IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. R.J.D., 2011 NSPC 78

Date: November 10, 2011
Docket: 2311230, 2314259, 2314260, 2314261, 2314639, 2314641, 2322487, and 2342220
Registry: Halifax

Her Majesty the Queen

v.

R. J. D.

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	October 25, 2011
Oral decision:	November 10, 2011
Charges:	Youth Criminal Justice Act 137 x 3 Criminal Code 145(3) x 4; 264.1(1)(a)
Counsel:	Terry Nickerson - Crown Attorney Chandra Gosine - Defence Attorney

By the Court:

1) R. D. has pleaded guilty to a number of offences. The legal issue is whether a Deferred Custody and Supervision Order (DCSO) can legally be imposed as a sentence under the provisions of the Youth Criminal Justice Act (YCJA). Counsel have indicated that they are seeking clarity and direction with regard to the interpretation of s. 39(1)(b) of the YCJA. I can provide a decision. Clarity and direction will, I expect, have to come, in due course, from the Court of Appeal.

2) In July of 2010 Mr. D. was charged with taking a motor vehicle without consent, contrary to s. 335(1).

3) On February 22, 2011 Mr. D. committed theft and was in possession of stolen goods valued under $5000.00. That resulted in charges under s. 355(b), 334(b) and a further s. 145(3) for failure to comply with a recognizance or undertaking. That would be the undertaking that related to the July 2010 offence.

4) On March 21, 2011 he failed to attend court. That resulted in a charge under s.

145(2)(b), to which he has also pleaded guilty. He received an absolute discharge for that offence on March 24, 2011.

5) On April 14, 2011 he was sentenced to a conditional discharge. That covered the July 2010 matter and the three charges from February 22, 2011. At this point he has one order, which covers 4 offences, occurring over two dates, about 7 months apart.

6) Mr. D. then admitted to the commission of a series of breaches. They begin on May 6, 2011 with a s. 137 breach of the YCJA. That was a breach of a court order not to operate a motor vehicle. The second incident occurred on May 12. He admitted to threatening to shoot a police officer in the back of the head. He also pleaded guilty to a breach under s. 145(3) of the Criminal Code and s. 137 of the Youth Criminal Justice Act (YCJA). On May 15, 2011 he was caught inside a vehicle at 2:30 am. He again pleaded guilty to breaches under s. 145(3) and s. 137. On May 27 he was in breach of a curfew condition once again and the police were called to his home to deal with an altercation. He was gone when they arrived. He remained at large until caught in a traffic stop on June 7. That resulted in a s. 145(3) breach. On July 22 he was in

breach once again, under s. 145(3). The police went to his home to do a compliance check and his grandmother said he wasn't living there anymore. He was required to be living at that residence. These are all breaches of the same order from April.

7) At some point, even under the YCJA, enough is enough. This is getting ridiculous. I use that word ridiculous for a reason. It doesn't mean funny. It means in this case, that the situation is one that would cause a reasonable person to conclude that the system is not doing its job. R. D. himself is ridiculing the system. He can breach whenever he wants it seems, and just get released once again.

8) A presentence report was prepared on October 18, 2011 for the sentencing scheduled for October 25. At that time Mr. D. was remanded at the Nova Scotia Youth Facility in Waterville, awaiting trial on robbery charges on November 1, 2011. On October 25 he was released on an Undertaking of a Responsible Person. That pending matter has no bearing on this sentencing.

9) Mr. D. is 16 years old. He had been living with his grandparents until September 1, 2011. At that time he decided to return to live with his mother. His

grandmother advised that while he was living with her, he was pushing the limits of the courts orders and not listening to her rules. She said that he seemed to think he could just do as he pleased. Looking at what was happening in May of this year, that statement hardly comes out of left field. His grandmother says that she and her husband remained committed to him. She said he was a "good boy" who associates with a "bad bunch of boys".

10) Mr. D. hasn't gone to school since September of last year. Mr. D. planned to attend school upon his release form custody.

