered to continue to provide support to him in the future. Clackson J found that he had made "serious and impressive efforts to put himself on the right path". Overall, Clackson J found that the ***Gladue*** factors relating to both offenders to be very compelling. He also noted that Bergey had taken very significant steps towards his own rehabilitation while in custody awaiting trial.

[67] In term of the ***Laberge*** categories, the reasons of the sentencing judge appear to place the case somewhere between the second and third categories. In the result, he sentenced both offenders to 6.5 years imprisonment, the Crown having sought a sentence of 12 years. Isadore received an additional 2 years and 2 months, concurrent, for the break and enter offence.

[68] In ***Ma***, a 2010 decision of the Ontario Superior Court of Justice, Ma and four others were charged in relation to the beating death of the victim. Ma was convicted of manslaughter following trial, though the sentencing judge took into consideration that Ma had offered a plea to manslaughter prior to trial. Following an aborted drug transaction that evolved into a verbal and physical confrontation, his assailants kicked the victim in the head and face until he became unresponsive. Ma left the scene at one point, and did not continue to participate in the assault when he returned. However, he did not intervene to stop the attack and left the scene with the others. He admitted to kicking the victim 5 or 6 times. During the attack, the bankcards of both the victim and his sister were taken while the attackers demanded that the victim supply the pin numbers associated with the cards. Ma was 18 years of age and had no previous criminal record. He arrived in Canada from China in 2004. The Pre-Sentence Report described his challenges on arrival in Canada. He stopped going to school and became involved with other recreational drug users. While in pre-trial custody he advanced his education and expressed a strong desire to remain in Canada. He expressed remorse when he addressed the court during the sentencing hearing. Letters of support were also presented to the court. The Crown sought a sentence of 10-12 years, while the Defence proposed a period of imprisonment between 7.5 and 8.5 years.

[69] In sentencing Ma to 9.5 years in prison, with credit for pre-trial custody of 6 years and 4 months, the court found that he was part of a group that intended to commit a major physical assault with reckless disregard for the risk of death. The sentencing judge found that Ma was responsible for getting others to participate in the attack, describing it as a "high-end aggravated manslaughter".

[70] In ***Simpson***, the accused entered a plea of guilty to manslaughter though he was originally charged with second-degree murder and robbery. The guilty plea was entered on the third day of a jury trial following 4 days of pre-trial applications. A co-accused also pled guilty to manslaughter in separate proceedings and was sentenced to 6 years imprisonment based on a joint submission by counsel. The intended victim, Peterson, was lured to an apartment on the pretext of having sex with a woman involved with others in drug dealings. The plan was to beat and rob Peterson in purported revenge for his allegedly prior bad behaviour relative to the members of the group. Peterson was, however arrested in relation to unrelated matters on his way to the scene of the later crime. The actual victim had also been invited to attend the apartment and arrived at approximately the same time that Peterson had been expected. Simpson

and his co-accused disguised themselves with masks prior to the arrival of the victim, mistakenly believed to be Peterson. They punched and kicked the victim and stole his wallet, cellphone and drugs that he had on his possession. He was ordered to strip naked and forced out of the apartment while the assault continued. At one point, the victim was stabbed while in the hallway of the apartment building. The victim was found by a passing taxi driver who called 911. The victim died in hospital during emergency surgery. A total of 3 stab wounds and 28 abrasions were identified on the victim's body.

[71] In sentencing Simpson to a period of imprisonment of 7 years, the court found that it was objectively foreseeable that the acts of the accused created a risk of bodily harm to the victim. Simpson was 29 years of age at the date of sentencing and had been subject to mistreatment as a child growing up on the Shoal River Reserve in Manitoba. The court accepted that ***Gladue*** factors reduced his moral blameworthiness for the offence.

Sentence Authorities Relied on by the Crown

[72] In ***Bird***, a decision of Berger J (as he then was) Irwin Bird and a co-accused, Felix Houle, were both sentenced to 15 years imprisonment in conjunction with the vicious beating of two victims, one of whom died of injuries sustained during the incident. A series of concurrent sentences were imposed relative to convictions entered for manslaughter, aggravated assault, and unlawful confinement. Another co-accused, Leroy Bird, aged 25 and with a minor record, was sentenced to a global sentence of 10-year imprisonment. The sentencing judge described the actions of the three as a joint enterprise during a night of prolonged terror visited upon the three victims and innocent witnesses. The attack on the victim who ultimately died of his injuries was motivated by alleged wrongdoing on his part, while drugs motivated the beating of one of the other victims. The attacks were unprovoked and involved threats, intimidation and acts of degradation. The accused were known to their victims and, as such, were trusted to enter the victim's home. Weapons, namely a hatchet and a coffee table leg, were used in the attack. Following the incident, the assailants attempted to destroy evidence by burning clothing and cleaning away blood. Berger J found that Houle played a significant role in the offences in that he directed the actions of the other two co-accused.

[73] Irwin Bird was 30 years of age at the time of the trial and sentencing. He had a minor record save for a conviction in 1988 for the attempted murder of a police officer for which he was sentenced to 6 years imprisonment. He had a Grade 7 education. Bird was a member of the Paul First Nation and the sentencing judge referred to the possibility that traditional native processes would achieve spiritual renewal. Irwin Bird and Houle spent 17 months in pre-trial custody. With respect to Irwin Bird, the Crown sought a sentence of life imprisonment.

