

CANADA / JUDGMENT

R. v. John

2023 BCSC 597

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2023 BCSC 597 R. v. John

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. John,

2023 BCSC 597

Date: 20230320

Docket: 38796-2

Registry: Duncan

Rex

v.

Colin Faustus John

Before: The Honourable Justice Warren

Ruling on Application for NCRMD Verdict

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Place and Dates of Hearing:

Duncan, B.C.

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Introduction

- [1] Colin John seeks a determination, pursuant to s. 16(1) of the Criminal Code, R.S.C. 1985, c. C-46, that he is not criminally responsible by reason of mental disorder for the second degree murder of Derek Descoteau and the attempted murder of Janelle Guyatt on May 20, 2016. I will sometimes refer to the verdict he seeks with the initials "NCRMD".
- [2] The most significant issue that arises on this application is the weight to be given to the uncontradicted expert opinion evidence of Dr. Santoch Rai and Dr. Andriy Kolchak. Each of them is a psychiatrist who assessed Mr. John for purposes of this application. Each of them expressed the opinion, from a psychiatric perspective, that it is more likely than not that at the time of the offences Mr. John met the test for an NCRMD verdict. Their opinions were based on a wide variety of information, including things Mr. John told them when they interviewed him. Mr. John testified on this application but in his testimony he did not repeat all the things he told Dr. Rai and Dr. Kolchak. In these circumstances, the Crown argues that their opinions cannot be given weight and without their evidence Mr. John has failed to establish the foundation required for a verdict of NCRMD.

Factual Background

- [3] By consent, much of the evidence tendered by the Crown at the trial itself was admitted into the record on this application. Among other things, this included a transcript of an audio recording from a police vehicle driven by Constable Bryan Bare, one of the first police officers to arrive at the scene; a note written by Mr. John that was found in a search of his house; several expert reports; and transcripts of witness testimony. Among others, this included the testimony of Ms. Guyatt; Mr. John's friends, John Bourcier and Jonathan Tschritter; Terry Rempel, a paramedic who accompanied Mr. John to the hospital following his arrest at the scene; and Carl Wright, a neighbour of Mr. Descoteau's who was one of the first people to arrive on the scene. In addition, an agreed statement of facts, various clinical records pertaining to Mr. John, and transcripts of police interviews of Mr. John in the days following the offences were admitted by consent, as were the expert reports of Dr. Rai and Dr. Kolchak. As I have said, Mr. John testified. Dr. Rai and Dr. Kolchak also testified.
- [4] I will review some of the evidence in more detail later. For now, I note that Mr. John admits that he killed Mr. Descoteau and that he intended to do so. He admits that he caused the injuries to Ms. Guyatt. The following is a brief summary of the central facts.
- [5] On the afternoon of May 20, 2016, Mr. Descoteau, who was 20 years old, died as a result of being stabbed multiple times by Mr. John. The attack occurred in Mr. Descoteau's home, a basement suite in his father's house in Chemainus. Ms. Guyatt was visiting Mr. Descoteau at the time. She was also stabbed by Mr. John. She suffered grievous injuries. On the day of the offences, Ms. Guyatt was 16 years old and of small stature. She testified she was about 5' 4" and weighed about 95 pounds.

- [6] At the time of the attack, Mr. John, who was then 23 years old, lived in his parent's house, next door to Mr. Descoteau. He surreptitiously entered Mr. Descoteau's basement suite from the backyard of the house, with a knife and a gun. He tried to shoot Mr. Descoteau with the gun but it did not fire. He then stabbed Mr. Descoteau multiple times with the knife. He also stabbed Ms. Guyatt.
- [7] Notwithstanding her significant injuries, Ms. Guyatt was able to leave the basement suite during the attack. She alerted several neighbours who approached the front of the house. Mr. Descoteau managed to get himself out the door of the suite, around the side of the house, and into the front yard, where he collapsed. A neighbour, Carl Wright, knelt at his side. Mr. John then arrived in the front yard and approached Mr. Descoteau. He did not attempt to resume the attack. To the contrary, he attempted to console Mr. Descoteau.
- [8] The police arrived and arrested Mr. John, who was bleeding from wounds to his hands. He was eventually transported by ambulance to Nanaimo Regional General Hospital.
- [9] Tragically, Mr. Descoteau succumbed to his injuries.
- [10] During a search of Mr. John's home following the attack, police found additional firearms and ammunition, as well as the note I have already referred to.
- [11] Mr. John claims that he committed the offences while suffering from a mental disorder that rendered him incapable of knowing that what he did was wrong. His counsel argues that he was motivated by a delusional belief, caused by the mental disorder, that Mr. Descoteau was a sexual predator who was about to sexually assault Ms. Guyatt, who Mr. John believed was underage, and that he had to intervene.

Procedural Background

- [12] After his arrest, Mr. John was detained at the Vancouver Island Regional Correctional Centre ("VIRCC"). In April 2017, following some episodes of what was referred to as "odd behaviour", he was admitted to the Forensic Psychiatric Hospital in Coquitlam ("FPH") on a temporary absence from VIRCC. He returned to VIRCC about a month later.
- [13] The preliminary hearing commenced in July 2017. A concern soon arose about Mr. John's fitness to stand trial and the presiding judge granted an order for an assessment of his fitness. He was admitted to FPH on August 1, 2017, where he remained for about three weeks. Dr. Robert Lacroix, a forensic psychiatrist associated with the Forensic Psychiatric Services Commission, conducted an assessment and expressed the opinion that Mr. John was not unfit. The preliminary hearing continued and Mr. John was ultimately committed to stand trial.

- [14] The trial commenced before me on November 19, 2018. By November 22, 2018, I was concerned about Mr. John's fitness to stand trial. The trial was adjourned pending the outcome of a fitness assessment that was conducted by Dr. Tyler Oswald, another psychiatrist associated with the Forensic Psychiatric Services Commission. Dr. Oswald issued a report on November 27, 2018 in which he expressed the opinion that Mr. John was unfit. The issue of Mr. John's fitness was not pursued further at that time.
- [15] When the Crown closed its case on December 12, 2018, the trial was adjourned and scheduled to reconvene in July 2019. The defence retained Dr. Stanley Semrau to conduct a psychiatric assessment of Mr. John's mental state at the time of the offences to evaluate the prospect of seeking an NCRMD verdict. Dr. Semrau was unable to form an opinion because Mr. John would not discuss the offences with him. Dr. Semrau concluded that Mr. John was unfit to stand trial. By consent, I then ordered another assessment of Mr. John's fitness.
- [16] Mr. John was admitted to FPH on July 2, 2019, where his fitness was assessed by Dr. George Wiehahn, a third forensic psychiatrist associated with the Forensic Psychiatric Services Commission. Dr. Wiehahn issued a report in which he opined that Mr. John was likely not unfit to stand trial.
- [17] Faced with competing expert opinions on the question of Mr. John's fitness, I directed that the issue be tried. That hearing was held in August 2019.
- [18] On August 23, 2019, I found that Mr. John was unfit for trial. I ordered him detained in custody at FPH. He was eventually placed under the care of Dr. Kolchak. He remained at FPH for more than two years, during which time he received treatment.
- [19] In a report to the Review Board dated October 16, 2019, Dr. Kolchak expressed the opinion that Mr. John was unfit to stand trial. The Review Board subsequently found Mr. John unfit to stand trial.
- [20] On August 11, 2020, Dr. Kolchak wrote a follow-up report in which he expressed the opinion that Mr. John had regained his fitness to stand trial. The Review Board reviewed Mr. John's disposition and found that he was fit.
- [21] Pursuant to s. 672.48(2) of the Criminal Code, the Court was then required to retry the issue of Mr. John's fitness. Following that trial in August of 2021, I found that he was fit to stand trial. New trial dates were secured.
- [22] Before the new trial commenced, Mr. John decided to plead guilty. On November 30, 2021, his counsel submitted an agreed statement of facts in which Mr. John admitted, among other things, that:
- he caused the injuries that resulted in Mr. Descoteau's death;

· he intended to cause Mr. Descoteau's death, or that he intended to cause bodily harm to Mr. Descoteau that he knew would likely cause his death and he was reckless as to whether Mr. Descoteau's death would ensue; and

· in intending to cause Mr. Descoteau's death, or bodily harm to Mr. Descoteau, he caused bodily harm to Ms. Guyatt.

He pleaded guilty to the second degree murder of Mr. Descoteau and the aggravated assault of Ms. Guyatt. As is typical, I then ordered a pre-sentence report with a psychiatric component.

[23] Dr. Oswald met with Mr. John for the purpose of preparing the pre-sentence report. In that report, he raised a question about Mr. John's mental state at the time of the offences. This prompted a defence application for an assessment of Mr. John's mental condition at the time of the offences to determine whether he was suffering from a mental disorder that rendered him exempt from criminal liability. I granted that order in March 2022.

[24] Dr. Rai conducted that assessment. He issued his report on May 3, 2022. The defence then gave notice of the present application for an NCRMD verdict.

[25] The Crown then obtained an assessment of Mr. John's mental state at the time of the offences from Dr. Kolchak. Dr. Kolchak issued his report on September 29, 2022.

[26] The NCRMD hearing commenced on October 17, 2022.

The Applicable Law

Legal requirements for an NCRMD verdict

[27] A finding that an accused person is not criminally responsible by reason of a mental disorder exempts the person from criminal responsibility on the basis that they lacked the capacity to commit the offence, but it does not release the person from control by the state. Rather, an NCRMD finding triggers a special mechanism for the treatment and management of the person, usually in custody, in order to protect the public from potential threats the person may pose: see Part XX.1 of the Criminal Code.

[28] Mental disorder, as a basis for an exemption from criminal liability, is described in s. 16 of the Criminal Code. Section 16(1) requires the party seeking an NCRMD verdict to prove that at the time of the offence:

- the accused person was suffering from a mental disorder, and
- the mental disorder rendered the person incapable of appreciating the nature and quality of their act, or incapable of knowing that the act was wrong.

[29] Sections 16(2) and (3) specify that there is a presumption that the person did not suffer from a mental disorder so as to be exempt from criminal responsibility until the contrary is proved; the burden of displacing that presumption is on the party that raises the issue; and the contrary must be proved on a balance of probabilities. A balance of probabilities means

more likely than not; in other words, that the evidence is sufficient to tip the balance in favour of the person who has the burden. It does not mean proof beyond a reasonable doubt, which is a higher standard.

- [30] The analysis proceeds in two stages. At the first stage, s. 16 requires a finding of a mental disorder at the time of the offences. The scope of "mental disorder" for the purposes of s. 16 is very broad. Whether an illness, disorder, or condition amounts to a "mental disorder" is a legal question, not a medical question, although "medical expertise plays an essential part in the legal characterization exercise": *R. v. Bouchard-Lebrun*, 2011 SCC 58 at para. 61.
- [31] The second stage involves an assessment of the effects of the mental disorder. Again, proof of the disorder by itself is not sufficient. It is not even sufficient that the mental disorder affected the state of mind of the accused person while he or she was committing the act. The mental disorder must have rendered the accused person incapable either of appreciating the nature and quality of the act or knowing that it was wrong.
- [32] As I have said, Mr. John admitted that he intended to kill Mr. Descoteau. Therefore, it is the second branch of incapacity that he relies on. He says he was suffering from a mental disorder that left him incapable of knowing that killing Mr. Descoteau was wrong.
- [33] In *R. v. Oommen*, [1994] 2 S.C.R. 507 at 518, the Supreme Court of Canada addressed the second branch of the test. The Court explained that "[t]he crux of the inquiry is whether the accused lacked the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not" (para. 26).
- [34] In *R. v. Minassian*, 2021 ONSC 1258 at para. 58, Justice Malloy recently summarized the principles flowing from *Oommen*:
- (1) Under a s. 16 analysis, the focus is not on the accused's intellectual capacity to know right from wrong in the abstract sense, but rather on the capacity to know that a particular act was wrong in the particular circumstances of the case.
 - (2) The issue is whether the accused possessed the capacity to know that the act in question was morally wrong having regard to the everyday standards of the ordinary person.
 - (3) An accused cannot be said to "know" something is "wrong" within the meaning of s. 16 if, because of a mental disorder, he lacks the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.
 - (4) This does not excuse psychopaths or any other persons following their own deviant code of behaviour because they choose to do so, rather than because they are incapable of knowing that their acts are wrong in the eyes of society.

- [35] In summary, the focus is not on the ability of the accused person to distinguish right conduct from wrong conduct in general or in the abstract, but on the person's ability to rationally perceive and choose between right and wrong conduct in the particular circumstances of the case.
- [36] I will now summarize the legal principles that apply to the assessment of the expert psychiatric evidence.