11) During a telephone interview conducted on October 12, 2011 it was reported that he blamed the police for the breaches. He said that they were harassing him all the time. With regard to uttering threats, he said that the police had treated him unfairly. While a lack of remorse is not in any way an aggravating factor in sentencing, these statements go well beyond that. They are not the statements of a person who maintains his innocence or who just lacks empathy for a victim. They provide some insight into his current state of mind. He doesn't understand that when placed on a court order he is required to abide by the terms and responsible for his own failure to do so. That

speaks to whether certain consequences are at all meaningful to him.

12) The presentence report should be quoted verbatim here:

> For the Youth Court's information, R. requested this writer inform the court he is adamant he does not want a curfew. He felt this condition would only set him up for failure. R. made reference he would prefer to serve custody as opposed to having a Court imposed curfew in the community. Following R. stating he did not view a curfew as beneficial for him, R. then suggested he would not want a curfew unless it was for 11:00 pm.

13) People are allowed to say what they want about their sentencing. They are allowed to stand up for themselves. But the process of sentencing should not be confused with some kind of negotiation between the offender and the court. Mr. D. seems to be saying that he will decide what kinds of conditions he can or will comply with. It doesn't work that way.

14) As a young person who had breached a court order before, in February 2011, he went back at it again in May. A court order does not seem to be enough to exert any kind of control over his impulsive behavior. A probation order, in these circumstances, would be just another order, or just another meaningless piece of

paper. It is not a meaningful consequence for a young man who doesn't think court orders mean anything. The consequences of a further breach have to be immediate to be meaningful to him.

15) A relatively brief, 30 day DCSO, would serve to provide a meaningful consequence, while also providing some positive direction. It would mean that for the first time, a breach would be likely to result in a return to actual custody. He would have to establish a pattern over 30 days of abiding by an order. If he were to return to his behavior from May of this year, he would know full well what that would mean. That is not a form of punishment or specific deterrence. In other words, it isn't a threat. He needs to know that actions have consequences. For young people, the immediacy of the consequence is important. Behaving in the way he has should have a consequence. He should also know that continuing with that pattern has a consequence.

16) A 30 day DCSO is a proper sentence for R. D. It keeps him out of jail. That is a good thing. It allows him to decide whether he will go back. During that 30 day period he should be on a strict curfew from 6 pm until 6 am. He would remain in his

residence unless he is in the presence of a parent or guardian or when dealing with medical appointments or medical emergencies. He needs to stay out of trouble. That is even more critical for that 30 day period. A curfew is a way to make it easier to stay out of trouble.

17) The DCSO would also require that he keep the peace, be of good behavior and attend court as and when directed. He should attend for assessment with respect to alcohol addiction and anger management and to participate and cooperate with the forms of treatment recommended. He is not to possess weapons. He is not to associate with anyone he knows to have a youth criminal justice or criminal record. He is not to operate a motor vehicle.

18) That DCSO should be followed by a period of probation for 11 months. The terms would be the same except that the curfew would be relaxed to being from 10 pm to 6 am daily.

19) That sentence is, in my view, a way to try to stop the spiral. Probation is a consequence. It just doesn't mean much to him. Failing to impose such a meaningful

sentence is not doing R. D. any favours. It would amount almost to a form of "enabling".

Legal Issue

20) That sentence reflects Mr. D.'s circumstances and appropriately addresses his needs. It makes sense. The only issue at this point is whether it is a sentence that can legally be imposed. Making sense isn't enough. Judges don't just get to impose sentences because they make sense or seem like the right thing to do. They must comply with the law.

21) Mr. Gosine argues that what has been referred to as the "gateway to custody" is not open. I have not had the benefit of briefs or extensive legal argument in this matter. Argument was in fact startlingly brief. As I understand it, the defence position is that s. 39(1)(b) of the YCJA allows for custodial sentences only when a young person has failed to comply with non-custodial sentences, in the plural. There must be failures to comply with more than one sentence and the ones before the court for this sentencing don't count.