[74] Felix Houle, aged 32, had a lengthy record, including convictions for break and enter, assault causing bodily harm, robbery and a number of property related offences. He was a father of 6 children and a member of a respected family on the Paul First Nation. His wife was ill and, as such, the impact of his sentence would be significant on the other members of his family. He was found to be remorseful, to have embraced religion, and to have participated in a healing ceremony relative to this matter.

[75] In sentencing the two principal actors in the attack to global sentences of 15 years, the sentencing judge found that there was little to distinguish their respective moral blameworthiness relative to this incident.

[76] In ***Reid***, a decision of Skarica J of the Ontario Superior Court of Justice, the accused was sentenced to 15 years imprisonment for manslaughter, with enhanced credit for time spent in pre-trial custody. He was charged with first-degree murder, along with a co-accused who was convicted by a jury of the more serious offence. The trial judge's findings of facts described the killing as the result of a robbery gone wrong. The victim was a barber who was involved in the sale of marihuana to a select group of friends. Reid was told that the plan was to rob Harris while armed with a weapon, but never told that his co-accused planned to kill Harris. Both Reid and his co-accused were in possession of firearms at the time of the incident. After the two assailants entered the barbershop, Reid placed a gun at the waist of a customer in the shop and told him not to look up. At the same time, the co-accused pulled out his gun and shot Harris while he attempted to flee the barbershop, pursued by both Reid and his co-accused. Both assailants fled to a pre-arranged location where Reid has left a change of clothing and where they both disposed of their weapons and other items that could link them to the offence. Neither Reid nor his co-accused sought aid or assistance for the fatally wounded victim. On the instructions of the trial judge, Reid was found guilty of manslaughter as a party to the offence.

[77] Reid was 28 years of age at the time of sentencing. He had a very serious record for offences of violence and the use of firearms, including 2 convictions for robbery. At the time of the offence he was bound by the terms of a firearms prohibition order. He was in pre-trial custody for a period of approximately 28 months, for which the sentencing judge accorded him credit of 3.5 years. He did not complete high school and worked as a general labourer. He enjoyed the support of his mother, stepfather and siblings. According to the pre-sentence report, he used marihuana on a regular basis and had engaged in drug trafficking of marihuana and cocaine to support his own drug habit. The author of the pre-sentence report offered the opinion that his drug use was not problematic. Once released from prison, Reid's stated intention was to relocate to Alberta to live with one of his older brothers. Reid was remorseful and expressed his apologies to the family of the victim during the sentencing hearing. The Court found as aggravating the fact that Reid was less than forthcoming in his evidence during the trial. The Crown sought a sentence of 15-18 years, while the Defence urged the court to impose a sentence of 4 years. In sentencing Reid to 15 years imprisonment, less credit for time spent in pre-trial custody, the sentencing judge described him as "a dangerous criminal who has not been deterred by previous criminal sentences" (at para 63).

[78] In ***Varga***, the accused and three accomplices drove to the home of the deceased with the objective of stealing marihuana. When they arrived at the deceased's home, the accused was alone with him for approximately 30 minutes while the others searched the residence and retrieved a quantity of marihuana. While alone with the deceased, Varga beat him all over his body with a baseball bat, including while the deceased lay incapacitated on the floor. The purpose of the beating was to force the deceased to disclose the location of money from the sale of marihuana believed to be on the premises. No money was, however, ever located. In a further effort to discover the location of the suspected money, Varga stabbed the deceased several times with a steak knife, all the while being urged to desist by one of his accomplices. Before leaving the residence, the assailants disconnected the telephone at the residence and attempted unsuccessfully to bind the victim with duct tape. The victim was still alive when the group departed, though no efforts were made to seek or render assistance to him.

[79] Varga was 21 years of age at the time of the offence. He had a Grade 12 education, was married with one child, and was employed. At the time of the offence, he was on parole relative

to a global sentence of 4 years imposed for various offences, including robbery, use of a firearm during the commission of an offence and break and enter. At trial, he was sentenced to 14 years for the offence of manslaughter with no eligibility to apply for parole until at least half of the sentence had been served, and to be served consecutively to a sentence then being served. Counsel made a joint submission for a 12-year sentence, but the sentencing judge declined to accept the joint submission finding that the offence involved a home invasion and that the beating was unnecessary and gratuitous to the completion of the plan to steal marihuana and money. The sentencing judge concluded that the appropriate sentence was 15 years, but reduced the sentence to 12 years in recognition of the mitigating effect of the guilty plea. The sentence was upheld on appeal.

[80] In ***Bidesi***, the accused was convicted of manslaughter following trial on a charge of second-degree murder. Two co-accused had earlier entered pleas of guilty to the offence of manslaughter and been sentenced to periods of imprisonment of 6 years and 7 year, respectively, less credit for pre-trial custody.

[81] Bidesi was 26 years of age at the time of the sentencing. Both of his parents were from Fiji, but separated when he was 5 years of age. His father and grandmother thereafter raised him until his father remarried. Overall his home life was described as stable and nurturing. He formulated a plan to break into the home of the deceased and recruited two others to assist him in the execution of the plan. The victim was shot at close range by the accused who, along with two others, broke into the victim's home and committed a home invasion with a view to rob the victim of drugs and money. Bidesi provided loaded shotguns to his two accomplices and ensured that they were properly disguised. The victim was shot by one of the three individuals involved in the incident though the identity of the shooter was never determined. After killing the victim, the accused directed the others during the ensuing robbery. The sentencing judge found that the home invasion and planned robbery involved considerable planning and deliberation.