The weight to be given to expert opinion evidence

- [37] As I have said, NCRMD is a legal determination. I am not bound to agree with or adopt the opinions of the psychiatrists, even though they agreed with each other and their opinions were not contradicted. Nevertheless, psychiatric opinion most often plays a central role in the determination of whether an accused should be found not guilty by reason of mental disorder: *R v. Molodowic*, [2000] 1 S.C.R. 420 at para. 10.
- [38] In *Molodowic* at para. 7, the Supreme Court of Canada explained that in deciding whether an accused person should be found not guilty by reason of mental disorder, the trier of fact "is not bound by the expert psychiatric testimony and its probative value [is] to be assessed in the same manner as any other testimony". Having said that, the Court emphasized that there must be a rational basis for rejecting psychiatric evidence. Justice Huband of the Manitoba Court of Appeal, whose dissenting opinion in *Molodowic* was approved by the Supreme Court, explained that a rational basis for rejecting expert evidence may arise if there was some "discernible flaw" in the expert's reasoning or "because the opinion was formulated on too fragile a factual basis or because the opinion conflicts with inferences one might logically draw from other evidence": *R. v. Molodowic* (A.J.) (1998), 126 Man. R. (2d) 241, at p. 252.
- [39] Where, as here, an expert develops an opinion after conducting their own investigation, the opinion will be based on a factual foundation composed of a variety of resources and sources of information. These may include the expert's own intellectual resources, observations or tests, the expert's review of other experts' observations and opinions, research, and information from others - this list is not exhaustive. The probative value of the opinion will be undercut if the factual foundation on which it is premised is not reliable.
- [40] Often, such an expert will rely on information that would not have been admissible if presented in court. A common example is hearsay evidence. Expert witnesses often form their opinions, at least in part, on out-of-court interviews or written statements that would not satisfy any of the exceptions to the hearsay rule. In such a case, if the opinion is relevant it is admissible for the purpose of assisting the trier of fact draw inferences in areas where the expert has special knowledge or experience. The hearsay is also admissible for the purpose of showing the facts on which the opinion is based so the opinion can be evaluated, but it is not admissible to actually establish those facts: *R. v. Abbey*, [1982] 2 S.C.R. 24. If those facts are not independently established, the weight that can be given to the expert

opinion may diminish: *R v. Lavallee*, [1990] 1 S.C.R. 852 at para 84.

- [41] In *Lavallee*, the Supreme Court of Canada explained that not every fact relied on by an expert witness needs to be "independently" proved for the expert's evidence to be given weight: at 895-896. As long as there is some admissible evidence to establish the foundation for the expert's opinion, the trier of fact cannot ignore the opinion. Where the factual basis of an expert's opinion is "a mélange of admissible and inadmissible evidence", the weight attributable to it is directly related to the amount and quality of the admissible evidence on which it relies: *Lavallee* at 897.
- [42] In his concurring reasons in *Lavallee*, Justice Sopinka clarified that there is a distinction between hearsay an expert "obtains and acts upon within the scope of his or her expertise" and hearsay "from a party to litigation touching on a matter directly in issue" or from another inherently suspect source: *Lavallee* at 899-900. The former type of hearsay contains "strong circumstantial guarantees of trustworthiness" and, accordingly, the lack of independent proof of that type of hearsay should not diminish the weight given to the opinion: *Lavallee* at 899. In contrast, the failure to prove hearsay from an inherently suspect source such as a party to the litigation, will affect the weight to be given to the opinion, sometimes to the vanishing point. However, Sopinka J. noted that it will "only be very rarely" that an expert's opinion is based on such information, with no independent proof at all. He explained that where an expert's opinion is based only in part upon suspect hearsay, the matter is purely one of weight (para. 84).
- [43] More recently, in *Mazur v. Lucas*, 2010 BCCA 473 at para. 40, the Court of Appeal reiterated the principles established in *Lavallee*. Among other things, the Court expressly observed that when an expert relies on hearsay in forming an opinion, the weight that is ultimately placed on the opinion may depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. The Court instructed that the correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is to address the weight to be given to the opinion in light of the reliability of the hearsay.

Summary of the Evidence on this Application

The Crown's evidence during the trial

- [44] As I have said, much of the evidence tendered by the Crown at the trial itself was admitted into the record on this application, by consent. I am not going to summarize this evidence but I will refer to some of it in my discussion of the expert evidence and in my analysis.

Mr. John's testimony

- [45] Mr. John testified over two days, and was briefly re-examined on a third day. His direct examination occupied about an hour and a half. His cross-examination occupied about five and half hours.

- [46] Mr. John grew up in Chemainus, with three sisters and a brother. One of his sisters died of a heroin overdose several years ago. Another sister was diagnosed with schizophrenia. He said she had "significant mental problems", which he became aware of when he was a teenager. He testified that a maternal uncle also was diagnosed with schizophrenia. His mother died in 2019.
- [47] Mr. John was home schooled for most of his elementary school years. He said he got into fights in kindergarten (which he characterized as typical roughhousing) and his mother decided it was better for him to be schooled at home. He returned to public school in grade 8, at Chemainus Junior High School. He said he did not have many friends and was bullied by older kids. He got into some fights. Once, after being goaded by some other students, he shot a student with a BB gun. He became upset about that because he testified he knew what he did was wrong. At some point, he switched to Cowichan Secondary School because he was not getting along with the other students. He graduated from that high school.
- [48] Mr. John worked part-time as a baker at Country Grocer while in high school. He was laid off after two or three years when there was a change in the ownership of the store.
- [49] Mr. John used marihuana while in junior high. He started using cocaine when he was attending Cowichan Secondary, and he drank alcohol occasionally. He denied selling drugs, except for some marihuana in high school. He said he used the money he made at Country Grocer to buy cocaine. When he was in grade 11 or 12, he overdosed on cocaine and ended up in the hospital. He stopped using cocaine sometime after that.
- [50] Mr. John had a couple of "run-ins" with the police as a teenager, but nothing noteworthy.
- [51] Mr. John attended some anger management sessions arranged by his mother when he was a teenager. He testified that his mother and two of his sisters had previously, and independently, told him that they had been sexually assaulted in the past, and that this made him angry. After one of his sisters told him she had been sexually assaulted, he was so angry he got in his truck and went for a drive to try to find the alleged perpetrator. He did not find him, but he acknowledged that it was his intention to confront him and that the confrontation might have become physical had he located the person.
- [52] After graduation from high school, Mr. John got a full-time job at a bakery on Salt Spring Island. He got an apartment there and lived on his own. This lasted about six to eight months. He said he got into squabbles with a co-worker and then got laid off but the two were not related. He moved back into his parents' house in Chemainus. This was about four or five years before the offences. He testified that he looked for work, off and on, and did some odd jobs, but he never got another regular job.

- [53] After moving back into his parents' house, Mr. John spent a lot of time on his own, in his bedroom, playing videogames and watching movies. He also watched other people playing videogames on YouTube. He said he was very caught up in this and felt he had a connection with these YouTubers. He hung out with his friends, John Bourcier, Chris Kitchen, and Jonathan Tschritter. He testified that he drank alcohol occasionally but did not use drugs.
- [54] Mr. John testified that his uncle owned a remote property at Mount Richards, but did not live there. He testified that he often went to the property and helped out. His friends visited him there on occasion. Sometimes he stayed overnight and sometimes he stayed for a few days. When he stayed overnight, he stayed alone.
- [55] Mr. John testified that some time prior to the offences, he was in a gravel pit near his home when he heard voices coming from the bushes. He testified that he felt they were talking about him or threatening him in some way. He said he also heard a sound like a safe hitting the ground, which was confusing. He testified that he could not find the source of the noise and felt that he was losing it, but he did not tell anyone about this experience at the time.
- [56] Mr. John testified that some months before the offences, probably in the summer of 2015, he found a camera case containing four hand guns and ammunition. He found it in the bushes on the other side of the fence at the back of a property he was at with his aunt. He said the property belonged to his aunt's friend, who was in jail, and he was helping his aunt move the contents of the house to a storage unit. He testified that he assumed the guns belonged to his aunt's friend and that the friend had hid them in the bushes.
- [57] Mr. John testified that John Bourcier lived just down the road from where he found the guns. He said he took the camera case with the guns to Mr. Bourcier's house and stashed it under the stairwell. He later retrieved it and hid the guns in his house and at the gravel pit. Sometime after finding the guns, he showed them to Mr. Bourcier. He made a makeshift holster. He took one of the guns, the Phoenix .22, to a farm where he shot it once. He made a suppressor for the Phoenix out of old deodorant cans. He said he did that so he could fire it at the gravel pit without attracting attention. He testified that he carried another of the guns, a 9 mm Ruger, around with him in the holster. He said he did that because he was "slightly concerned that [he] might have to use a gun one day". He also carried boxcutters around with him. In cross-examination, he said that before the offences he did not think he needed the weapons and he was not worried that someone was going to get him.
- [58] Mr. John testified that he found the knife that he used to stab Mr. Descoteau and Ms. Guyatt in a bag at home amongst his father's old "stuff". He testified that he took the knife with him when he went to the Mount Richards property and he also took it to John Bourcier's house.

- [59] Mr. John testified that he had known Mr. Descoteau's father since he was in high school. He said they used cocaine together once when Mr. John was 19 years old. He testified that a few months before the offences, Mr. Descoteau moved in with his father. Mr. John testified that he spoke to Mr. Descoteau once or twice over the fence but did not spend any real time with him. He acknowledged that, after the offences, he told a doctor that he thought Mr. Descoteau was being a bit of a jerk.
- [60] Mr. John testified that he saw girls coming to the house with Mr. Descoteau. He recalled one girl in particular who he thought looked like she was still in junior high. When he was asked if this caused him concern he said it did not "at the time", but at some later time it did concern him.
- [61] Mr. John testified that on the day of the offences he was planning to go to the Mount Richards property and was in the process of packing. He planned to take the Phoenix .22 with him to shoot while there. He could see Mr. Descoteau's house from the open doorway. He saw Mr. Descoteau come home with a girl who appeared to be about 14 or 15 years old. He thought she was too young for Mr. Descoteau and that Mr. Descoteau was going to "take advantage" of her sexually. He said this angered him because she seemed under age, and he decided to kill Mr. Descoteau. He said he took the Phoenix .22 and the knife and walked over to Mr. Descoteau's home with the intention of killing him.
- [62] Mr. John passed his mother and sister in the driveway. He testified he concealed the gun in his sleeve and he had the knife in his pocket. When asked why he hid the gun, he said he did not want them to see it and he did not want them to know what he was about to do.
- [63] Mr. John said that when he decided to kill Mr. Descoteau and when he commenced the attack he did not think that what he was doing was wrong. In cross-examination he agreed that he knew, in a general sense, that it is wrong to kill people.
- [64] Mr. John testified that when he arrived at the stairs leading down to Mr. Descoteau's basement suite, he took off his shoes because they are steel-toed and bulky, and he was worried they would weigh him down. He entered the residence and removed his hoodie and T-shirt because he said in the past he lost a fight when his shirt was pulled over his head and he wanted to avoid that. He said he saw Mr. Descoteau, from the back, sitting on the couch. He assumed Ms. Guyatt was lying on the couch beside Mr. Descoteau. He approached Mr. Descoteau from behind. Mr. Descoteau turned around and faced him. Mr. John pointed the gun at Mr. Descoteau's head and pulled the trigger but the gun did not fire.
- [65] Mr. John testified that he then stabbed Mr. Descoteau in the neck. He testified that he believed he stabbed Mr. Descoteau about seven times but it could have been more. He testified that he did not intend to stab Ms. Guyatt but she got in the way and he accidentally stabbed her in the back of the neck while he was trying to stab Mr. Descoteau. He testified that he did not recall stabbing her anywhere else.

- [66] Mr. John testified that at some point during the attack, Mr. Descoteau said "Colin, it's not what you think". He testified that he and Mr. Descoteau continued to struggle over the knife. He said he eventually let go of the knife because he had a strange feeling that what he was doing was wrong. He said he first had that feeling when he released the knife. He said that he eventually came to think that Mr. Descoteau might have been telling the truth when he said "it's not what you think". He said when he released the knife he thought he had made a mistake. He said when he let go of the knife, Mr. Descoteau took it from him and swung it in a circular motion, slicing through both of Mr. John's hands.
- [67] Mr. John testified that Mr. Descoteau then left the basement suite. Mr. John said he does not know what happened to the knife after that. He testified that he followed Mr. Descoteau outside, went around the side of the house, and into the front yard. He testified that when he reached the front yard he saw Mr. Descoteau lying on ground with a neighbour, Mr. Wright, next to him. He said he knelt down next to Mr. Descoteau and put his hand on his shoulder to see if he was all right. He testified that at this point he no longer wanted to kill Mr. Descoteau and he felt regret.
- [68] Mr. John testified the police arrived shortly thereafter and he was arrested. He was taken to the hospital where he stayed about a day, and then to the police station.
- [69] Mr. John testified that after his arrest, he once heard voices when he was in his cell. He said he heard a female voice say "his name is Colin". He said no one else was in his cell and there was no one in the hallway at the time.
- [70] Mr. John testified that he has seen several doctors since his arrest. He testified that there was never a time when he tried to deceive a doctor or be untruthful to a doctor. He testified that when he met with Dr. Rai and Dr. Kolchak for the purpose of their NCRMD assessments he did his best to tell them how he was thinking and what he did. He testified he told them the truth.
- [71] In cross-examination, Mr. John was not challenged on his testimony that he told Dr. Rai and Dr. Kolchak the truth, his testimony about what prompted the attack, or his testimony that when he decided to kill Mr. Descoteau and initiated the attack he did not think what he was doing was wrong. The closest the Crown got to challenging Mr. John's testimony on the last point was asking him to agree that if Mr. Descoteau had said the words "Colin, it's not what you think" before Mr. John started stabbing, he would not have started at all. His answer was to the effect that this is possible but he has no idea.