22) That means that a person may have multiple breaches of the same probation order or conditional sentence order, over any number of court appearances but the gateway is not open because the breach has been of one sentence. That person may appear in court, having been previously convicted of numerous breaches of the same order, to be sentenced for numerous breaches of numerous other orders, and would still not be custody eligible. There must be, in the past, more than one breach of more than one order.

Context

23) Many young people who appear in Youth Justice Court are involved in multiple matters, arising from multiple incident dates, with multiple charges on each, often involving multiple accused people. As a result, a young person may appear in court on an arraignment day with 6 or 7 files, crossing over with 6 or 7 other people and involving many, many charges. That seems to happen much more frequently than it does in adult court.

24) As part of that sometimes cumbersome process, files are often consolidated for sentencing on the same date. It is not unusual at all to see a young person plead guilty on numerous files, with incident dates over a span of months, covering a range of charges. When that happens the sentence is consolidated as well. Rather than a separate probation order for each charge, or for each incident date, one probation order is prepared. For a young person in particular, one piece of paper that sets out the rules is better than 15 pieces of paper applying to different charges with different conditions on each one. That is a recipe, or perhaps, 15 recipes for failure.

25) The pattern in youth court is to see breaches. Young people under the YCJA are more likely to spend time supervised under probation or other orders than they are to spend time in custody. Because of that, they are at risk of breaching those orders. Troubled young people who find themselves in the system sometimes get drawn into a spiral of breaches. If a person is having trouble controlling impulses for example, the chances are high that he or she will be back on one or more breaches. When that person is made the subject of more orders that generates more breaches.

26) When a consolidation sentencing is done it can cover a lengthy period of time.

Because young people very often are released pending resolution of matters, guilty pleas may be tendered later in the process than in adult court. Young people may also start to go through the restorative justice process, have matters set over for months, then, if that process breaks down, return for sentencing.

27) That means that a person who has been sentenced to a probation order may have been involved in a number of matters. Those matters may have nothing to do with each other. The sentence reflects the seriousness and circumstances of each of those matters. It could deal with a pattern of behavior that took place over a period of months. That single probation order or sentence order may contain provisions that relate to the circumstances of one of more of the incidents or charges. For example, the single order will contain non-association clauses with the co-accused on a variety of matters, and no contact provisions with regard to victims in each.

28) That could be done by preparing numerous probation orders. Each offence could result in the preparation of a separate probation order. There could be 3 month, 6 month, 9 month and 12 month probation orders issued on the same day for the same

young person. They could have different curfew provisions reflecting the different circumstances of the offences. They could each require the young person to stay away from different people, attend for different kinds of counseling, and perform different amounts of community service due on different dates. That would of course all be very proper and all very legal. The “t’s” would be crossed and the “i’s” nicely dotted.

29) From the point of view of the young person, that is confusing and rather unfair. Trying to juggle the orders would be hard enough. Keeping track of the court dates for that matter is a challenge. The homeless youth who appear in court have no one to remind them of their obligations, nowhere to file orders and fridge on which to stick the otherwise helpful yellow reminder notices for scheduled court appearances. Once a breach happened, say for example a curfew breach, he or she might generate two charges from each of the many probation orders. Those numerous charges would then mean the imposition of yet more orders.

30) From the administration point of view it is time consuming and wasteful. In the Halifax Youth Court, a Thursday arraignment day can deal with over 100 individuals with many more informations and many many more charges. Staff stay sometimes late

into the evening dealing with the pile of paperwork that has been generated. The creation of virtually duplicate, but not exactly duplicate, probation orders for young people can lead to the kind of clerical errors that allow things to fall between the cracks.

Legal Interpretation

31) The consideration of the legal issue happens in that practical context. It is within that context that the YCJA should be practically and liberally interpreted. That should be done in a way that is consistent with the principles and values of the YCJA. That doesn't mean that the wording of the section can be ignored or that it can be interpreted in a way that makes administrative sense or in the way that perhaps it "should" have been drafted. The words must be read as they are written, informed by the principles of the legislation.