[82] Bidesi began drinking alcohol in his early teens and began to smoke marihuana in high school. He sold marihuana and then crack cocaine while in his late teens. He was bullied and racially targeted in school and was expelled from school while attending Grade 10. He carried a handgun at school for his protection. He had a limited criminal record, but recent convictions demonstrated an increase in violent behaviour. His longest sentence prior to the manslaughter conviction was 30 months after he was convicted of unlawfully causing bodily harm after he brandished a firearm at a friend following an argument in a restaurant. While in remand in relation to the murder charge, he was convicted of assault causing bodily harm in relation to a fellow inmate and was sentenced to 6 months. He had virtually no employment history, though worked briefly for his uncle as a labourer.

[83] He was sentenced to 14 years imprisonment less credit for pre-trial custody totalling 5 years and 1.5 months. The sentencing judge noted that while the accused was young, and demonstrated some prospect for rehabilitation, but was not seen as someone likely to change. The accused apologized to the victim's family during the sentencing hearing and took full responsibility for his actions, though the sentencing judge expressed doubts as to the sincerity of these expressions of remorse. While awaiting trial, he completed his high school equivalency, attended a substance abuse management program and joined Alcoholics Anonymous. However, evidence was led during the sentencing hearing that strongly pointed to highly disruptive and violent behaviour by the accused while on remand. In the result, the sentencing judge concluded,

adopting the approach set out in ***Laberge***, that his level of moral culpability approached near murder. He also found that the prospects for rehabilitation were limited.

[84] The final decision relied on by the Crown is ***Baldwin***, a 2017 decision of the Ontario Superior Court of Justice. In that instance, the accused, aged 31 years, plead guilty to manslaughter having been initially jointly charged with one other person, Rachel Fenn, with second-degree murder. The victim was a 61-year-old Indigenous man who lived on the Akwesane Mohawk First Nation. The victim and Fenn had been in an on/off relationship until several months before his death when she became involved with Baldwin. One month prior to his death, the victim called the police to his residence after reporting a physical altercation with Baldwin. The police drove Baldwin and Fenn back to Cornwall after the victim indicated that he wanted them both removed from his property.

[85] On the date of the offence, Fenn and Baldwin travelled to the victim's residence in an apparent effort to retrieve three dogs from the deceased. Baldwin brought a case of 48 cans of beer with him in the hope that this might assist in obtaining the deceased's agreement to give Fenn the dogs. Baldwin struck the deceased in the head several times with a glass object following the significant consumption of alcohol by all three. He told police that the deceased was still alive when he and Fenn departed the scene, though neither of them took any steps to obtain assistance for the deceased. The cause of death was determined to me multiple blunt and sharp force trauma to the head and neck area. The deceased was found to have a blood alcohol level of 303 milligrams percent at the time of his death.

[86] Baldwin had a number of criminal convictions dating back to his youth including, most significantly, a prior conviction for manslaughter in 2005, for which he was sentenced to 6 years in prison. Four years later, while on parole and subject to a firearms prohibition order, he was convicted of robbery and received a consecutive sentence of 12 months to the unexpired portion of his manslaughter sentence.

[87] Baldwin grew up with an abusive, alcoholic father. At one point he was sent to a youth facility for teenagers experiencing difficulties at home. He remained with his mother when his parents separated, but that relationship deteriorated. The sentencing judge found Baldwin to be of limited intellectual ability. He quit school in Grade 8 when we was 16 years of age, but subsequently obtained his Grade 12 equivalency as an adult. As a child, he would take a knife with him to school to defend him and was expelled on many occasions for getting into fights and threatening teachers. He began drinking at the age of 14 and was drinking heavily on a daily basis by the time he was 18 or 19. He also abused cannabis and other drugs, but his main addiction related to alcohol. A psychiatric assessment determined that he suffered from PTSD, ADHD, alcohol use disorder, and anti-social personality disorder.

[88] The sentencing judge found that the deceased was a vulnerable victim given his severe alcoholism and his state of intoxication at the time of his death. The fact that the victim was in his own home was also found to be an aggravating factor, as well as the fact that Baldwin took no steps to alert anyone to the deceased's physical predicament or to render any assistance. Once Baldwin and Fenn arrived back at their home, they hid the clothing they had been wearing at the time of the attack. In sentencing Baldwin to 12 years imprisonment, less credit for time spent in pre-trial custody, the sentencing judge referred to the fact that the accused continued to have substance abuse and anger management issues notwithstanding the fact that these issues were

identified in the various expert reports filed in conjunction with Baldwin's first conviction for manslaughter in 2005.

Analysis

[89] It is a fundamental principle of sentencing that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": s 718.1 *Criminal Code*.

Gravity of the Offence

[90] The offence of manslaughter is one of the most serious criminal offences known in law. In Canada, Parliament has directed that a conviction for manslaughter carries a maximum sentence of life imprisonment. The possibility of a possible life sentence for the taking of a human life clearly reflects Parliament's views as to the gravity of this offence. This very significant sanction reflect our society's values surrounding the sanctity of life.

