YOUTH JUSCTICE COURT OF NOVA SCOTIA
Citation: *R. v. E.B.L.*, 2015 NSPC 76

Date: 2015-11-06
Docket: 2851646-2851651
Registry: Pictou

Between:

Her Majesty the Queen

v.

E.B.L.

SENTENCING DECISION

Restriction on Publication: Pursuant to ss. 110 and s. 111 of the *Youth Criminal Justice Act*

Judge:	The Honourable Judge Del W. Atwood
Heard:	4, 6 November 2015 in Pictou, Nova Scotia
Charge:	Section 271 of the Criminal Code of Canada.
Counsel:	T. William Gorman for Nova Scotia Public Prosecution Service Douglas Lloy Q.C. for E.B.L.

Identity of young person not to be published--*YCJA*

110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this *Act*.

(2) Subsection (1) does not apply
(a) in a case where the information relates to a young person who has received an adult sentence;
(b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and
(c) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this *Act* or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either *Act* at the time of the publication.

(4) A youth justice court judge shall, on the *ex parte* application of a peace officer, make an order permitting any person to publish information that identifies a young person as having committed or allegedly committed an indictable offence, if the judge is satisfied that
(a) there is reason to believe that the young person is a danger to others; and
(b) publication of the information is necessary to assist in apprehending the young person.
(5) An order made under subsection (4) ceases to have effect five days after it is made.

(6) The youth justice court may, on the application of a young person referred to in subsection (1), make an order permitting the young person to publish information that would identify him or her as having been dealt with under this *Act* or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, if the court is satisfied that the publication would not be contrary to the young person's best interests or the public interest.

Order restricting publication--victim

111. (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

By the Court:

[1] E.B.L. is a young person within the meaning of sub-s. 2(1) of the *Youth Criminal Justice Act*. He pleaded guilty on 3 June 2015 to six counts of sexual assault. There is an order in place prohibiting the publishing or broadcasting of any information that might identify the victim. Right after E.B.L. made his pleas, counsel applied for and the court granted an order for a s. 34 assessment. The assessment report was completed in early September. I adjourned the sentencing hearing until 4 November 2015 to allow the psychologist who conducted the assessment to be subpoenaed to come to court and provide the court and counsel with a clarification of certain observations recorded in the report.

[2] The court heard a statement of facts on 4 November 2015. On six different dates in 2014, E.B.L. coaxed a 6-year-old female whose parents were friends of E.B.L.'s family to go into E.B.L.'s bedroom. Once there, E.B.L. performed what were described to the court as acts of frottage upon the victim. Both remained fully clothed. The victim did not want these things to happen to happen to her, and told E.B.L. to stop. E.B.L. cajoled her into silence by stating

that he would not be her friend any more if she told on him. I was satisfied that the facts supported the guilty pleas, and recorded s. 36 *YCJA* findings of guilt.

[3] I adjourned sentencing until today, 6 November, to consider the evidence and to evaluate the appropriateness of the common sentencing recommendation for a 6-month deferred-custody-and-supervision order, followed by probation.

[4] And to review a procedural point.

[5] The prosecution declined to make an election as to mode of process when invited to do so by the court at E.B.L.'s arraignment, and did not elect thereafter. In my view, this means, absent a procedural decision by the prosecution that might evince a contrary intent, that the matter ought to be dealt with summarily. In saying so, I take into account the fact that the Court of Appeal has not pronounced conclusively on this point, having limited its rulings so far to the issue of lawful appeal venue in the absence of an election as to mode of process in hybrid cases.[1]

[6] It is, without doubt, imperative that this court hold itself bound by decisions of the Court of Appeal. The Court of Appeal is the highest reviewing court of this province. The principle of rule of law makes it imperative that I follow

[1] *See R. v. L.T.*, 2014 NSCA 25 at para. 11, and *R. v. R.V.F.*, 2011 NSCA 71 at paras. 39-40.

declarations of law made by the Court of Appeal. Of that, there must be no doubt.[2]

[7] Recognizing that the Court of Appeal has not decided this point, it is my view that, in the absence of an election by the prosecution, a hybrid youth-justice charge ought to be dealt with summarily. I say so for the following reasons.