Dr. Rai

- [72] Dr. Rai is a forensic psychiatrist. He works as a forensic psychiatrist at FPH and at a treatment centre in Abbotsford. He is a clinical educator at the UBC medical school where he educates medical students and residents in forensic psychiatry. He appeared about 50 times a year over the past ten years before the Alberta Review Board as an expert in forensic psychiatry and, since recently moving to British Columbia, he has done the same before the

British Columbia Review Board several times. During the course of his career he has performed hundreds of forensic psychiatric assessments.

- [73] In addition to conducting an assessment of Mr. John's mental condition at the time of the offences, he was Mr. John's treating psychiatrist for about two months while Mr. John was an inpatient at FPH.
- [74] There was no objection to Dr. Rai's qualifications. I accepted him as eminently qualified to provide the opinions expressed in his report. No flaw in his reasoning was identified. His opinion is entitled to significant weight, provided it rests on a sufficiently stable factual foundation.
- [75] Dr. Rai had access to a large volume of medical records from FPH, including the reports of several psychiatrists who have assessed Mr. John since the offences. He also reviewed the agreed statement of facts entered by consent on this application, and other material provided to him by the Crown.
- [76] Dr. Rai commenced his report by identifying the charges faced by Mr. John and summarizing the attack and its aftermath. He then set out information he obtained from his interview of Mr. John, including what Mr. John told him about the period leading up to the offences and what he was thinking when he decided to kill Mr. Descoteau. Dr. Rai then summarized a report from a social worker documenting a limited "past forensic history". He summarized Mr. John's family history and medical history as documented in some clinical records, including some information relayed by Mr. John's father and mother. He identified Mr. John's current medications. He summarized Mr. John's pre-offence psychiatric history as gleaned from various records.
- [77] There is then a section outlining Mr. John's post-offence psychiatric history. This is a lengthy section, comprising 17 of the 38 pages of the report. This information was gleaned primarily from the reports of other psychiatrists, clinical records maintained at VIRCC during periods when Mr. John was incarcerated there, and clinical records maintained at FPH during periods when he was admitted to that facility. I am going to summarize this information in some detail because both Dr. Rai and Dr. Kolchak emphasized that their opinions about Mr. John's mental state at the time of the offences are based to a significant extent on a retrospective analysis that considers the extensive post-arrest psychiatric history.
- [78] Among other things, Dr. Rai noted the following:
- In late May 2016, within days of the offences, Mr. John was described as being confused about his lawyer. Later, a psychologist at VIRCC suspected he was experiencing psychosis with hallucinations and documented vague and odd responses to questions. Mr. John denied symptoms of psychosis when meeting with a psychiatrist but she made a note of odd posture, grimacing and blinking. She felt his presentation was not "clearly driven by psychosis".

- While incarcerated at VIRCC in the period up to April 2017, several episodes of odd behaviour were documented including catatonic behaviour and unusual body movements. Mr. John was described as non-verbal, unresponsive, and not reactive to pain. A noose was found in his cell. He was seen touching the walls of his cell in ways that raised questions about whether he was hallucinating. In April 2017, he was certified under the Mental Health Act, R.S.B.C. 1996, c. 288, and transferred to FPH.
- During that admission to FPH, Mr. John was observed making strange movements at times, was reluctant to engage in conversation, demonstrated an unusual interpretation style and often made idiosyncratic remarks. Psychological testing revealed no evidence Mr. John was attempting to feign or exaggerate his symptoms. Possible diagnoses identified in May 2017 were conversion disorder with mixed symptoms, other specified personality disorder, the prodromal phase of schizophrenia, or autism spectrum disorder.
- Mr. John returned to VIRCC in May 2017. He was being treated with clonazepam and presented in a more relaxed and improved frame of mind.
- As I have noted, a fitness assessment was conducted in August 2017. Dr. Lacroix performed that assessment and concluded that Mr. John was fit for trial. However, he noted that Mr. John's presentation included muteness and an inability to ambulate at times. He noted Mr. John was often vague in his answers to questions and frequent non sequiturs were noted. It was also noted that Mr. John did not demonstrate any "clear evidence" of psychosis.
- Mr. John returned to VIRCC later in the summer of 2017. He was described as catatonic at times. He was seen banging his head on the wall in November 2017. He continued to give odd answers to questions and displayed odd mannerisms and posture. He was described as providing largely nonsensical conversation during an appointment with a psychologist in December. In February 2018 he was described as "behaviourally dysregulated", shouting and banging and disrobing in his cell. It was noted that in March 2018, he smashed his head in order to kill himself. It was again noted that there was "no clear evidence" of psychotic symptoms but an increase in his clonazepam dose was recommended. In November 2018, Mr. John had periods of disassociation and unresponsiveness. He engaged in screaming, making odd statements, referring to God, and expressing suicidality.
- In November 2018, I ordered a fitness assessment. That assessment was performed by Dr. Oswald, who I have said opined that Mr. John was fit for trial. At that time, Dr Oswald was of the view that conversion disorder with concurrent autism spectrum disorder appeared to be the most likely diagnosis but he wrote that he was unable to rule out a psychotic illness.
- As noted, Dr. Semrau attempted to conduct a psychiatric assessment of Mr. John in the spring of 2019. He formed the view that Mr. John was not fit for trial and that he was likely suffering from some sort of paranoid psychotic disorder.

· Mr. John's fitness to stand trial was then assessed again in July 2019. When he was admitted, Dr. Kolchak noted an inability to communicate and reports of auditory hallucinations that he was not willing to discuss. Nevertheless, Dr. Wiehan expressed the view that Mr. John was likely not unfit to stand trial, but he noted that he presented with elements of developmental disorders, psychosis, as well as maladaptive responses to stress.

· As noted, in August 2019 I found Mr. John unfit to stand trial. He was admitted to FPH. He was observed having isolated verbal outbursts and episodes of punching the air. When he was asked about auditory or visual hallucinations he stated that in 2014 he had the feeling that his hands and feet did not exist, he felt as though he was hollow and there was nothing under his skin. It was noted that he appeared tangential and presented some loose associations, weird mannerisms, posture and facial expressions, discordant affect, and illogical thought process. Dr. Kolchuk diagnosed unspecified psychotic disorder and conversion disorder. Mr. John subsequently developed significant depressive symptomology. He had been treated with antipsychotic and antidepressant medication since being admitted to FPH in August 2019. He then underwent electroconvulsive therapy. He responded well to that treatment and his depression subsided. Subsequent to that, Dr. Kolchak opined that he had regained his fitness for trial.

· I found Mr. John fit for trial in August 2021. He has continued to be treated with an injectable antipsychotic medication and an antidepressant medication, among other things. When assessed in December 2021, he was described as cooperative with good eye contact, somewhat slow speech, blunted emotional range, but not exhibiting the awkward interpersonal style he previously exhibited. There was no odd behaviour or mannerisms noted and he denied symptoms of psychosis. His thought process appeared organized. He was diagnosed as likely suffering from a psychotic disorder, specifically schizophrenia with catatonia.

[79] Following this detailed post-offence psychiatric history, Dr. Rai noted Mr. John's substance use, personal history, employment, and relationship history as documented in various clinical records some of which include information provided by Mr. John, Mr. John's father and Mr. John's mother.

[80] The next section of Dr. Rai's report summarized Mr. John's admission to FPH in March 2022 for the NCRMD the assessment. Dr. Rai noted some of Mr. John's prior symptoms as relayed by Mr. John. This included his report that he heard a woman's voice at VIRCC, saying his name, and he could not find anyone around when he heard it. He was inconsistent when asked if he had heard voices at any other time but he denied ever hearing commanding voices telling him to do things. He also told Dr. Rai that he had paranoid thoughts in the past and gave as an example receiving messages from the radio and television at VIRCC. He said he felt he was being watched by staff at VIRCC and on one occasion at FPH he felt one of the staff members was referring to him using Mr. Descoteau's name. He denied a history of false beliefs or experiences that might have been consistent with well-formed and persistent delusions. Dr. Rai noted no evidence of disordered thinking or obvious catatonic symptoms at that time but there was persistent evidence of negative symptoms including amotivation,

poverty of speech, and poverty of affect. Dr. Rai also noted no evidence of active psychotic symptoms such as delusions or hallucinations.

- [81] The next section of Dr. Rai's report sets out his opinion and recommendations. He commenced by commenting on how unusually difficult the assessment was. He wrote that he is "most certain" that Mr. John currently has a severe mental illness that has evolved and become more evident in the years since the offences.
- [82] In terms of diagnosis, Dr. Rai expressed the opinion "within a reasonable degree of medical certainty" that Mr. John has schizophrenia. He explained that this is most often diagnosed by the presence of prominent delusions and/or hallucinations but that these are not mandatory requirements for the diagnosis. He explained that schizophrenia can also be diagnosed on the basis of the presence of disorganized speech plus the presence of either one or both of catatonia and/or negative symptoms. He said with Mr. John there is clinical evidence of all three of disorganized speech, catatonia and negative symptoms, and less prominent symptoms consistent with delusions and auditory hallucinations. He noted the delusion Mr. John relayed in the form of beliefs that television and radio content was about him. In addition, Dr. Rai expressed the opinion that Mr. John had prominent and chronic depressive symptomology. He wrote that in light of the concurrent presence of depressive disorder and schizophrenia the most apt diagnosis may be schizoaffective disorder.
- [83] In cross-examination, Dr. Rai explained that disorganized speech is speech that reflects disconnected thoughts. He explained that there are about nine symptoms associated with catatonia, which include immobility and abnormal movements. Dr. Rai noted stupor and posturing as examples - which he said are appearing not to be aware of one's environment and standing or remaining in one posture for long periods. Dr. Rai explained that negative symptoms reflect a deterioration in functioning, for example amotivation, isolating, and not working.
- [84] Returning to the report, Dr. Rai then assessed Mr. John's mental condition at the time of the offences. He wrote that he is "uncertain as to whether [Mr. John's] current illness was present at a diagnostic level at the time although [he is] more certain that [Mr. John] was probably in the early evolving stages of his illness at the material time ". Dr. Rai opined, "within a reasonable degree of medical certainty", that Mr. John "was probably labouring under a psychotic medical mental disorder at the time of the alleged offences although the exact clinical diagnosis at the material time is not clear". Dr. Rai expressed the possibilities as "either in the prodrome phase of his developing schizophrenia or he may have developed fully by that stage". In Dr. Rai's opinion, Mr. John's mental disorder at the time of the offences "caused him to become mentally fragile and easily prone to having micro-psychotic episodes that caused him to suddenly have fragmentary and brief losses of contact with reality", and that these micro-psychotic episodes "appear to have been precipitated in part by external events that had an intense emotional import or were otherwise stressful or disorienting for other reasons".

- [85] Dr. Rai expressed the view that at the time of the offences, Mr. John experienced a scene that likely had a strong emotional impact probably because of his distressing memories of his family members having been sexually assaulted in the past. He expressed the view that in the moments immediately before and during the attack Mr. John believed that Mr. Descoteau was planning to engage in non-consensual or illegal sexual activity with a vulnerable female. Dr. Rai characterized this belief as intense and wrote that it may have been delusional.
- [86] Dr. Rai also expressed the opinion that this intense belief made Mr. John "intensely angry". He wrote that the anger "probably arose from an unusually intense and perhaps irrational belief about [Mr. Descoteau's] intentions", that it was "possibly more intense because of the damaging impact that schizophrenia (or prodrome) can have on a person's ability to control emotions", and that Mr. John had a "somewhat grandiose perception of himself, in the moment, as someone who needed to rescue and save the female". He opined that this strong sense of grandiosity in the moment "may have been of delusional intensity". He expressed the opinion that in this intensely angry emotional state, Mr. John was "unable to turn his mind to a rational consideration or analysis of what he saw and believed about the two victims". In addition, because of "the likely presence of the symptom of disorganized thinking, caused by schizophrenia (or prodrome), he was probably also unable, or was less able, to rationally think through what he should or should not do in that moment".
- [87] Dr. Rai opined "with a reasonable degree of medical certainty", that it is unlikely Mr. John would have committed the offences had he not had an underlying internal psychotic mental illness. He wrote that it is likely that Mr. John's "perception of the behaviour of [Mr. Descoteau] was intensely out of touch with reality, and that his false negative beliefs about [Mr. Descoteau] may have reached a delusional intensity in the moments immediately preceding the killing". He expressed the opinion that "because of his inability to think rationally in the moment, because of his medical mental disorder at the time, he believed that the only option he had was to act in the way that he did (i.e. to do the killing) in order to save the female from being harmed". In Dr. Rai's opinion, Mr. John believed that what he did was the right thing to do in that moment.
- [88] Dr. Rai expressed the opinion that Mr. John's symptoms were probably genuine. He noted some inconsistencies in the reporting of his symptoms and events but overall was "reasonably confident that his description of his experiences [was] sufficiently credible and consistent with genuine psychiatric symptoms". He reiterated that the 2017 psychological testing of Mr. John at FPH revealed no evidence of Mr. John exaggerating symptoms or feigning psychopathy and that the results placed Mr. John in the "honest responding" category. He confirmed that his own interactions with Mr. John gave rise to no reason to disagree with the results of that testing.
- [89] In summary, Dr. Rai's prevailing opinion as expressed in his report was that Mr. John was probably suffering from a psychotic mental disorder at the time of the offences, that was probably at the prodrome phase of developing schizophrenia but may have been fully

developed schizophrenia; that Mr. John probably acted out of anger that was intensely out of touch with reality, and because of the likely presence of disorganized thinking caused by the mental disorder, Mr. John's capacity to make a rational choice between right and wrong was probably impaired and he believed that what he was doing was right.