[91] The moral blameworthiness associated with the offence of manslaughter is generally very high so as to attract a sentence that emphasizes denunciation and deterrence. The involvement of a weapon in the commission of the offence is a significant aggravating circumstance.

The Accused's Degree of Responsibility and *Gladue* Analysis

[92] In ***R v Arcand***, 2010 ABCA 363, the Court of Appeal provided the following guidance on the proper approach to the assessment of the degree of responsibility of the offender (at para 58):

> The "degree of responsibility of the offender" as used in s. 718.1 certainly includes the mens rea level of intent, recklessness or wilful blindness associated with the actus reus of the crime committed. For this assessment, courts are able to draw extensively on criminal justice principles. The greater the harm intended or the greater the degree of recklessness or wilful blindness, the greater the moral culpability. However, the reference in s. 718.1 is not simply to the "mens rea degree of responsibility of the offender" at the time of commission of the crime. Parliament evidently intended "degree of responsibility of the offender" to include other factors affecting culpability. These might relate, for example, to the offender's personal circumstances, mental capacity or motive for committing the crime.

[93] As described in ***Arcand***, this aspect of the proportionality principle involves an analysis of those factors that impact on an accused's degree or responsibility or moral blameworthiness for the offence. This includes an application of the ***Laberge*** principles previously discussed, the possible impact of ***Gladue*** factors, and all other circumstances relating to this offender and this offence.

a) Assessment of the *Gladue* Factors

[94] Earlier in these reasons I outlined in some detail the content of the ***Gladue*** Report that was prepared in relation to the Accused. I must now consider whether any of the identified ***Gladue*** factors are relevant to the Accused's moral culpability and, if relevant, how they inform the determination of the appropriate sentence in this instance.

[95] It is a guiding sentencing principle recognized by the Supreme Court in ***R v Gladue***, [1999] 1 SCR 688, that aboriginal people face racism and systemic discrimination inside and outside the criminal justice system. The Supreme Court in ***Gladue***, and subsequently in ***R v Ipeelee, 2012 SCC*** 13, sought to make the sentencing process more meaningful and relevant to the accused, the victim and to the community.

[96] ***Ipeelee*** identifies two ways in which specific ***Gladue*** factors properly inform the sentencing process. First, systemic and background factors associated with an individual offender may assist in assessing the moral blameworthiness of that offender (at para 73). Second the ***Gladue/Ipeelee*** inquiry may assist in assessing the overall effectiveness of the sentence itself (at para 74).

[97] At para 60, the Supreme Court in ***Ipeelee*** instructed trial courts that they

> …must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.

[98] The role of the sentencing judge in applying ***Gladue*** factors was discussed in some detail by the Court of Appeal in ***R v Laboucane***, 2016 ABCA 176, at para 5:

> [W]e urge front line judges, when sentencing Aboriginal offenders, to be ever mindful of two fundamental and inter-related obligations: the first obligation is to carefully consider *Gladue* factors in all Aboriginal sentencing cases unless the offender expressly waives the right to have *Gladue* factors considered: ***Ipeelee*** at para 60; the second obligation is to provide transparent and understandable reasons – amenable to appellate review – as to whether, and how, identified *Gladue* factors impacted the creation of a just sanction for that particular offence and that particular offender.

[99] Subsequently in ***R v Okimaw***, 2016 ABCA 246, the Court elaborated on its earlier decision in ***Laboucane*** and set out (at para 75, 87) a two-step process:

> Step One: Do ***Gladue*** Factors Bear on this Offender's Culpability?
>
> Step Two: What types of sentencing sanctions are appropriate in the circumstances for this particular Aboriginal offender?

Factors Bearing on This Offender's Culpability

[100] The Court in ***R v Napesis***, 2014 ABCA 308, at para 8, summarized the duties resting on a judge in the assessment of ***Gladue*** factors as follows:

> …sentencing judges have a duty to address *explicitly* an aboriginal offender's circumstances, and the systemic and background factors that contributed to those circumstances…and must explain whether those circumstances are relevant to determining a fit sentence by affecting the appellant's degree of blameworthiness for these offences.

[101] Sentencing judges have this duty because "systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" and, moreover, "the reality is that [the offender's] constrained circumstances may diminish their moral culpability": ***Ipeelee*** para 73.

[102] However, the decisions in ***Gladue*** and ***Ipeelee*** make it clear that systemic and background factors "do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence": ***Ipeelee*** at para 83.

[103] The nuanced nature of this inquiry has been eloquently described by the Saskatchewan Court of Appeal in ***R v Whitehead***, 2016 SKCA 165 at para 68:

> …a sentencing court must take judicial notice of and must ascertain the extent to which these systemic and background factors have had a bearing on an offender's culpability for an offence. Although based on palpable and objective evidence, the assessment of the *particular* effects of factors such as these on a *particular* offender's culpability for a *particular* offence is inherently subjective to the *particular* sentencing judge. This could be described as an amorphously uncertain exercise that will inevitably result in a measure of seeming arbitrariness in the sentencing of Aboriginal offenders; but, in fact, it is simply the manifestation of the exercise of the "specialized discretion that Parliament has explicitly vested in sentencing judges" ([***R v M(CA)***, [1996] 1 SCR 500] at para 92).