[8] To be sure, section 34 of the *Interpretation Act* states:

> 34. (1) Where an enactment creates an offence,
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> (a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
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> (b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and
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> (c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.
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> (2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.[3]

[9] The effect of para. 34(1)(a) is that dual-procedure, hybrid offences are deemed to be governed by an indictable process in the absence of an actual or implied

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[2] *R. v. Oxford*, 2010 NLCA 45 at para. 122.
[3] R.S.C., 1985, c. I-21.

election by the prosecution to proceed summarily.[4] There is nothing in the *Interpretation Act* that would directly exclude the *YCJA* from this deeming provision. However, s. 3 of the *Interpretation Act* sets out an important qualifier:

> 3. (1) Every provision of this Act applies, *unless a contrary intention appears*, [emphasis added] to every enactment, whether enacted before or after the commencement of this *Act*.
>
> (2) The provisions of this *Act* apply to the interpretation of this *Act*.
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> (3) Nothing in this *Act* excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this *Act*.

[10] I take this to mean that the deemed-indicatable presumption in para. 34(1)(a) of the *Interpretation Act* can get overridden in a statute of particular application if that statute is found to contain provisions that would declare otherwise. I think that there is plenty in the *YCJA* that would oust the presumption that hybrid offences are deemed to proceed indictably in the absence of an election by the prosecution.

[11] Section 3 of the *YCJA* establishes a special system of criminal justice for young persons:

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[4] See note 1, supra; and see *R. v. D.C.*, [2014] N.J. No. 215 at para. 28 and *R. v. S.B.*, [2014] N.J. No. 161 at para. 32 (P.C.).

3. (1) The following principles apply in this *Act*:

(a) the youth criminal justice system is intended to protect the public by

(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,

(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and

(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) *the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:*[emphasis added]

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the *greater dependency of young persons and their reduced level of maturity*, [emphasis added]

(iii) *enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,* [emphasis added]

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) *special considerations apply in respect of proceedings against young persons* [emphasis added] and, in particular,

> (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
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> (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
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> (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
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> (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.
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> (2) *This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1)* [emphasis added].[5]

[12] Section 14 of the *YCJA* makes it imperative that the primary point of reference for courts dispensing youth justice be the *YCJA*:

> 14. (1) *Despite any other Act of Parliament* [emphasis added] but subject to the *Contraventions Act* and the *National Defence Act*, a youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person, *and that person shall be dealt with as provided in this Act* [emphasis added].

[13] Section 32 of the *YCJA* spells out the procedural steps which must be fulfilled on arraignment by a presiding judge.

> 32. (1) A young person against whom an information or indictment is laid must first appear before a youth justice court judge or a justice, and the judge or justice shall

[5] S.C. 2002, c. 1.

> (a) cause the information or indictment to be read to the young person;
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> (b) if the young person is not represented by counsel, inform the young person of the right to retain and instruct counsel; and
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> (c) if notified under subsection 64(2) (intention to seek adult sentence) or if section 16 (status of accused uncertain) applies, inform the young person that the youth justice court might, if the young person is found guilty, order that an adult sentence be imposed.
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> (d) [Repealed, 2012, c. 1, s. 170]
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> (2) A young person may waive the requirements of subsection (1) if the young person is represented by counsel and counsel advises the court that the young person has been informed of that provision.
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> ….

[14] Section 32 does not include a requirement that the prosecution elect mode of process on arraignment or that the court require it be done. When read in conjunction with ss. 3 and 14, it would seem to me that, in the absence of a provision making mandatory the recording of an election as to mode of process by the prosecution, it would be contrary to the core principles of the *YCJA*—which recognize young persons' diminished moral blameworthiness, reduced level of maturity, entitlement to enhanced procedural protection, and claim to special consideration—to deem a dual-procedure charge being subject to an indictable process, thereby more serious and penally consequential, in the absence of an actual election by the prosecution.