[90] In his report, Dr. Rai did offer an alternative hypothesis. In this regard, he wrote that there is a "strong possibility" the Mr. John's actions were driven by reality-based anger rather than anger fuelled by false beliefs due to an underlying psychotic mental illness. He said this alternative hypothesis would not be incompatible with the co-occurrence of a mental illness. In this scenario, he explained that Mr. John's false beliefs may have merely been wrong assumptions coupled with a sense of righteous indignation, and the mental disorder would have played a role but not to the extent of rendering him incapable of moral reasoning. In cross-examination, he clarified that the anger itself is not determinative - rather it is the cause of the anger that is important for his opinion.

[91] After correcting for a typographical error identified by Dr. Rai while testifying during the hearing, his conclusion was expressed in these words:

In the final analysis, on the basis of the information made available to me, it is my opinion that Colin John may have suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of subsection 16(1) of the Criminal Code at the time of the act or omission charged against the accused, in relation to the murder charge.

This is because, in my opinion, with a reasonable degree of medical certainty, his disordered mental condition at that material time was of sufficient intensity that may have impaired his capacity to make a rational choice about moral right and wrong, to the extent that he was rendered incapable compared to the normal capacity of an ordinary person as regard moral wrongfulness.

[Note: This was an unusually difficult assessment, and there may be nearly equal clinical evidence to support opposing psychiatric opinions. Therefore, the alternative hypothesis may be an equally, if not more, valid explanation of his actions at the material time. However, my opinion remains that there may be sufficient clinical evidence to support an NCRMD verdict.]

[92] That conclusion section of the report is written in an equivocal manner. Whether Dr. Rai had actually formed the opinion that it was more likely than not that Mr. John met the test for an NCRMD verdict, was not clear from reading that passage alone. He explained in his testimony that his phrasing reflected a concern to not usurp the role of the Court. He clarified that it is his opinion that Mr. John met the test on a balance of probabilities standard and this was his opinion at the time he wrote the report.

[93] Dr. Rai was cross-examined at length by Crown counsel. He did not retreat from the opinions he expressed in the report. Prior to testifying, at the Crown's request he reviewed certain portions of the transcript of Mr. John's testimony on this application. Dr. Rai testified that his opinion did not change as a result of that review. Also, he testified that when he

wrote his report, he considered it to be a close call as to whether the balance of probabilities threshold was met but that since beginning his testimony, reviewing some of the evidence, and reflecting on some of the questioning, his opinion that Mr. John met the balance of probabilities threshold became stronger.

- [94] In cross-examination, Dr. Rai agreed that Mr. John displayed an ability to engage in moral reasoning when, after receiving correcting information from Mr. Descoteau during the attack (that is, Mr. Descoteau saying "its not what you think"), he developed a strange feeling that he might have been wrong and ultimately concluded he had been wrong. Dr. Rai also opined that Mr. John's irrationally held belief about Mr. Descoteau was intense but not rigidly-held and he said that would explain why Mr. John was remorseful by the time he approached Mr. Descoteau on the ground in the front yard. He explained that an intense delusion can impact behaviour even if it is not rigidly held or fixed; such a delusion can dissipate spontaneously or in response to new information.
- [95] Dr. Rai testified that Mr. John's demonstration of distress and remorse in the immediate aftermath of the attack does suggest that by then he had regained his capacity for moral reasoning, but that this behaviour also supported Dr. Rai's opinion that Mr. John lacked that capacity at the material time. He noted Mr. Rempel's evidence that Mr. John became demonstrably more upset in the ambulance when he learned that Mr. Descoteau had died. Dr. Rai considered this to be evidence of empathy. He acknowledged the possibility that it reflected a concern for himself and the legal consequences of his conduct, but Dr. Rai thought that was less likely because Mr. John was clearly facing serious legal consequences before learning that Mr. Descoteau had died. He explained that it is unlikely that a person with empathy would do what Mr. John did, which supports his opinion that at the material time Mr. John was unable to access his reasoning ability or, in other words, he had lost the capacity for moral reasoning.
- [96] In cross-examination, Dr. Rai agreed that a traumatic event, such as the attack on Mr. Descoteau, could trigger a mental disorder not previously present, he said most commonly depression or PTSD. He agreed that it could also exacerbate a previously present mental disorder. He agreed that stress can cause physical symptoms such as elevated heart rate, difficulty focussing, fear, and confusion. He agreed that stress can increase symptoms of catatonia.
- [97] While testifying, Dr. Rai was asked whether Mr. John's conduct in hiding the gun from his mother and sister suggested that he knew what he was doing was wrong. Dr. Rai said that, in his opinion, this behaviour is not inconsistent with Mr. John lacking the capacity for moral reasoning at the material time. In his opinion, Mr. John was determined to kill Mr. Descoteau and steps taken to evade detection or avoid being stopped suggest that he knew what he was doing was legally wrong, but those steps are not inconsistent with him being incapable of knowing that what he was doing was morally wrong.

- [98] In cross-examination, Dr. Rai reiterated that many of the symptoms he relied on in reaching his opinion presented after the offences. Essentially those symptoms supported the opinion Mr. John suffered from a mental disorder after the offences, and that made it more likely he suffered from a mental disorder at the time of the offences. He said that the only symptoms present before the offences were negative symptoms and what he referred to as "short-lived oddities in his beliefs or experiences". The latter, which I will address in more detail later, included some of Mr. John's interactions with Mr. Descoteau, overhearing Mr. Descoteau's father say something, believing Mr. Descoteau was a jerk, and interpreting a sound heard at the gravel pit as a safe falling to the ground. He explained it was Mr. John's reaction or interpretation of these events that was odd. Later he said that these odd experiences and beliefs could also be described as paranoia.
- [99] In cross-examination, the Crown took Dr. Rai through a lengthy process that involved asking him whether his opinion would change from supportive of an NCRMD verdict to not supportive of an NCMRD verdict if certain pieces of information were removed from his report. Essentially, the Crown asked him to restate his opinion on a series of different factual foundations. Some of this was hard to follow because it was not always clear whether Dr. Rai was being asked to express his opinion based on a factual foundation that did not include a single fact or group of facts, or whether he was being asked about the cumulative effect of removing a series of facts or groups of facts, one after another. Nevertheless, after reviewing the transcript of Dr. Rai's testimony I concluded that some of this was clear enough to require consideration. In setting out those portions, I will use some of the same shorthand references that were used by the Crown.
- [100] Before doing so, I note that Dr. Rai made clear in his testimony that no single or particular symptom was determinative of his ultimate opinion. He emphasized that his opinion was based on a holistic review of all the clinical evidence.
- [101] As I have already noted, Mr. John told Dr. Rai that about two months after the offences, he was receiving messages from the TV and radio; he thought he was being watched by staff at VIRCC, and he thought a staff member at FPH had referred to him using Mr. Descoteau's name. I will refer to all of that as the "delusions of reference", which was a term used by the Crown. Mr. John told Dr. Rai in the period leading up to the offences he overheard Mr. Descoteau's father say derogatory things about Mr. Descoteau which caused Mr. John to think Mr. Descoteau was a jerk; he saw Mr. Descoteau pointing an object at another person as if it was a gun and this caused Mr. John to believe Mr. Descoteau could be dangerous; Mr. Descoteau's father commented to Mr. John that Mr. John's sister was attractive and Mr. John found that to be inappropriate; Mr. John saw Mr. Descoteau with another young looking girl prior to the day of the offences and this made him confused or suspicious of Mr. Descoteau's inclinations; when he saw Mr. Descoteau and Ms. Guyatt enter the basement suite on the day of the offences this affirmed his suspicions; and when he said he heard a voice and a noise at the gravel pit, he characterized the noise as sounding like a safe falling to the ground. I am going to refer to all of that information collectively as the "odd beliefs

and experiences". In his report, Dr. Rai referred to Dr. Kolchak's October 10, 2019 report which recorded Mr. John saying that in 2014 he had the feeling that his hands and feet did not exist, as though he was hollow, and there was nothing under his skin. I will refer to that as the "2014 delusion". I will use the term "negative symptoms" to refer to impaired functioning such as not working and isolating.

- [102] Dr. Rai testified that if he had not been told about the "delusions of reference", that probably would not change his opinion.
- [103] Later, he agreed that if Mr. John had not told him about the "odd beliefs and experiences" and also had not told him about the "delusions of reference", then his conclusion probably would change.
- [104] Dr. Rai agreed that without the "odd beliefs and experiences", the "negative symptoms", and the evidence of Mr. John having limited personal relationships, he would still support an NCRMD verdict but if, in addition to not having any of that information, he also did not have the information about the "delusions of reference", his opinion would change.
- [105] Later Dr. Rai said that without the information about the "odd beliefs and experiences", the "2014 delusion", and the "delusions of reference", his opinion would change and would no longer support an NCRMD verdict.

Dr. Kolchak

- [106] Dr. Kolchak is a forensic psychiatrist. He now works as a forensic psychiatrist for Correctional Services of Canada. Between 2014 and 2022, he worked at FPH. His role at FPH included treating people with severe mental health issues who are undergoing court-related assessments, including assessments for the purpose of NCRMD applications, and providing professional opinions to the Review Board of British Columbia in relation to people who have been found unfit for trial or not criminally responsible by reason of mental disorder. He has conducted about 200 NCRMD assessments in his career. He is an also associate clinical professor in the Department of Psychiatry at the UBC medical school where he teaches forensic psychiatry. He holds a variety of administrative positions including chair of the BC Chapter of the Canadian Academy of Forensic Psychiatry and Law.
- [107] In addition to conducting an assessment of Mr. John's mental condition at the time of the offences, Dr. Kolchak was Mr. John's treating psychiatrist while Mr. John was an inpatient at FPH.
- [108] There was no objection to Dr. Kolchak's qualifications. I accepted him as eminently qualified to provide the opinions expressed in his report. No flaw in his reasoning was identified. As with Dr. Rai's opinion, his opinion is entitled to significant weight, provided it rests on a sufficiently stable factual foundation.

[109] Dr. Kolchak had access to a large volume of medical records from FPH, the agreed statement of facts entered by consent at this hearing, and other material provided to him by the Crown including statements made by Mr. John in the days following the attack, witness statements, and transcripts of the testimony of several of the witnesses who testified at the trial.

[110] Dr. Kolchak commenced his report by summarizing aspects of the evidence at trial and other information provided to him by the Crown that he considered material. Among other things, he noted the following:

- At the scene immediately following the attack, Mr. John was described on Constable Bare's audio recording as "pretty disorientated". In Constable Bare's video recording, Mr. John appears disoriented and fearful but able to follow directions.
- A narrative provided by the Crown described police actions at the scene. Among other things, it noted that Mr. John was unresponsive when warned by police, he was observed to mumble and seemed to struggle to focus, he asked a police officer about Mr. Descoteau's condition, and when he was "re-chartered" for a charge of murder because Mr. Descoteau had succumbed to his injuries, he began to sob.
- Records from the Nanaimo Hospital, where Mr. John was taken after the attack noted, among other things:
 - o Although able to follow simple commands, Mr. John was not able to give the doctor any history.
 - o His speech was described as nonsensical and his heart rate was increased even at rest.
 - o A police report described Mr. John's mental status as "very uncooperative, making limited eye contact and responding selectively to questions, his speech was very slow rate, unlimited in content, he is barely audible but coherent?" His affect was restricted, it was difficult to assess his thought content, he grimaced and presented with eyes closed or staring into space and would not respond when attempts were made to explore the reason for this. Otherwise no overt perceptual abnormalities were observed.
- From the statement and testimony of Mr. Rempel, it was noted that Mr. Rempel believed Mr. John's presentation had a "psychiatric component" and therefore asked that he be taken to Nanaimo Hospital rather than the local hospital. Mr. John was asked if he ever used street drugs and he responded that he doesn't do drugs. He continued to answer all subsequent questions with, "I don't do drugs". He was making animalistic grunting sounds, rolling his eyes up towards the top of his head, and not following direction. Mr. Rempel noted the "primary issue is psychological in nature".
- From the statement of Carl Wright, when Mr. Wright was attending to Mr. Descoteau, Mr. John came over, said he was sorry, and knelt beside Mr. Descoteau.