[104] The Court of Appeal in ***Okimaw*** (at para 64) noted that a mere recitation or listing the relevant factors is not sufficient:

> Merely acknowledging "the existence of systemic factors", as here, is insufficient. Rather, sentencing judges *have a duty to consider* "the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts": ***Ipeelee*** at para 72 (emphasis added).

[105] The Saskatchewan Court of Appeal in ***R v Chanalquay***, 2015 SKCA 141, also provided guidance in the identification and application of ***Gladue*** factors to a particular set of facts. At para 52, the Court held:

> A sentencing judge should not simply stack up all of the ***Gladue***-type considerations at play in a case and, if the list is long or severe, automatically proceed on the assumption such factors have had a substantial limiting effect on the offender's culpability. The required analysis is more demanding than that. To determine the extent to which *Gladue* factors impact on an offender's moral culpability, a sentencing judge must examine both the nature of the relevant factors and the particulars of the crime in issue. He or she should then consider the extent to which the unique circumstances of the offender "bear on his or her culpability" (***Ipeelee*** at para 83) in the specific context of the case at hand. As mandated by the Supreme Court, the search here is not for a cause-and-effect relationship but for circumstances that cast light on the degree of the offender's blameworthiness for the specific offence in issue. It might be that the *Gladue* considerations impact the offender's culpability a great deal, not at all, or only to some intermediate extent.

[106] While no proof of causation is required, some linkage or connection between an offender's background or circumstances and his or her offending behaviour must be established. This was recognized in ***Laboucane*** (at para 63), citing ***Ipeelee*** (at para 83), where the Court of Appeal explained: "[t]his is not to say that those factors need not be tied in some way to the particular offender and offence". The Court in ***R v Delorme***, 2017 SKCA 3, at para 81, articulated it succinctly: "[a]lthough the link between ***Gladue*** considerations and offending behaviour need not be causal, it must be comprehensible".

[107] The Court in ***R v Napesis,*** 2014 ABCA 308, (at para 13), elaborated on this point in the context of the offender before it:

> While the appellant's upbringing was undeniably difficult, there must be some connection between an aboriginal offender's background (including systemic factors which affect Aboriginal people generally) and his extensive history of crimes of dishonesty which also comprise the main body of the offences for which we are sentencing him today. There need not be a causal connection between an aboriginal offender's circumstances and his offending, in order for those circumstances to be relevant: ***Ipeelee*** at para 83. To influence the ultimate sentence, however, those circumstances must clarify or cast light on the degree of the offender's blameworthiness for his offence. Sometimes those circumstances do not play a significant part in bringing an aboriginal offender before the courts: ***Gladue*** at para 69.

[108] The Court in ***Okimaw*** provided further clarification on the so-called cause-and-effect issue when it determined that an offender need not have personally attended residential schooling in order for a court to find inter-generational trauma flowing from the attendance of family members at such institutions: ***Okimaw*** at para 68.

[109] Before turning to consider the ***Gladue*** factors that may apply in this instance, I would refer to the decision of Tilleman J in ***R v BTQ***, 2018 ABQB 521, in which he provided a thoughtful and comprehensive explanation of the scope and significance of a ***Gladue***. I agree with Tilleman J's approach to the incorporation of an offender's ***Gladue*** factors into the sentencing process. In my view, this approach reflects a proper application of ***Gladue*** and ***Ipeelee***.

[110] Turning to the present case, the Accused did not attend a residential school, but it would appear that his maternal grandfather is a residential school survivor. Based on the materials before me, it would appear that he attained an important leadership role within the Enoch First Nation. While the Accused's father and maternal grandmother are both Caucasian, I cannot disregard the fact that the Accused has a significant connection to the Indigenous community through his mother and, in turn, her father. At the same time, it is important to recognize and acknowledge that the Accused has spent virtually all of his life with significant cultural identity challenges, being part Indigenous, part Caucasian, and part African. This so-called cultural "confusion" has been intensified by the fact that the Accused's skin colour, unlike that of at least some of his siblings and other family members, is less clearly Indigenous, leading to feelings of exclusion and cultural isolation from members of his own family and his community.

[111] I am satisfied that the Accused was exposed to Indigenous culture and practices from an early age thanks in part to the efforts of his grandfather, his non-Indigenous father, and Indigenous neighbours who facilitated his attendance at community events, practices and

ceremonies. While the Accused had one foot, so to speak, planted in his Indigenous heritage, his skin colour had the effect of isolating him from other Indigenous family members and, accordingly, from a part of his cultural heritage. This isolation was only intensified by his mother's substance abuse, domestic violence within the home, and very frequent foster care placements necessitated by chaotic family circumstances, notably inadequate parenting. In the result, it seems clear that the potentially positive link that the Accused's mother could have played between her children and their Indigenous culture and heritage was seriously compromised. Sadly, this contributed to the Accused and his siblings falling victim to the very type of dysfunction that has plagued Indigenous communities in this country for generations and which lie at the heart of efforts to give voice to these contextual factors through ***Gladue*** reports.

[112] The Accused's father was not Indigenous and his own personal challenges around drug abuse, anger management and domestic violence were doubtless significant contributing factors to the personal and family dysfunction that is so well documented in the various reports presented to the court during the sentencing process. It is not, unfortunately, clear from these reports whether the Accused's foster placements were with Indigenous families. As such, it is not possible to gauge the extent to which the Accused was raised in a predominantly Indigenous environment. Regardless, I am satisfied that at least some of the Accused's childhood and early life experiences involved intergenerational trauma flowing from his Indigenous antecedents on his mother's side.