[15] Lots more in the *YCJA* evinces this tendency toward the less severe. Take, for example, sections 119 and 120 of the *YCJA* which deal with periods during

with authorized persons might have access to records pertaining to young persons. Access to a prior record, particularly at a sentencing hearing, may have a significant impact upon the liberty interests of a young person, given that a prior record is, typically, evidence of a need for a more significant penalty as a meaningful consequence. On this important point, the s. 121 of the *YCJA* states:

> 121. For the purposes of sections 119 and 120, if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

[16] If the prosecution is silent, then the presumption is summary process in determining how long a youth record ought to be accessible.

[17] Take next the issue of appeals. In a rule-of-law society, a court of original jurisdiction is required to be alive to the reality of appellate review. Trial courts should try to create records that allow for meaningful review. Furthermore, trial courts should try to get it right the first time, because reversal or variation on review serves to delay final outcomes, taxes personal and institutional resources, and imposes unneeded stress on persons with interests at stake who just want to get things over with. This means that a trial court should be familiar with the criteria to which its decisions will be subject on judicial

review. This is especially so with respect to review criteria spelled out in a statute; after all, a court must take judicial notice of all applicable statutes.[6] A rational legal system should try to facilitate the appellate-review process through clarity of reasoning that works toward reducing, not multiplying, instances of reversible error. How, then, to interpret sub-s. 37(7) of the *YCJA*?

> (7) For the purpose of appeals under this *Act*, if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

[18] Section 10 of the *Interpretation Act* makes clear that the law is always speaking. This is often applied in the context of fixing in time a statutory duty or obligation, or confirming the existence of a statutory right.[7] It has also been applied to allow terminology in a statute to be forensically modernized or updated.[8] In this case, the effect of the loquacity of the law is that sub-s. 37(7) of the *YCJA* doesn't kick in only when there happens to be an appeal on the go. Rather, it is a part of what is supposed to be a complete code of procedure for dealing with young persons at all stages of the forensic process; a trial court should make reference to it in ensuring that youth criminal justice be dispensed

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[6] Canada Evidence Act, R.S.C. 1985, c. C-5, s. 18.
[7] *See, e.g., Ryan v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [1998] N.S.J. No. 169 at para. 17 (C.A.).
[8] See, e.g., *Yemshaw v London Borough of Hounslow* [2011] UKSC 3 at para. 56, per Hale L.J., referring to the common-law always-speaking principle.

in a way that is rational, from beginning to ending, even if the case end up before a reviewing court. This goes along with the rest of s. 10 of the *Interpretation Act:* "so that effect may be given to [an] enactment according to its true spirit, intent and meaning."

[19] A rational interpretation of sub-s. 37(7) leads me to conclude that I ought to deal with a hybrid charge upon which the prosecution has not made its election in the same way a reviewing court is directed to deal with it: I should deem it to be an offence punishable on summary conviction. To deem otherwise runs the risk of creating a real procedural schmozzle.

[20] Consider what happened in *R. v. R.V.F.*[9] R.V.F. was before the Youth Justice Court charged with occupying a vehicle in which a firearm was stored. Section 94(1) of the *Code* creates a dual-procedure offence, punishable either by summary conviction to a maximum 6-month term of imprisonment under the general-penalty provisions of sub-s. 787(1) of the *Code*, or by indictment to a maximum 10-year penitentiary term. The prosecution declined to make an election as to mode of process. R.V.F. later pleaded guilty. At the sentencing hearing, it was noted that the prosecution had failed to elect; after hearing

[9] Supra, note 1.

argument, the sentencing judge deemed the charge indictable under para. 34(1)(a) of the *Interpretation Act*, and imposed an indictable-level 14-month custody-and-supervision term under para. 42(2)(n) of the *YCJA* (once credit was given for time spent in pre-trial custody, the net sentence was four months of secure custody and two months of community supervision). I describe the sentence as being one of indictable level for this reason: para. 38(2)(a) of the *YCJA* states that a sentence imposed upon a young person must not result in a punishment greater than that which would be appropriate for an adult. Had the charge against R.V.F. proceeded summarily, it would seem that the upper limit of a custodial term under para. 42(2)(n) would have been six months, given the maximum term of imprisonment permissible in a summary case against an adult. R.V.F. appealed his sentence to the Court of Appeal. The Court of Appeal decided that R.V.F. was in the wrong court, as the proper venue of appeal when the prosecution has not made its election is a summary-conviction-appeal court, this in accordance with sub-s. 37(7) of the *YCJA*. There is no record of R.V.F. having brought such an appeal. What would a summary-conviction-appeal court do in hearing an appeal before it under sub-s. 37(7) of the *YCJA*, having to review the legality of an indictable-level youth sentence? If the summary-conviction appeal court must deem the charges to have