- From the statement of Mr. John's mother, it was noted, among other things, that Mr. John was "depressed for years", she asked a doctor to see him but the doctor did not make house calls, she thinks Mr. John has Asperger's, Mr. John sits in a dark room all the time, he watches people play videogames online all the time, he hasn't worked for the last five years, Mr. John does not like the neighbours apparently because they do drugs and drink and then are horrible, Derek tries to be nice but has a temper, her son is "crazy", he overdosed about six years ago and did major brain damage, Mr. John has never been violent before, he was attacked in the past and did not resist, he lived at home for the past five years, he is not able to keep his mind on things and does everything the wrong way.
- From the statement of Mr. John's friend, John Bourcier, it was noted, among other things, that Mr. John was a nice polite guy who would give you the shirt off his back. Mr. Bourcier did not notice any mental health issues or change in behaviour with Mr. John, he was not aware of issues between Mr. Descoteau and Mr. John, he and Mr. John spoke to Mr. Descoteau over the fence the week before the attack and the conversation was normal and Mr. John seemed happy, he saw Mr. John with a bunch of handguns a month or two before the offences, Mr. John told him he found them in a ditch in the Duncan area, he sometimes saw Mr. John carrying a handgun concealed in his jacket, he saw Mr. John making a gun suppressor, Mr. John liked to carry the Phoenix .22, Mr. John told him he needs the gun because two bikers were following him around and he was afraid of them.
- From the statement and testimony of Mr. John's friend, Jonathan Tschritter, it was noted, among other things, that Mr. John showed him two guns about three weeks or a month before the offences, he said he robbed the guns from a crack shack in Duncan and hid them in log before bringing them home, he described Mr. John as a "weird guy", he said Mr. John told him one day that he did not think it would be hard to kill someone and an argument then ensued between them, Mr. John talked about making a silencer and suppressor, he said Mr. John would "creep them out" and noted that he would behave oddly by standing in the corner of the backyard or randomly standing in people's yards, and he noted one time, about two months before the offences, he left the house they were at and stood in the driveway for two hours for no reason.
- From statements given by Mr. John to the police and video interviews in the days after the offences, it was noted, among other things, that he would become tearful and show facial signs of anguish when asked about the offences, he understood why he was in custody, when the officer left the room he spontaneously slid off his chair onto the floor and had to be picked up by the officer upon his return, at times he appeared engaged with his speech appropriate, but he also appeared to try to speak with a British accent, he repeated things over and over, and made odd statements.

[111] In the next section of his report, Dr. Kolchak provided a detailed summary of Mr. John's post-offence psychiatric history. As with the summary in Dr. Rai's report, this information was gleaned primarily from the reports of other psychiatrists and clinical records. I have already highlighted key aspects of this information in my discussion of Dr. Rai's report and I will not repeat all of that. What follows are some points that Dr. Kolchak emphasized:

- In his summary of the records pertaining to Mr. John's admission to FPH in April 2017, Dr. Kolchak noted statements reported by Mr. John's mother most of which I have already mentioned. In addition, he noted that she said Mr. John pushed her one of two days before the offences which she said was uncharacteristic of him. Dr. Kolchak also emphasized certain bizarre aspects of Mr. John's behaviour during this admission including "nonsensical statements, idiosyncratic use of language, grimacing, unusual body movements, like writhing, head slumped, torso oddly twisted, shuffling gait, inappropriate smiling, touching the wall in an odd way", as well as reports of "headaches, blurred vision and restlessness", two episodes of "seemingly catatonic postictal behaviour", and reports by Mr. John of "significant concerns about his health and physical functioning, including unusual experiences of sensory and motor dysfunction, which are often associated with conversion disorders in the psychiatric population".

- In a section summarizing Mr. John's lengthy admission to FPH between September 2019 and December 2021, Dr. Kolchak noted several instances of bizarre behaviour and statements.

[112] In the next section of his report, Dr. Kolchak summarized information provided to him by Mr. John. The first three pages contain general background information. This was followed by a section titled "legal history prior to the offence" which is brief and appears to have been of minimal if any significance to Dr. Kolchak. Next was a section summarizing what Mr. John told him about his psychiatric history prior to the offences. The next section contained information provided by Mr. John about events that occurred in the months before the offences including information about his lifestyle. The next section summarized information provided by Mr. John about the day of the offences including what he said about Mr. Descoteau, about what he was thinking when he decided to kill Mr. Descoteau, and about how the attack unfolded. This was followed by a section setting out what Mr. John told him about the events after the arrest.

[113] The portion of Dr. Kolchak's report summarizing information provided to him by Mr. John is lengthy. I am going to note only three topics that figured most prominently in the Crown's submissions. First, Dr. Kolchak noted that Mr. John told him that on the way to Mr. Descoteau's residence he saw his mother and sister in the driveway and he hid the gun and the knife from them. Second, Dr. Kolchak noted that Mr. John told him that at some point during the attack he "got the feeling that he was wrong" and this was after Mr. Descoteau said "it's not what you think", and by the time Mr. John got into the front yard he wanted Mr. Descoteau to be okay. Third, Dr. Kolchak noted things Mr. John told him about his thoughts about the world and about Mr. Descoteau in the period before the offences. I will quote this section of Dr. Kolchak's report in its entirety because it figured prominently in the Crown's submissions:

Mr. John said that before the offence he thought that "the world was a worse place than it actually was". He said that "we lived in a world where we kill rapists and beat up people who are rapists". He claimed that he "thought it was socially acceptable". He said that he cannot remember when he started to feel that way but it was "probably years before" and that he "didn't tell anyone that he was thinking like that" because he "didn't have many close friends". He also thought that people "wouldn't understand".

Mr. John said that he "thought he was on the good side" at the time of the offence. He felt like "the world was against him or he was against it". He claimed that he "had bad things happening to him and other people around him". He claimed that he was "more vigilant about the world". He said that he "thought people still felt the same way he did". He "just assumed everything".

Mr. John explained that he "saw a lot of things like people getting killed in movies and raped". When I proposed to him that those were movies which are made based on fictional scenarios, he said "I thought it was based on real life they wouldn't make a movie about it unless it happened before my parents always told me the world is a bad place which would get better".

Mr. John thought the world "was a bad place and that he was better than the murderers and rapists in the world". He again remembered that the "victim brought a young girl a few months before the events". He remembers thinking it was "weird". It was at that time he assumed that victim "was a rapist". It was also at that time he thought that "I should be the one to deal with that" and on the day of the offence he felt that "enough was enough and that he should do something".

[114] In the next section of his report, Dr. Kolchak summarized the results of his current mental status examination of Mr. John. This was followed by the actual opinion section of the report.

[115] In the first part of the opinion section of the report, Dr. Kolchak addressed Mr. John's current mental state. He noted that there was little collateral information available about Mr. John's functioning and mental state before the offences. He noted that Mr. John himself was either unable or unwilling to disclose the full extent of his experiences in the years preceding and leading up to the offences. He said that Mr. John's friends disclosed some things that indicated that Mr. John was likely experiencing at least some symptoms of mental illness prior to the offences. In this regard, he noted what had been said about Mr. John standing for long periods in people's yards and a driveway. In his testimony he said he considered this behaviour to be significant to his assessment. He noted that Mr. John carried a gun for no apparent reason. He noted Mr. John's odd statement about the fact that it would be easy to kill someone and the note Mr. John wrote that did not have much logic to it and hence could be viewed as a manifestation of a disorganized thought process.

[116] Dr. Kolchak wrote that it is difficult to come to a conclusion about the presence of disease of the mind based on the pre-offence information alone. He emphasized that the pre-offence symptoms could be interpreted as signs of psychosis or a prodromal symptom of mental illness but based on the pre-offence information alone these symptoms could also be easily interpreted as non-psychotic and rather behavioural manifestations of some kind. He then

noted that Mr. John's odd behaviours came to the initial attention of the first responders and police officers in the hours and days after the offences. Dr. Kolchak noted the significant improvement in Mr. John's symptoms after treatment during his lengthy admission to FPH after he was declared unfit. He then expressed the opinion that Mr. John currently qualifies for the following diagnoses: stimulant use disorder in sustained remission, schizoaffective disorder depressed type, and catatonia associated with schizoaffective disorder.

[117] Dr. Kolchak next addressed the presence of mental disorder at the time of the offences. He repeated that if Mr. John's post-offence psychiatric history is excluded from the analysis is difficult to conclude that Mr. John qualified for the presence of a mental disorder at the time of the offences. Having said that he also noted that Mr. John's actions at the time of the offences seem to have very little reality-based motive. He then wrote that Mr. John's pre-offence behaviour seems to have continuity with the post-offence presentation. He concluded that it is likely that the symptoms noticed by others are an "integral part of the symptom complex which became identifiable when Mr. John came into contact with mental health professionals". He expressed the opinion that the symptoms Mr. John described, and which the Crown referred to as the delusional world view, can be interpreted as paranoid thinking which would explain Mr. John needing to carry a gun. In the result, on the basis of Mr. John's post-offence history together with the limited pre-offence information, Dr. Kolchak concluded that at the time of the offences Mr. John was more likely than not labouring under psychotic symptoms, specifically delusions, and experiencing psychosis in the context of schizoaffective disorder. His diagnoses for Mr. John at the time of the offences are the same as his current diagnoses: stimulant use disorder in sustained remission, schizoaffective disorder depressed type, and catatonia associated with schizoaffective disorder.

[118] Dr. Kolchak went on to discuss Mr. John's ability to understand the wrongfulness of his conduct. He noted again the delusional world view and beliefs about Mr. Descoteau. He concluded that Mr. John "became 'enraged' and decided to kill the victim based on psychotic perception of the world around him as well as delusional beliefs about the victim". He wrote that Mr. John made decisions which "seemed rational to him at the time, however, they were based in irrational perception of the world in the context of psychotic symptoms brought about by schizoaffective disorder". He concluded that at the time of the offences, on the balance of probabilities, Mr. John's ability to understand the moral wrongfulness of his actions was "significantly compromised by delusional perception of the world which arose in the context of mental disorder".

[119] Dr. Kolchak was cross-examined at length by Crown counsel. He did not retreat from the opinions he expressed in his report. Prior to testifying, at the Crown's request he reviewed certain portions of a transcript of Mr. John's testimony on this application. He testified that his opinion did not change as a result of that review. He quantified the level of certainty of his opinion that Mr. John meets the test for an NCRMD verdict at between 60 percent and 70 percent.

- [120] In cross-examination, Dr. Kolchak agreed that a traumatic event, such as the attack on Mr. Descoteau, could explain Mr. John's presentation in the immediate aftermath of the attack, and could trigger a mental disorder not previously present. He said Mr. John's presentation at that time did not necessarily lead to a belief that Mr. John was psychotic at the time. He agreed that conclusions about Mr. John's mental state cannot be drawn from individual pieces of information on their own. However, in his direct evidence he confirmed that some of the odd behaviours observed by others in the immediate aftermath and thereafter are consistent with catatonia and with all the information he now has it is his opinion that Mr. John was displaying symptoms of catatonia at the time.
- [121] In cross-examination, Dr. Kolchak was asked why Mr. John would hide the gun from his mother and sister if he thought he was doing the right thing. Dr. Kolchak said he did not know and noted that Mr. John said it was because he did not want to be stopped.
- [122] Dr. Kolchak testified that Mr. John's demonstration of remorse in the immediate aftermath of the attack suggests that, by then, he had regained his capacity for moral reasoning. He emphasized that he considered it necessary to assess Mr. John's capacity at each stage - first when deciding to kill Mr. Descoteau and when in the process of doing so; and second, after the fact; and he said he would not "conflate those two".
- [123] In cross-examination, Dr. Kolchak acknowledged he did not put an "angry vigilante" theory to Mr. John - he said, in effect, he had no reason to do so because Mr. John did not disclose information that suggested this was a possibility. He was unaware of Mr. John's previous reaction to his sister's disclosure that she had been sexually assaulted and he said he would have to explore that more fully to comment on it, but that his previous angry reaction could fit in with his distorted world view.
- [124] In cross-examination, Dr. Kolchak acknowledged that he did not put a "thrill kill" theory to Mr. John. He explained that he looked for a history of violence and found nothing significant. He said he considered alternative hypotheses and did not believe the thrill kill theory was a viable explanation.
- [125] As with Dr. Rai, the Crown took Dr. Kolchak through a lengthy process that involved asking him whether his opinion would change from supportive of an NCRMD verdict to not supportive of an NCMRD verdict if certain pieces of information were removed from his report. Dr. Kolchak considered some of this to be insignificant. For example, he said that the absence of the information from Mr. John's mother about his lifestyle in the period before the offences would not have any impact on his opinions. However, he agreed that the things Mr. John told him about his view of the world as a bad place and his perception of his role in it - what the Crown referred to as his delusional world view - was important. He acknowledged that this information was critical to his opinion that Mr. John was suffering from a mental disorder at the time of the offences and his opinion that this rendered him incapable of moral reasoning. He said without that information, he would suspect psychosis but his opinion would fall "under the probability threshold".