[113] The Accused's childhood is an all too tragic and familiar story of emotional and physical neglect, domestic violence within the home, parents addicted to alcohol and drugs, and a revolving door type involvement of Children and Family Services through foster care placements of questionable suitability for the growth and development of healthy, well-adjusted children.

[114] Mr. Mills had a disastrous start in life compounded by his own unique challenges around ADHD, possible fetal alcohol syndrome, physical abuse, emotional deprivation and further compounded in his teenage years by two separate head injuries and the discovery of a significant brain tumour. It is hardly surprising that he acted out in highly inappropriate ways through violence and what appears to have been aggressive, even defiant behaviour. I am struck by his brother Jeremy's observation that the Accused was mirroring their father's behaviour when acting out in aggressive and violent ways.

[115] The fact that Mr. Mills clearly had a very negative upbringing does not, of course, excuse his conduct in this instance. However, it does provide important context for a proper consideration of this offender convicted of this particular offence.

[116] Earlier in these reasons I referred to sentencing as being one of the most difficult functions performed by judges. I can do no better than to quote the words of Saunders J (as he then was) in ***R v McNeil*** (1997), 164 NSR (2d) 27 (SC):

> …the essential purpose of sentencing is to maintain respect for the law by which society chooses to regulate itself, thereby ensuring the peaceful enjoyment, order and safety of its citizens. The community expects the court to enforce its standards, to denounce unlawful conduct and to deal firmly but fairly with those persons convicted of crime. In determining a fit and proper sentence, well recognized principles have come to be applied in this jurisdiction. The primary consideration is always protection of the public. In addressing that primary concern, the sentencing judge is obliged to ask whether such protection may best

> be achieved by specific deterrence of the offender, general deterrence or those similarly disposed, rehabilitation of the offender, or some combination thereof.
>
> The weight to be given to each of those three factors depend upon the circumstances of each case. The offences in this case were violent crimes. The law tells us that in cases of violence, emphasis or weight must be placed on general and specific deterrence. One must never lose sight for the prospect for rehabilitation and reform of the offender. While always emphasizing general and specific deterrence in punishing for a violent crime one must always give some weight to the rehabilitation of the offender. In light of the reality that one day the prisoner will be released, one must reflect on the prospects for that individual's safe and productive return to his or her community.

The words of Justice Saunders eloquently capture the vey delicate balancing exercise that lies at the heart of the sentencing process.

[117] I am satisfied that there is some evidence in this instance of intergenerational trauma flowing from the attendance of the Accused's maternal grandfather at residential schools. I am also satisfied that other forms of intergenerational trauma, including domestic violence, drug and alcohol abuse, and poverty had a profound impact on familiar relationships within the Accused's immediate family.

[118] In ***BTQ***, Tilleman J concluded that multiple intergenerational traumas experienced by Mr. Q and the members of his family had the effect of reducing Mr. Q's moral culpability, an aspect of the proportionality analysis inherent in the sentencing process. Relying on the Court of Appeal's decision in ***Swampy*** (at para 37), he concluded that this reduced moral culpability had a "reductive effect upon the determination of a fit and proper sentence".

[119] I accept the Crown's contention that the Supreme Court's decision in ***Gladue*** does not support an automatic reduction in sentence on account of the fact that the offender is Indigenous. To the contrary, the Court in ***Gladue*** (at para 88) rejected the notion that s. 718.2(e) "requires an automatic reduction in sentence for an aboriginal offender". At para 28 of ***Stimson***, the court noted: (***R v Stimson***, 2011 ABCA 59)

> Even where the *Gladue* factors are present, the sentencing judge still has a duty to find a sentence that is fit considering all the circumstances surrounding the offence: *R v Wilson*, 2009 ABCA 257. A consideration of *Gladue* factors cannot reduce this sentence to one-eighth of a two-year sentence.

[120] I would adopt this line of reasoning and reach a similar conclusion in this instance. In my view, the multiple intergenerational traumas experienced by the Accused and the members of his family had the effect of reducing his moral culpability. Reduced moral culpability is, in my view, one aspect of the proportionality analysis. As noted above, this line of reasoning was applied by Tilleman J in ***BTQ***.

> **What types of sentencing sanctions are appropriate in the circumstances for this particular Aboriginal offender?**

[121] Having found that ***Gladue*** factors are relevant to the Accused's culpability, it is necessary to consider non-***Gladue*** sentencing factors and other sentencing principles in arriving at a proportional sentence. What the authorities on this issue reveal is that ***Gladue*** factors are an important aspect of the proportionality analysis, but are not a free-standing inquiry that come

into play to adjust an otherwise fit sentence after that sentence has already been determined: ***Gladue*** at para 88. The fundamental principle of sentencing is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. As the Court of Appeal explained in ***Swampy***, at para 26, "application of the ***Gladue*** analysis *achieves* a proportionate sentence" (emphasis in original).

[122] In ***Whitehead***, at para 83, the court explained the need to consider both ***Gladue*** factors and non-***Gladue*** factors in the following terms: "[i]n short, all of the aggravating and mitigating factors must be considered together with all of the principles and objectives of sentencing when determining a proportionate sentence for [the offender] and his crime".