proceeded summarily, than how could it do anything other than find an indictable-level sentence to be illegal? On the other hand, if upon a review of the record, the court were to find that the prosecution, in virtue of its conduct, had, as a matter of fact, elected to proceed by indictment, would the court not be compelled to find the deeming provisions in sub-s. 37(7) inapplicable, re-routing the appellant back to the Court of Appeal? In the circumstances that were alive in *R.V.F.*, an appellant could wind up in procedural limbo.

[21] Principles of consequential analysis inform me that a statute should be interpreted in such a way as to avoid a patently absurd result that interferes with the efficient administration of justice, or that is unreasonable, unjust or unfair.[10] It would be an absurdity to have a rational system of justice operate in such a way that a trial court do its job assuming an indictable process, only to have outcomes imposed under that law reviewed assuming a summary process.

[22] I recognize that deeming hybrid offences to have been prosecuted summarily in the absence of an election by the prosecution will not eliminate sentence appeals. Appeals will continue to be argued to determine whether a sentence was too little or too much. Verdict appeals will continue to be argued by

[10] See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Toronto: LexisNexis, 2014) at paras. 10.40-10.43.

counsel. Yes, things would work better if the prosecution made its election right away in all dual-procedure cases. Beveridge J.A. underscored this in *R.V.F.*[11]

[23] But a deemed-summary construct is a more stable, fail-safe system than one that deems an indictable process in the originating court: should the prosecution fail to make its election, and the case wind up subject to judicial review, then the trial and the review would get done under the same summary-proceeding standard, and there would be no doubt whether one is in the right court. The deemed-summary construct will offer certainty when uncertainty might otherwise reign. In the trial of an adult for a hybrid charge, there is a very specific do-or-die point when an election by the prosecution might be inferred absent a verbalized or documented choice: that is the entry of a plea. If an adult accused proceeds directly on arraignment to put in a plea on a hybrid charge without electing mode of trial, and the prosecution acquiesces in it, then the prosecution will be taken to have elected a summary process. However, in the prosecution of young persons, s. 142 of the *YCJA* applies summary-conviction procedures to most *YCJA* matters, even those that proceed by indictment. This

[11] Supra, note 1, at para. 42.

means that there are few triggering junctures in YCJA matters from which an election by the prosecution might be inferred.

[24] Accordingly, I deem E.B.L.'s charges to have proceeded summarily.

[25] This conclusion will not affect the resulting sentence, as the joint recommendation put before the court by counsel—six months of deferred custody on each count, to be served concurrently to each other, followed by an 18-month term of probation—is a sustainable sentence under either a summary or indictable process. It will have an impact on the retention period for the recorded finding of guilt; however, that is an issue dealt with statutorily, and does not require the court to do anything.

[26] There is a common sentencing recommendation before the court from prosecution and defence counsel, urging the court to consider a six-month term of deferred custody, followed by an 18-month term of probation. Indeed, defence counsel supported a deferred custody term exceeding six months. However, as the court noted during submissions, a six-month term is the maximum duration permissible under para. 42(2)(p) of the *YCJA*, and the *Act* does not contain an authority for the making of consecutive deferred-custody

orders.[12] Counsel agreed that, based on the particular circumstances of this offence, a deferred-custody order would not be excluded under sub-s. 42(5) of the *YCJA*.

[27] In my view, the recommendation of counsel is reasonable, and the sentence of the court will put it into effect. Here are my reasons for doing do.