The Positions of the Parties

- [126] The Crown emphasized that Mr. John bears the burden of establishing that he meets the requirements of an NCRMD verdict and argued that Mr. John failed to meet his burden. The Crown submitted that Mr. John's testimony that he hid the gun from his mother and sister and his testimony that during the attack he came to realize that he had been wrong supports the conclusion that Mr. John was capable of moral reasoning at the material time. The Crown says Dr. Kolchak actually provided a modified opinion while testifying, based on the evidence admitted at the hearing, that supports the conclusion that Mr. John was not suffering from a mental disorder at the time of the offences that rendered him incapable of moral reasoning.
- [127] Alternatively, the Crown argued that the evidence of mental incapacity is insufficient to displace the presumption of capacity in s. 16(2). In this regard, the Crown submitted that Mr. John's testimony is not sufficiently reliable or credible to ground the conclusion that he has met his burden and, even if his evidence is accepted, there is an inadequate evidentiary foundation for the opinions of Dr. Rai and Dr. Kolchak such that they should be given no weight. Specifically, the Crown submitted that their opinions depend on statements Mr. John made to them during their interviews of him that he did not repeat in his testimony.
- [128] Mr. John submitted that the evidence clearly establishes he was suffering from a mental disorder at the time of the offences and that the mental disorder rendered him incapable of knowing that what he was doing was wrong.
- [129] Mr. John relies heavily on the uncontradicted psychiatric evidence. He submitted that when he testified that he always told the truth to Dr. Rai and Dr. Kolchak he effectively adopted all the statements he made to them such that everything he told them has been proved and there is no basis to reject their evidence. Alternatively, he submitted the hearsay statements he made to Dr. Rai and Dr. Kolchak should be admitted for their truth under the principled exception for hearsay. In the further alternative, if I find that not all the statements have been proved and the hearsay versions are not admissible, then it is his position that enough of the factual foundation for Dr. Rai's and Dr. Kolchak's opinions has been proved to give their opinions considerable weight despite his failure to prove every statement that he made to them.

Analysis

Mr. John's credibility

- [130] The Crown emphasized that the important evidence about what Mr. John was thinking at the material time comes from him and argued that his testimony was not credible or reliable.

- [131] I agree that Mr. John's account is critical. I found some of his testimony unreliable. However, I do not agree that his testimony was not credible. To the contrary, I am satisfied that he was truthful.
- [132] The manner in which Mr. John testified suggested that he was being truthful. He answered questions directly but briefly. He did not obfuscate, embellish or exaggerate. He was subdued and displayed a level of reticence, but that is consistent with his presentation since the offences and appears to be a feature of his mental condition. All or nearly all of the psychiatrists who have dealt with him have commented on the difficulty they faced when attempting to engage with him on the topic of the offences. Considered in that context, he was responsive to the questions that were asked. He was generally consistent and provided reasonable explanations or clarifications when presented with an apparent or potential inconsistency. I will give some examples.
- [133] It appeared from Mr. John's direct evidence, that he took the guns home with him after finding them behind the property of his aunt's friend. He later clarified that he briefly hid them at Mr. Bourcier's house who lived very close by, retrieved them later, took them to his own house, and subsequently brought them back to Mr. Bourcier's house. There was nothing suspicious about this explanation.
- [134] Mr. John told his friends a couple of different versions of where he got the guns. He explained that he did not tell his friends the truth about where he found them because the person who he thought owned the guns was in jail and Mr. John did not want to get him involved. This is a reasonable explanation.
- [135] Mr. John admitted that he enjoyed telling tall tales to his friends. However, when considered in context it was clear that he did this to entertain them or to appear interesting to them. I did not find this concerning.
- [136] There were inconsistencies between Mr. John's testimony about the attack itself and the objective evidence. Mr. John testified that he stabbed Ms. Guyatt only once, however she sustained several stab wounds. He testified that he and Mr. Descoteau were well inside the basement suite when he released the knife to Mr. Descoteau, but the blood-spatter and DNA evidence suggests Mr. Descoteau was stabbed in the vicinity of the exterior door to the suite. His testimony about Mr. Descoteau cutting both of his hands with a single circular swipe of the knife seems unlikely.
- [137] These inconsistencies are not surprising given the traumatic nature of the event. As Dr. Kolchak testified, recounting a traumatic event years later would be difficult for someone with good mental health - it would be even harder for someone labouring under a mental illness. I can discern no motive for Mr. John to lie about these details. Ms. Guyatt's testimony was not inconsistent with Mr. Descoteau being the focus of the attack and Mr. John inflicting her wounds while attacking Mr. Descoteau. Mr. John's precise location in the basement suite when he released the knife does not seem material. It would not assist Mr. John to establish that Mr. Descoteau caused the injuries to Mr. John's hands. In the

circumstances, I do not consider Mr. John's account of the actual attack to be reliable, but it did not give rise to any concerns about the truthfulness of his testimony generally.

- [138] Importantly, Mr. John made admissions against interest that significantly enhanced his credibility. He admitted that he did not hear any voices or experience any visual hallucinations on the day of the offences, right before deciding to kill Mr. Descoteau, or in the days immediately after. He admitted that some of the more overt symptoms of mental illness that he exhibited after the offences were not present before the offences. He was asked in cross-examination about the symptoms displayed by his sister, who had been diagnosed with schizophrenia before the offences. It was apparent from his answers that he had personally observed her symptoms. If he was intent on lying about his thinking leading up to the offences and his reasons for the attack, it is likely he would have claimed to have experienced hallucinations, delusions, or some other more overt symptoms of mental illness.
- [139] Similarly, Mr. John's pursuit of an NCRMD verdict has not been fervent. Dr. Semrau's efforts to explore the possibility of an NCRMD defence were thwarted by Mr. John's reticence in his interviews with Dr. Semrau. After being treated at FPH between 2019 and 2021, Mr. John was found fit to stand trial. He then pleaded guilty. The prospect of seeking an NCRMD verdict was raised by the defence in a formal way (by seeking a court-ordered assessment) only after a question about Mr. John's mental state at the time of the offences was raised as an aside in the court-ordered presentence report. If Mr. John was lying about his thinking leading up to the offences and his reasons for the attack, it is likely he would have more vigorously pursued an NCRMD defence and at an earlier stage.
- [140] Finally, the psychological testing revealed no evidence of Mr. John feigning or exaggerating symptoms of mental disorder. Dr. Kolchak expressed the view that the likelihood of Mr. John feigning or malingering is very low given this testing. Dr. Rai agreed and expressed the view that "the overall longitudinal history of [Mr. John's] mental condition points to the likelihood that his symptoms at the material times were probably genuine".
- [141] In summary, while I do have concerns about the reliability of Mr. John's account of how, precisely, the attack unfolded, I do not have concerns about his veracity. I accept his core narrative, including his evidence about his life and experiences before the offences, where he got the guns, his beliefs about Mr. Descoteau, his thinking leading up to his decision to kill Mr. Descoteau, and his reason for doing so. I also accept that he was remorseful in the immediate aftermath of the attack. His evidence about that was corroborated by third party observations.

The weight to be given to the psychiatric opinion evidence

- [142] Again, the Crown's position is that as a consequence of Mr. John's failure to say, during his testimony, some of the things he said to Dr. Rai and Dr. Kolchak when they interviewed him, I can give their evidence no weight.

- [143] Ultimately, the Crown did not make the same submission with respect to the information Dr. Rai and Dr. Kolchak gleaned from the statements of Mr. John's mother who died in 2019. That information concerned what was referred to during the hearing as negative symptoms, such as a decline in function. Neither Dr. Rai nor Dr. Kolchak considered the information of negative symptoms to be critical to their opinions and, accordingly, the failure of Mr. John to prove that information independently during the hearing would have little if any impact.
- [144] In any event, even without the evidence of Mr. John's mother, it was established that Mr. John's function had declined in the years prior to the offences. He graduated from high school while also working part-time at a job he held for two or three years. After graduation, he worked full time and lived on his own for six to eight months. There was then a substantial decline in function. Over the next four years or so he did not work and he spent most of his time alone in his bedroom. Although he continued to enjoy spending time with a few friends, the evidence clearly established that he was displaying symptoms of amotivation and isolating in the period leading up to the offences.
- [145] I turn now to the statements Mr. John made to Dr. Rai and Dr. Kolchak that he did not repeat in his testimony.
- [146] Contemporaneous utterances or statements made while an accused was experiencing symptoms of mental illness can be considered original evidence that goes to the person's state of mind, but cannot be offered as proof of any fact asserted in them. However, statements from an accused recalling or discussing a previous delusion are not original evidence, but are hearsay assertions not admissible to prove the fact asserted: *R. v. Worrie*, 2022 ONCA 471 at 152, citing *R. v. Kirkby* (1985), 21 C.C.C. (3d) 31 (Ont. C.A.), at 53-56, leave to appeal refused, [1986] 2 S.C.R. vii.
- [147] An example of the first category is Mr. Rempel's evidence that when Mr. John was asked if he ever used street drugs he responded that he does not do drugs, and then he continued to answer all subsequent questions with, "I don't do drugs". The fact that he provided nonsensical answers is admissible, not to prove that he does not do drugs, but as potentially relevant to assessing his mental state at the time. In contrast, the statements that the Crown says have not been proved and therefore undermine the weight that can be given to the expert evidence in this case fall into the second category. They are out-of-court statements made by Mr. John about his previous thoughts and experiences, and those statements are not admissible to prove the facts asserted.
- [148] As discussed, Mr. John submitted that when he testified that he always told the truth to Dr. Rai and Dr. Kolchak he effectively adopted all the statements he made to them such that everything he told them has been proved and there is no basis to reject their evidence.
- [149] As explained by Justice Frankel in *R v. Pattison*, 2013 BCCA 246 at para 42:

The general rule is that an accused is not permitted to introduce his or her out-of-court statements. As Madam Justice Charron stated in *R v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111;

[36] Exculpatory out-of-court statements made by an accused are also subject to the general exclusionary rule against hearsay. Where the accused testifies, such statements are generally inadmissible because they are viewed as self-serving and lacking in probative value.

Further, as a general rule, prior consistent statements are inadmissible: *R v. Sterling*, 2008 SCC 10 at para. 5.

[150] Whether a witness adopts a prior statement is a question of fact for the trier of fact to determine: *R. v. Moir*, 2013 BCCA 36 at para. 28, citing *R. v. Stiers*, 2010 ONCA 382 at para. 42, and *R. v. Toten* (1993), 14 O.R. (3d) 255, 1993 CanLII 3427 (O.N.C.A.) at 242. A witness cannot adopt a prior consistent statement unless the witness has a present recollection of the past events referred to in the statement and a recollection of the statements themselves. It is not enough to say that a statement was true because the witness would not lie to their doctor or the police. This can be described as "vouching" for the prior statement, but not adopting it: *Toten* at 41-44.

[151] If the witness does not or is not able to properly adopt the prior statement, then unless another rule of evidence allows it, the prior statement is not admissible for its truth: *R. v. Khelawon*, [2006] 2 S.C.R. 787 at paras. 38-41. Caution must be taken to accurately reproduce a record of the prior statements that may be put to the witness during testimony in order to allow the finder of fact to consider those statements adequately adopted by the witness: *Khelawon* at para. 41.

[152] Although Mr. John testified that he did his best to tell Dr. Rai and Dr. Kolchak what he was thinking and that he told them the truth, he was not actually referred to the statements in question. Accordingly, his testimony is not sufficient for me to find that he adopted, and thereby proved, those statements.

[153] I turn now to Mr. John's alternative submission; that the hearsay statements he made to Dr. Rai and Dr. Kolchak should be admitted for their truth under the principled exception for hearsay.

[154] Prior to admitting hearsay statements under the principled exception, the judge must determine on a voir dire that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities: *Khelawon* at para. 47

[155] The defence did not apply, on a voir dire, to have the hearsay statements in question admitted for their truth. In any event, and leaving aside the question of reliability, the necessity component of the test has not been established.