[123] If the results of a ***Gladue*** analysis lead to a finding of reduced moral blameworthiness on the part of the offender, "there is a consequential reductive effect upon the ultimate determination of a fit and proper sentence": ***Swampy***, at para 25. Conversely, if the unique circumstances of the offender do not bear on his or her culpability, "they will not influence the final sentence": ***Ipeelee*** at para 83.

[124] When crafting a sentence for an Aboriginal offender, "[s]ection 718.2(*e*) requires the sentencing judge to explore reasonable alternatives to incarceration": ***Gladue*** at para 92. The ***Gladue*** report filed in relation to Mr. Mills contains valuable information on culturally-based programs that the author believes might assist in his long-term rehabilitation. The difficulty in this instance is that I have come to the conclusion that a penitentiary term of imprisonment is required to give proper effect to the principles of deterrence and denunciation. This is one of those situations contemplated in ***Gladue*** where denunciation and deterrence are fundamentally important. At para 78 of ***Gladue***, the Supreme Court recognized that "there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant".

[125] This was the case in ***Okimaw***, where, "[i]n light of society's need to sharply and categorically condemn violent knife attacks, a period of incarceration [was] warranted": ***Okimaw*** at para 89. The Court of Appeal found that alternatives to incarceration "will not effectively achieve the necessary sentencing objectives of denunciation and deterrence, which remain paramount in this particular case".

[126] Where the court has assessed the gravity of an offence and the offender's moral culpability for its commission as requiring a sentence in excess of two years of imprisonment, the restorative justice principles that underpin s 718.2(e) can only be given effect, when and if appropriate, through the term of imprisonment imposed on the offender. The imposition of a sentence in excess of two years obviously eliminates probation as a vehicle with which to address rehabilitation or to give effect to restorative justice principles. Nonetheless, a balancing is still required so as to ensure that these other relevant sentencing objectives are not lost or otherwise somehow eliminated just because of the requirement for a jail terms in excess of two years. Reduced moral culpability can find expression in the determination of the precise period of imprisonment that is appropriate in the circumstances.

[127] I have carefully reviewed the various authorities provided by both the Crown and the Defence. In my view, all of the cases relied on by the Crown involved significantly more serious circumstances than the within matter. In addition, I am not persuaded that any of these offenders had the same type of compelling personal circumstances, including relevant ***Gladue*** factors, that I find exist in this case.

[128] ***Bird and Houle*** is distinguishable on the basis that that case involved a planned home invasion in which both accused viciously beat not only the deceased, but at least two other innocent individuals present in the home at the time. The trial judge described the circumstances as a night of prolonged terror involving an unprovoked attack, threats, intimidation and acts of degradation. Like the present case, the accused were known to the victims and were trusted to enter the home of one of the victims. The attacks involved weapons, a hatchet and a coffee table leg. Unlike the present case, the assailants attempted to destroy evidence after the fact by burning clothing cleaning up blood. Bird also had a prior conviction for attempted murder of a police officer. Both accused were of Indigenous decent. The matter proceeded to trial and, as such, neither accused had the mitigating effect of an early guilty plea.

[129] The circumstances in ***Reid*** are somewhat similar in that both involved a planned robbery, though Reid was unaware that his co-accused planned to kill the victim as well. However, Reid attended the scene armed with a firearm and actually used the firearm to intimidate a witness who happened to be present at the scene. The robbery involved an element of planning in that Reid had arrange to leave a set of clothing at a pre-arranged location so that he could get rid of the clothing worn during the robbery. He also disposed of his weapon and other items that could potentially link him to the offence. Like the present matter, Reid and his co-accused fled the scene without taking any steps to render aid to the wounded victim. I also find the case distinguishable on the basis of Reid's personal circumstances compared to the Accused in this instance. First, Reid had a serious criminal record involving offences of violence, including two prior convictions for robbery. Second, the sentencing judge described him as a "dangerous criminal who has not been deterred by previous criminal offences".

[130] The circumstances in ***Varga*** are somewhat similar to the within matter in that both involved a planned robbery in the context of the drug trade. However, in addition to a prolonged beating of the deceased with a baseball bat, even after he was incapacitated, Varga also stabbed the victim several times in an attempt to get information relating to the location of money suspected to be on the premises. The sentencing judge concluded that the proper sentence was 15 years, but reduced the sentence to 12 years in recognition of the accused's guilty plea. I would also distinguish ***Varga*** on the basis that he had a more serious criminal record than the Accused in the within matter. Specifically, a prior conviction for robbery in relation to which he was on parole at the time of the incident.

[131] The decision in ***Bidesi*** involves circumstances that I would characterize as significantly more serious than the within matter. First of all, ***Bidesi*** involved a conviction following trial, not a guilty plea. Second, the accused developed a plan to commit a home invasion and then recruited two others to assist him in the execution of the plan, supplying both of them with loaded shotguns and disguises to hide their identity. The trial judge found that the incident involved considerable planning and deliberation, unlike the within matter. Also, unlike the present matter, the trial judge found that the accused had limited prospects for rehabilitation given his history of violence.

[132] In ***Baldwin***, the accused had a prior conviction for manslaughter, as well as a conviction for robbery while on parole and subject to a firearms prohibition order. The sentencing judge noted that Baldwin continued to have substance abuse and anger management issues notwithstanding that these issues were clearly identified and brought to his attention at the time of his first manslaughter conviction. A further aggravating circumstance not present in the within matter is that the accused and his accomplice attempted to conceal evidence following the

incident. The cases are similar in terms of the fact that both involved beatings administered with a weapon and the fact that the assailants failed to render or seek aid for the victim after the fact.