[28] During the course of the sentencing hearing, the court heard the evidence of Dr. Simeon Hansen, a registered psychologist who prepared the s. 34 psychological assessment which describes E.B.L.'s risk of reoffending and sets out counselling options available to E.B.L.

[29] I did not require a qualificational *voir dire* and allowed Dr. Hansen to provide opinion evidence in the field of child psychology and sex-offender risk assessment as a *persona designata* under. S. 34 of the *YCJA*. [13]

[30] Dr. Hansen was called by the prosecution to explain a number of qualifying statements in his assessment which might be taken to have impacted on his assessment of E.B.L.'s risk to reoffend.

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[12] *See R. v. K.M.S.*, 2007 SKCA 16 at para. 2; and *R. v. J.P.L.H.-D.*, 2013 BCCA 295 at paras. 16-18.
[13] See, e.g., *R. v. Bingley*, 2015 ONCA 439 at para. 38: no qualificational *voir dire* needed to receive DRE evidence as DRE is designated under sub-s. 254(3.1) of the *Code* to evaluate drug impairment.

[31] Dr. Hansen testified that E.B.L. was very reticent in talking about his sexuality. Dr. Hansen stated that it was not uncommon for psychological assessments in sex-offence cases to bring out anxieties in young people because of the sensitivity of the topic. Nevertheless, Dr. Hansen felt confident in his judgment that, even if no interventions were put in place, E.B.L.'s risk of reoffending sexually would be within the low range. Dr. Hansen based his opinion on E.B.L. having no history of other offending or antisocial behaviour and having strong familial support.

[32] Dr. Hansen offered the caveat that, because of E.B.L.'s anxiety in participating in the assessment process, he was unable to determine conclusively whether E.B.L. was attracted sexually to children generally, or just to this one victim. However, he was confident that E.B.L.'s participation in the Initiative for Sexually Aggressive Youth through the IWK Health Centre would help pinpointing the nature of E.B.L.'s risks and needs, and could be done successfully in the community.

[33] I gave careful consideration to the impact statement submitted to the court by the victim's parents. It is clear to me that this six-year-old girl and her family have been affected profoundly by E.B.L.'s actions. Victim impact, as well as denunciation and deterrence, are factors to consider in imposing a

sentence under paras. 38(3)(b) and 38(2)(f) of the *YCJA*. However, as I observed in *R. v. C.N.T.*, they do not figure as predominantly as in adult cases.[14] The main focus, as described in sub-s. 38(1) of the *YCJA*, should be accountability, the imposition of consequences that are meaningful for E.B.L., and assisting E.B.L. in working toward his rehabilitation and reintegration into society. These are violent offences within the definition of para. 39(1)(a) of the *YCJA*, so that custody is permissible. Psychological trauma which is inherent in the sexual abuse of children is a form of violence.[15]

[34] However, given the common sentencing recommendation, the very positive prognosis offered by Dr. Hanson, and the high level of family support very much in evidence in this hearing, I agree that a six-month deferred custody term, followed by 18 months of probation would be appropriate.

[35] The court orders that there be a six-month deferred custody term imposed in relation to each charge, to be served concurrently with each other. This will be followed by an 18-month term of probation, deferred pursuant to sub-s. 42(12) of the *YCJA* to start on the expiration of the deferred-custody term; there need only be one probation order to cover all of the charges. The court will impose

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[14] 2015 NSPC 43 at para. 16.
[15] *See R. v. D.C.*, 2005 SCC 78 at para. 20.

appropriate counselling and conduct conditions in each order. There will be a two-year sub-s. 51(3) prohibition order, and a primary-designated-offence DNA collection order. As very helpfully recommended by the prosecutor, the orders will be endorsed to record that the charges proceed summarily so that records custodians will be able to accurately calculate records-retention dates.

[36] E., the victim impact statement tells me that the members of this family really feel that their trust was betrayed. You can't turn back the clock and make things un-happen. But you can try to repair and rebuild things. Being sorry is important. But trust will have to be re-earned, and that will take work. You're going to have the strong support of your Mom and your youth worker. I've heard that you've been working hard in school this year. You know what success looks like. I know that you are going to be working over the next two years to achieve success.

JPC