- [156] In this context, necessity means that the hearsay is the only available means of putting the evidence before the court, for example where the declarant is deceased. As I have already alluded to, Mr. John has consistently presented as reticent. It is difficult to draw information out of him. This has been noted by several psychiatrists, and I have observed it myself in the manner in which he testified. It appears that this is a feature of his mental illness. In the circumstances, I am not ruling out the possibility that necessity might have been established, but it has not been established on the record before me. For that reason, the hearsay statements are not admissible under the principled exception.
- [157] That leaves Mr. John's further alternative argument; that enough of the factual foundation for Dr. Rai's and Dr. Kolchak's opinions has been proved to give their opinions considerable weight despite his failure to prove every statement he made to them.
- [158] As is apparent from my review of Dr. Rai's and Dr. Kolchak's evidence, the factual foundation for their opinions is "a melange of admissible and inadmissible evidence". Each of them emphasized that their opinions about Mr. John's mental state at the time of the offences were based on a holistic view of all the information they had. It was very clear that their opinions depended very heavily on the extensive post-arrest psychiatric evidence, none of which has been challenged. However, the information Mr. John provided to them during their interviews of him was also important, and not all of those statements were proved for their truth. As I have explained, in these circumstances, I must determine the weight to attribute to their opinions by considering the degree to which the factual foundations for them have been proved and, where they rely on hearsay, the reliability of the hearsay: Lavallee at 899; Mazur at para. 40.
- [159] Dr. Rai agreed that if Mr. John had not told him about the "odd beliefs and experiences", the "2014 delusion", and the "delusions of reference" his opinion would change. Earlier he said the omission of the "odd beliefs and experiences" and the "delusions of reference" would be enough to change his opinion. Ultimately, I understood him to agree that what was critical to him was some evidence of "positive" symptoms, and he characterized the "odd beliefs and experiences", the "2014 delusion", and the "delusions of reference" as positive symptoms.
- [160] Mr. John did not testify about the "delusions of reference" or the "2014 delusion".
- [161] Again, the "odd beliefs and experiences" noted by Dr. Rai referred to Mr. John's statements that he overheard Mr. Descoteau's father say derogatory things about Mr. Descoteau which caused Mr. John to think Mr. Descoteau was a jerk; he saw Mr. Descoteau pointing an object at another person as if it was a gun and this caused Mr. John to believe Mr. Descoteau could be dangerous; Mr. Descoteau's father commented to Mr. John that Mr. John's sister was attractive and Mr. John found that to be inappropriate; Mr. John saw Mr. Descoteau with another young-looking girl prior to the day of the offences and this made him confused or suspicious of Mr. Descoteau's inclinations; when he saw Mr. Descoteau and Ms. Guyatt on the day of the offences this affirmed his suspicions; and when he said he heard a voice and a

noise at the gravel pit, he characterized the noise as sounding like a safe falling to the ground.

[162] Mr. John did not repeat all of this information in his testimony but he is not required to repeat it word for word. He did testify about some of it. He testified that he told the doctor that he thought Mr. Descoteau was being a jerk. As I have said, he testified that he was always truthful with the doctors. He testified that he saw girls coming to the house with Mr. Descoteau, including one girl who he thought looked underage, and while this did not concern him at the time, it did concern him later. He testified that when he saw Mr. Descoteau and Ms. Guyatt together he thought she seemed underage, he thought Mr. Descoteau was going to take advantage of her sexually, and this angered him and triggered his decision to kill Mr. Descoteau. He testified that he heard a voice and a noise at the gravel pit and he characterized the noise as sounding like a safe falling to the ground. I accept his testimony. In other words, the existence of some of the "positive symptoms" was established in the evidence.

[163] In addition, Dr. Rai emphasized that it was not just the content of the statements concerning the "odd beliefs and experiences" that was significant, but it was also the manner in which Mr. John spoke to him about those things and the level of importance he ascribed to them which Dr. Rai considered was significant in assessing Mr. John's state of mind at the time of the offences. Dr. Rai's descriptions of the manner in which Mr. John said these things and Dr. Rai's evaluation of the importance Mr. John ascribed to them is original admissible evidence, which I accept.

[164] Accordingly, there is some admissible evidence of the positive symptoms Dr. Rai agreed were critical. That, together with the vast amount of other information Dr. Rai relied on, establishes a foundation for Dr. Rai's opinions. It would not be appropriate for me to reject his opinions in their entirety merely because they were based in part on "suspect hearsay". On this basis alone, I am satisfied that Dr. Rai's opinions are entitled to some weight, notwithstanding the fact that Mr. John did not repeat in his testimony every statement that he made to Dr. Rai.

[165] Dr. Kolchak agreed that the things Mr. John told him about his view of the world as a bad place and his perception of his role in it - what the Crown referred to as his delusional world view - were critical to his ultimate opinion and without that information, he would suspect psychosis but his opinion would fall "under the probability threshold".

[166] I have already quoted the portion of Dr. Kolchak's report that he was asked to ignore during this part of the cross-examination. In summary, it included Mr. John's statements that he thought it was socially acceptable to kill rapists; the world was a bad place; people were either on the good side or the bad side; he was on the good side; a few months before the offences, he saw Mr. Descoteau with a young girl, assumed Mr. Descoteau was a rapist, and thought he should deal with it; and on the day of the offences he felt enough was enough and he should do something. Mr. John did not repeat all of that in court, but the theme of

him inferring that Mr. Descoteau was a sexual predator, from seeing him with two young looking girls within a relatively short period, and that he had to stop it did emerge from Mr. John's testimony.

- [167] Dr. Kolchak appeared to agree that it was appropriate to distinguish between Mr. John's more general delusional world view and his more specific delusions about Mr. Descoteau, and he appeared to agree that both were critical. Mr. John did not repeat in his testimony the statements that suggested a more general delusional world view. In these circumstances, a very serious question arises as to whether any weight can be given to Dr. Kolchak's opinions.
- [168] After reflecting on that question at length, I have concluded that Dr. Kolchak's opinions are entitled to be given some weight even though Mr. John did not repeat in court the statements that suggested a more general delusional world view. This is because there are strong indications that the hearsay statements that he made to Dr. Kolchak are reliable such that the failure to prove them in court should not diminish the weight given to the opinions as much as it otherwise would have. The same conclusion applies to the hearsay statements Dr. Rai relied on.
- [169] I have not overlooked the "practical distinction" made by Justice Sopinka in *Lavallee* at 899-900 between hearsay an expert obtains within the scope of their expertise, which may be inherently reliable, and hearsay from a party touching a matter directly in issue, which is inherently suspect. However, in this case, there are indications of trustworthiness in relation to Mr. John's hearsay statements that have satisfied me that it would be wrong to reject Dr. Kolchak's report in its entirety.
- [170] In reaching this conclusion, I have been guided by the reason for the presumptive exclusion of hearsay statements and the justification for the exceptions. "[T]he central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability", and without the ability to test the declarant's perception, memory, narration, and sincerity through examination, it is difficult for the trier of fact to test the trustworthiness of the hearsay statements: *Khelawon*, at para. 2. However, exceptions to this presumptive exclusion exist because "[i]n some circumstances, the evidence presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding.": *Khelawon* at para. 2.
- [171] To be clear, I am not saying that the hearsay statements in issue are admissible for their truth. I have already concluded that Mr. John has not met the test for admission under the principled exception. However, the underlying reason for the rules applicable to the admission of hearsay provides helpful guidance when assessing the reliability of the statements for the purpose of determining how much weight should be given to the expert evidence. Again, there are strong indications of reliability concerning the statements in this case.

- [172] First, the Crown had the ability to test the reliability of the statements in question and chose not to do so. Mr. John testified. He testified that he told the doctors the truth. The Crown chose not to cross-examine him on that assertion or on any of the hearsay statements themselves. Of course, Mr. John bears the burden and the Crown was not obliged to elicit any evidence from him. However, this is not a case where there was no opportunity to test the reliability of Mr. John's in-court assertion that he told the doctors the truth or his out-of-court statements to the doctors. Rather, a choice was made by the Crown not to avail itself of that opportunity.
- [173] Second, while the reliability of the specific statements in issue has not been tested, Mr. John's credibility, and specifically the credibility of his account of his thinking leading up to the offences, has been tested. For the reasons I have already expressed, I found him be a credible witness. There is no evidence of feigning or malingering. To the contrary, both experts expressed the view that the likelihood of feigning or malingering is very low in light of the results of the psychological testing.
- [174] Third, this case is distinguishable from cases where the psychiatric evidence was rejected because the accused's account was not believed. There is no actual inconsistency between what Mr. John told the doctors and what he said in court. The problem is that he did not provide as many details in his testimony. He was not asked, in his evidence in chief, many specific questions related to the information in issue. I do not know why he was not asked. I do know that he was reticent while testifying. As I have already said, this has been a central feature of his presentation since the offences and it appears to be a characteristic of his illness. Dr. Rai and Dr. Kolchak each treated Mr. John over an extended period. They were familiar with his presentation. Each of them has extensive experience conducting assessments of people who are seriously mentally ill. I have no doubt they are skilled questioners. It is not surprising that they elicited more detailed information from Mr. John. In the circumstances, there appears to be at least some explanation for the gap between Mr. John's testimony and the information he gave to the doctors.
- [175] In summary, even without considering the reliability of the hearsay statements in issue, I am not satisfied that there is a rational basis for rejecting the opinion evidence of Dr. Rai and I find that his evidence is entitled to be given weight. Having actually considered the reliability of the hearsay statements in issue, I am not satisfied that there is a rational basis for wholly rejecting the evidence of Dr. Kolchak. Having actually considered the reliability of the hearsay statements in issue, Mr. John's failure to prove those statements does not diminish the weight to be given to either Dr. Rai's or Dr. Kolchak's opinion as much as it otherwise might have done.
- [176] I turn now to the substantive questions.

Did Mr. John suffer from a mental disorder at the material time?

- [177] The Crown conceded that at the time of Dr. Rai's and Dr. Kolchak's assessments Mr. John was suffering from a mental disorder of a type that could cause an incapacity for moral reasoning. There is no dispute that this mental disorder is of a type that falls within the Criminal Code definition of "mental disorder".
- [178] On the basis of Dr. Rai's and Dr. Kolchak's evidence, I find that Mr. John is currently suffering from serious mental disorders, including schizoaffective disorder and catatonia associated with schizoaffective disorder.
- [179] I am also satisfied that it is more likely than not that Mr. John suffered from a mental disorder at the time of the offences. This is based on several aspects of the evidence considered together. I emphasize that individual pieces of the evidence considered on their own would be of little significance. It is the combination that has persuaded me that the balance of probabilities threshold has been met.
- [180] First, Mr. John currently suffers from a serious mental disorder. As Dr. Rai explained this increases the likelihood he was suffering from the same mental illness or an earlier version at the time of the offences. In Dr. Kolchak's view, Mr. John's pre-offence behaviour seems to have continuity with the post-offence presentation.
- [181] Second, there is evidence that before the offences Mr. John suffered from what Dr. Rai referred to as negative symptoms. Even without considering the hearsay statements of Mr. John's parents, as I have already explained there is evidence that clearly suggests a deterioration in Mr. John's function, amotivation, and isolation.
- [182] Third, there is evidence of Mr. John displaying pre-offence catatonic symptoms. I am referring to the evidence of Mr. Tschritter, who described Mr. John standing alone in people's yard for lengthy periods. This behaviour is consistent with the symptoms of catatonia that Dr. Rai referred to as stupor and posturing. Dr. Kolchak considered this evidence to be significant. There is also evidence of behaviours in the immediate aftermath of the attack that Dr. Kolchak testified were symptoms of catatonia.
- [183] Fourth, there is a small amount of evidence of Mr. John displaying pre-offence paranoia. I am referring to the evidence that Mr. John was carrying a gun around for no apparent reason. His friend, Mr. Bourcier testified that Mr. John told him he needed the gun because two bikers were following him around and he was afraid. In his testimony, Mr. John denied being concerned about people being after him, but he also testified that he carried the gun because he was "slightly concerned that [he] might have to use a gun one day".
- [184] Fifth, there is evidence that before the offences, Mr. John likely experienced an auditory hallucination at the gravel pit. The Crown argued that the voices and sound Mr. John heard could have been caused by people who were present but not seen by Mr. John. That is, of course, a possibility. However, Mr. John maintained in cross-examination that it is unlikely anyone else was around.