[133] Having carefully considered all of the Crown's case authorities, I find that the sentence of 14 year proposed by the Crown is not appropriate having regard to the various aggravating and mitigating factors. In my view, such a sentence would not be proportionate to the seriousness of the offence and the degree of responsibility of the Accused.

[134] I have also carefully considered the cases relied on by the Defence. A number of these decisions involve sentences that are below the sentence proposed by the Defence in this instance. While the discussion of the underlying sentencing principles is helpful, these cases are of limited assistance.

[135] ***KKL*** and ***Bisonnette*** do not, in my view, provide appropriate comparators to the within matter. ***KKL*** involved what I would describe as a "shaken baby" type scenario involving a frustrated parent who forcibly placed the baby on the floor causing multiple skull fractures. The actions of the accused were found to fall in the second ***Laberge*** category, unlike the within matter. Further, the sentence of the Court of Appeal of 4.5 years falls well below the sentence proposed by the Defence in this instance. With respect to ***Bisonnette***, the sentencing judge found that the actions of the accused fell in the first ***Laberge*** category, unlike the within matter where the Defence concedes that we are dealing with circumstances falling in the third ***Laberge*** category. The sentence ultimately imposed was considerably less than the sentence recommended by the Defence in this instance.

[136] The circumstances in ***Holloway*** are somewhat similar to the within matter. Effectively, Holloway received a sentence of 10 years taking into consideration credit for pre-trial custody. Like the present matter, Holloway was involved with others in killing the victim over an alleged prior incident. Holloway kicked the deceased 4 or 5 times and then stabbed him with a butter knife that he retrieved from the kitchen after the victim had been incapacitated. Like the present matter, the incident involved a prolonged violent assault. The accused was also of Indigenous heritage and found to have similar risk factors to the Accused in this instance. Of note, Holloway was convicted following trial and, as such, did not have the benefit of a guilty plea by way of mitigating circumstance. While there are some obvious differences between ***Holloway*** and the within matter, I am satisfied that it provides a very useful reference given the overall similarities.

[137] The circumstances in ***Larson*** are also similar to the present case. Larson's personal circumstances are also comparable. However, like a number of the other cases cited by the Defence, the sentence imposed in this instance was significantly less than the sentence recommended by the Defence in this instance.

[138] The decision in ***Swampy*** is a helpful reference given the factual similarities to the present case. However, ***Swampy*** involved a trial, not a guilty plea. I would also characterize the moral blameworthiness of Swampy as somewhat greater than the Accused in this instance given the actions of the accused in leaving the scene to retrieve a knife and then continuing the assault commenced previously. Swampy was sentenced to 8 years, upheld on appeal, in circumstances in which he had been in pre-trial custody for 296 days. With enhanced credit for pre-trial custody, his sentence was effectively one of over 9 years.

[139] The decisions in ***Guitar***, ***Isadore***, ***May*** and ***Simpson*** all involve circumstances that are somewhat comparable to the within matter. The decision in ***Isadore*** is, in my view, particularly

helpful in that it, like the current matter, involve compelling ***Gladue*** factors. However, all of these cases involved sentences less than the sentence recommended by the Defence in this instance, with the possible exception of ***Guitar***, where the effective sentence was one of 10 years with 1:1 credit for pre-trial custody. They are, accordingly, of limited assistance in crafting a fit and proper sentence in this case.

Conclusion

[140] Earlier in these reasons I set out in some detail the personal circumstances of the Accused. In assessing his moral blameworthiness, I take into consideration his youth, his tragic upbringing, his early guilty plea, his limited criminal record, his expressions of remorse, the relevant ***Gladue*** factors, the strong family support available through his brother Jeremy, and the steps that he has taken to turn his life around and move forward in a positive way. In my view, these are significant mitigating circumstances.

[141] I have also carefully considered the submissions of both the Crown and the Defence. As such, I have taken into consideration the character of the offender, the nature of the offence, and the circumstances surrounding the commission of the offence. In the balancing exercise associated with crafting a fit and proper sentence, I have weighed the gravity of the offence and the degree of responsibility of the offender.

[142] I sentence the Accused to 10 years imprisonment in relation to the death of Douglas Miller. He is to be given credit for pre-trial custody of 24.75 months, leaving a remaining sentence of 7 years, 11.25 months. At the request of the Defence, I strongly recommend that this sentence of imprisonment be served at the Drumheller Institution so as to facilitate access to members of his family.

[143] In addition, I make the ancillary orders requested by the Crown in relation to a 10-year firearms prohibition order, and the requirement for the Accused to provide a sample of his DNA.

[144] A copy of these Reasons, together with a copy of the ***Gladue*** Report, the Pre-Sentence Report and the FAOS report shall be attached to the warrant of committal and provided to the correctional authorities to hopefully assist in the administration of Mr. Mills's sentence.

[145] I am most appreciative of the great assistance provided by counsel in this instance.

Heard on the 26th day of July and the 30th day of August, 2019.
Dated at the City of Calgary, Alberta this 4th day of September, 2019.

M. David Gates
J.C.Q.B.A.

Appearances:

S. Parker Q.C.
for the Crown

R. Snukal
for the Accused