- [185] Sixth, as I have already explained, there is some evidence of Mr. John having what Dr. Rai called "odd beliefs and experiences" before the offences.
- [186] Seventh, there is evidence that Mr. John wrote a note, before the offences, that Dr. Kolchak considered could be viewed as a manifestation of a disorganized thought process.
- [187] Eighth, there was a great deal of evidence of Mr. John engaging in extremely odd behaviour and disorganized speech or disorganized thinking in the immediate aftermath of the offences. This includes the evidence of Constable Power and Constable Bare who attended at the scene, the evidence of Carl Wright and Terry Rempel, the records from the Nanaimo Hospital, and Mr. John's police interviews over the following days, much of which was referred to by Dr. Kolchak. I have not overlooked the concessions of Dr. Rai and Dr. Kolchak to the effect that the trauma of the attack could itself cause this kind of behaviour, trigger a mental illness, or worsen an existing mental illness. However, neither of them expressed the view that this was the case for Mr. John. The odd behaviours persisted for years, waxing and waning to some extent, until Mr. John was appropriately treated with antipsychotic medication and electroconvulsive therapy following his admission to FPH in 2019. All of this suggests the odd behaviour in the immediate aftermath is more likely linked to a pre-existing mental disorder.
- [188] Ninth, Dr. Rai testified that schizophrenia can be diagnosed on the basis of disorganized speech plus either catatonia or negative symptoms. As I have just mentioned, there is evidence of disorganized speech in the immediate aftermath of the offences and also during the police interviews over the next couple of days. There is also the pre-offence note written by Mr. John. There is evidence of both pre-offence catatonia and negative symptoms. There is evidence of catatonia in the immediate aftermath of the attack.
- [189] Finally, notwithstanding extensive cross-examinations, both Dr. Rai and Dr. Kolchak remained firm in their opinions that Mr. John suffered from a mental disorder at the time of the offences and, for the reasons I have already expressed, it is appropriate for me to ascribe weight to their evidence.
- [190] For these reasons I find, on a balance of probabilities, that at the time of the offences Mr. John suffered from a mental disorder of a type that could cause an incapacity for moral reasoning. I would have reached the same conclusion without giving weight to Dr. Kolchak's opinions.

Did the mental disorder render Mr. John incapable of knowing that what he did was wrong?

- [191] As I have explained, the crux of the inquiry is whether the mental disorder caused Mr. John to be incapable of deciding whether it was right or wrong to kill Mr. Descoteau.
- [192] Each of the parties referred me to prior cases that they said were instructive. However, the cases are very fact specific and helpful primarily for identifying the applicable principles. For example, there are cases where evidence of a reality-based motive detracted from the case for an NCRMD verdict (e.g. *R v. Campione*, 2015 ONCA 67; *R. v. Tkachyk*, 2022 ONSC

6463). There are cases where the accused testified about why he did what he did and the judge did not believe him (e.g. *R v. Klein*, 2021 BCSC 743; *R v. Kohsa*, 2013 BCSC 2298). There are cases where the taking of steps to evade detection detracted from the case for an NCRMD verdict because this conduct was seen as bearing upon the accused's capacity to appreciate the wrongfulness of their conduct (e.g. *Tkachyk*; *R. v. W.A.*, 2022 NUCJ 28). However, there are also cases where an NCRMD verdict was reached despite attempts taken by the accused to evade detection (e.g. *Worrie*; *R v. Metatawabin*, 2022 ONSC 1370). There are cases where a verdict of NCRMD was reached despite post-offence expressions of remorse (e.g. *R v. Q.M.*, 2022 NUCJ 6; *R. v. Foulds*, 2019 BCSC 1060). There are many cases where one psychiatrist expressed an opinion supportive of an NCRMD verdict and another psychiatrist expressed an opinion to the contrary. Notwithstanding an extensive search, I have not discovered any case where all the psychiatric evidence supported an NCRMD verdict, the accused testified about his thinking at the material time, and his testimony was found credible.

- [193] *Moldowic* is a case that bears some similarity to this one. The accused killed his grandfather then drove to a friend's house, told her father what he had done, and said that the police should be called. Two psychiatrists testified and each of them expressed the opinion that the accused suffered from a mental disorder that rendered him incapable of knowing his actions were wrong. Their opinions were based to a significant extent on their interviews with the accused. The accused did not testify. There was no contrary psychiatric evidence but the Crown challenged the experts on cross-examination and was successful in eliciting some concessions from at least one of them. The accused was convicted by a jury. His conviction was upheld on appeal. However, the Supreme Court of Canada allowed his further appeal and entered a verdict of not criminally responsible by reason of mental disorder.
- [194] In *Molodowic*, there was no dispute that the accused suffered from paranoid schizophrenia, and, by his own admission, he knew what he was doing was legally wrong. The narrow issue was whether he lacked the capacity for moral reasoning. The court noted that despite various contrary possibilities being presented to the psychiatrists in cross examination they did not depart from their overall conclusions that the accused lacked the capacity for moral reasoning at the time he committed the offence. In the end, the Supreme Court of Canada substituted a verdict of NCRMD because there was no basis for rejecting the evidence of at least one of the psychiatrists.
- [195] To find that Mr. John was incapable of knowing that what he was doing was wrong, there must be some evidence from which I can draw inferences about his state of mind and beliefs at the time. There is such evidence, which I will review in a moment. First, I will address the specific arguments advanced by the Crown.
- [196] The Crown argued that the evidence actually supports the conclusion that Mr. John was not suffering from a mental disorder that rendered him incapable of moral reasoning. This argument rests on two propositions: first, Mr. John's conduct in hiding the gun and his

concession that during the attack he came to the realization that he had been wrong support the conclusion that he was capable of moral reasoning at the material time; and second, Dr. Kolchak provided a modified opinion, while testifying, that supports the conclusion that Mr. John was not suffering from a mental disorder at the time of the offences that rendered him incapable of moral reasoning. I do not accept either of those propositions.

- [197] When asked about Mr. John's conduct in concealing the gun, Dr. Rai opined that this behaviour is not inconsistent with his opinion that Mr. John lacked the capacity for moral reasoning at the material time. As I have already explained, he said that Mr. John was determined to kill Mr. Descoteau and, in his opinion, steps taken to evade detection or avoid being stopped suggest that he knew what he was doing was legally wrong, but are not inconsistent with him being incapable of knowing it was morally wrong. It was clear from the cross-examination of Dr. Kolchak that he did not consider the hiding of the gun to be significant.
- [198] The evidence clearly supports the conclusion that Mr. John regained his capacity for moral reasoning at some point. However, it does not support the positive inference that he was capable of moral reasoning when he decided to kill Mr. Descoteau and initiated the attack. Both expert witnesses were aware of the change in Mr. John's view of Mr. Descoteau when they wrote their reports and neither suggested this weighed against a verdict of NCRMD.
- [199] Dr. Rai's evidence on this point was particularly compelling. As I have already explained, in cross-examination, he opined that Mr. John's irrationally held belief about Mr. Descoteau was intense but not rigidly held, and dissipated. He also expressed the opinion that Mr. John's demonstration of remorse in the immediate aftermath of the attack indicates that he had regained his capacity for moral reasoning, but he said that this behaviour supported his opinion that Mr. John lacked capacity at the material time because it demonstrated empathy. He said it is unlikely that a person with empathy would have done what Mr. John did and this reinforces his opinion that at the material time Mr. John was unable to access his reasoning ability. Dr. Kolchak agreed that Mr. John's demonstration of remorse in the immediate aftermath suggests that he regained his capacity for moral reasoning, but he emphasized that it was necessary to consider Mr. John's capacity at each point in time and he would not "conflate those two".
- [200] When Dr. Kolchak's testimony is considered as a whole, it is clear to me that he did not express a modified opinion that supports the conclusion that Mr. John was not suffering from a mental disorder at the time of the offences that rendered him incapable of moral reasoning. As I have explained, he agreed that without the information from Mr. John about his delusional world view he could not explain Mr. John's actions and, while he would suspect psychosis, his opinion that Mr. John was incapable of moral reasoning would fall "under the probability threshold", but he did not express any positive opinion that Mr. John was capable of moral reasoning.

- [201] Mr. John testified about his state of mind and beliefs at the material time. I accept his evidence. His testimony about his thoughts and beliefs was consistent with what he told Dr. Rai and Dr. Kolchak, although, as I have said, it included fewer details.
- [202] From Mr. John's evidence I find that that he had very limited contact with Mr. Descoteau before the offences, but nevertheless formed the view that Mr. Descoteau was a "jerk". I find that he saw girls coming to the house with Mr. Descoteau and noted that one, in particular, looked too young to be with Mr. Descoteau. I find that although this did not concern him at the time, it came to be concerning to him. I find that on the day of the offences, he saw Mr. Descoteau come home with a girl who appeared to be about 14 or 15 years old, he thought she was too young for Mr. Descoteau and that Mr. Descoteau was going to "take advantage" of her sexually, this angered him, he suddenly decided to kill Mr. Descoteau, and he did not think that what he was doing was wrong. From all the evidence, I infer that he decided to kill Mr. Descoteau to put a stop to what he had concluded was a pattern of sexually predatory behaviour.
- [203] I am satisfied, on a balance of probabilities, that, because of the presence of the mental disorder I have found he suffered from, Mr. John's beliefs were intensely out of touch with reality and he was incapable of rationally choosing between right and wrong conduct. As I will elaborate on in a moment, this conclusion is based on the combination of the nature of Mr. John's mental disorder; Mr. John's explanation and his assertion that he did not think what he was doing was wrong; the paucity of evidence of any reality-based motive; and the evidence of Dr. Rai. When Dr. Kolchak's evidence is added, the foundation for this finding is even stronger.
- [204] Schizoaffective disorder is a type of mental disorder that can cause an incapacity for moral reasoning. That is conceded.
- [205] Mr. John's explanation is irrational. The Crown made the point that it was not irrational to suspect that Mr. Descoteau was engaging in sexually inappropriate conduct with a young person. That may be true, but Mr. John's response was irrational. It was entirely disproportionate, and had a permanent and drastically negative affect on his own life. His claim that he did not think that what he was doing was wrong is also irrational. A subjective belief that killing Mr. Descoteau was, in the circumstances, justified, would not equate to an incapacity for moral reasoning. However, Mr. John's testimony that he did not think that what he was doing was wrong contributes to the conclusion that he had lost the capacity for rational perception.
- [206] No reality-based motive is likely. The Crown raised the prospect of reality-based anger and a "thrill kill" with Dr. Rai and Dr. Kolchak. Dr. Rai opined that the reality-based anger theory was less likely than the delusion-based anger theory. Dr. Kolchak did not consider the reality-based anger theory to be a likely possibility. Neither of them considered the thrill-kill theory to be a likely possibility. Neither of these alternative motives was put to Mr. John in cross-examination. Even leaving that aside, there is nothing in the evidence of Mr.

John's background that suggests either is a likely possibility.

- [207] Although there was some evidence of Mr. John getting into fights in his youth, none of that was beyond ordinary. His reaction to being told by his sister that she had been sexually assaulted, was anger. He got in his truck and went looking for the perpetrator with the intention of confronting him. He admitted that had he found the person it could have gotten physical. Many people would not have responded that way, but Mr. John's response cannot be characterized as extreme in the circumstances. Furthermore, it bears little similarity to impulsively killing a neighbour because of a suspicion, based on the thinnest of foundations, that the neighbour was about to sexually assault someone Mr. John did not even know. Finally, the inference to be drawn from the evidence of Mr. John's friends was that he was actually slow to anger.
- [208] Neither the absence of a reality-based motive nor the inexplicable nature of what Mr. John did means that his mental disorder caused him to act and deprived him of the ability to engage in rational moral reasoning. However, the absence of evidence that would suggest a real possibility of a reality-based motive is one of the several factors I have mentioned that, considered together, provides the foundation for my conclusion.
- [209] Finally, both psychiatrists who conducted assessments of Mr. John provided evidence that strongly supports the conclusion that Mr. John's mental disorder rendered him incapable of knowing that what he was doing was wrong. Neither retreated from their opinions in cross-examination. Dr. Rai said he had become more certain of his opinions. Although these opinions were based to a significant extent on Mr. John's statements, some of which were not repeated in his testimony, for the reasons I have given, I nevertheless ascribe weight to them. To be clear, I would have reached the same conclusion on the basis of Dr. Rai's opinion together with the other factors just mentioned, without giving weight to Dr. Kolchak's opinions.
- [210] For these reasons I find that Mr. John's mental disorder rendered him incapable of knowing that what he was doing was wrong.

Disposition

- [211] In conclusion, it is my verdict that Mr. John is not criminally responsible for the murder of Mr. Descoteau and the attempted murder of Ms. Guyatt by reason of mental disorder.
- [212] I decline to exercise my discretion to hold a disposition hearing. Pursuant to ss. 672.45(1.1) and 672.47 of the Criminal Code, a transcript of these reasons together with the record of this hearing will be sent to the Review Board for disposition within 45 days. Pursuant to s. 672.46, Mr. John will remain in the custody of the Forensic Psychiatric Hospital pending the Review Board's decision.
- [213] Counsel, are there any questions?

[214] CNSL K. PAZIUK: No, thank you, Madam Justice.

[215] CNSL S. BAKKEN: I will just note, Madam Justice, the family prepared victim impact statements that I understand will be read at the hearing by the Review Board.

[216] THE COURT: Thank you for telling me that. Questions, Mr. Sheets?

[217] CNSL S. SHEETS: No, thank you, Madam Justice.

[218] THE COURT: Before adjourning I want to acknowledge the presence of Ms. Guyatt in the courtroom, her friends and family, and the many friends and family members of Mr. Descoteau, who have endured these difficult and very protracted proceedings. Many lives have been permanently and tragically diminished by what Mr. John did. I am very sorry for your loss.

"Warren J."

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