32) There is a presumption against the use of custody. The YCJA must be interpreted with that in mind. Courts that have considered this issue of interpretation have focused on that fundamental principle. I believe that they are right to do so. The

YCJA should be interpreted in a way that reduces the reliance on custody.

33) There is also a principle that young people should be treated based on their actions and on their circumstances. While in adult sentencing for example, deterrence is a legitimate objective, in youth court it is not. A young person is not to be used as an "example" to others. Sentencing is an individualized process.

34) A young person's fate should not be decided by the issue of whether, in court, on a given day, two virtually identical orders were drawn up or only one probation order was signed. Young people are treated based on their actions not based on their paperwork.

35) Sentences imposed should be fair. The YCJA requires judges to consider other sentences imposed by others in similar circumstances. This interpretation would mean that the availability of custody would depend on whether all offences were consolidated in one probation order or were, perhaps just by a scheduling decision, the very same offences were dealt with on two days with two orders. A young person's situation could in that circumstance be determined on the basis of luck, fate or chance.

Arbitrary is rarely fair. It is hardly a principle of the YCJA.

36) The preamble of the YCJA states that Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences, and effective rehabilitation and reintegration. It should reserve its most serious intervention for the most serious crimes and reduce over-reliance on incarceration for non-violent young persons. The values of the system include accountability, respect, responsibility and fairness.

37) The interpretation that requires the breach of two probation orders may, in one sense at least, result in less reliance on incarceration. It makes it impossible for a judge to exercise his or her discretion to impose a custodial sentence. That interpretation privileges one principle not only over all the others but to the negation of the others.

38) It limits a judge's discretion to impose custody even when custody is called for. It is well worth recalling that it isn't called for or imposed to punish the young person. It is called for as a meaningful consequence and as a last resort to assist in the

rehabilitative process. This interpretation helps to keep a person out of custody even when, on all the other principles of the YCJA, the person needs to be in custody. The YCJA, on this interpretation tells a judge, faced with a case in which custody is the required, right, non-punitive, last resort option, to assist in rehabilitation and reintegration and impose meaningful consequences for a young person, "You can't do that." And it's not because of any principle. It's because of how the sentences were consolidated in a single probation order.

39) It does keep the young person out of custody. It does so in a way that is unrelated to principle so that a bar to custody being imposed on even numbered days would have the same result. In the long run it changes nothing. Rules that lack a foundation in principle tend to be pretty easy to get around. The way around this one is the creation of a paper trail to hold open the gateway to custody. That trail serves no other purpose and leads to confusion and multiplication of charges. Young people are being done no favours by that. Rather than having matters consolidated, young people may then be sentenced to more than one probation order on one day. For multiple matters there would be multiple orders. No one's interest is served. The system then becomes more about counting orders than assessing behavior.

40) With respect, that hardly does much to command respect.

41) The YCJA limits the circumstances in which a young person can receive a custodial sentence. Those limits are guided and should be guided by principle. They are not arbitrary selection mechanisms to pull random people out of custody to keep the numbers appropriately low. Under s. 39(1)(a) such a sentence is available, but certainly not mandatory, for violent offences. Under. s. 39(1)(c) custody is an option when a person has committed an offence for which an adult could receive a sentence of two years and the young person has a history that shows a pattern of findings of guilt. According to s. 39(1)(d) custody is a legal sentence in extraordinary circumstances, where there is an indictable offence with aggravating circumstances such that a non-custodial sentence would be inconsistent with the principles of sentencing set out in the YCJA. Those provisions are principle based.

42) Under s. 39(1)(b) a custodial sentence may be imposed when a young person has “failed to comply with non-custodial sentences.” The issue is what that phrase means. It would be strange, in its context, if it too were not principle based.

43) To begin with, it doesn't mean that if the condition is met the young person must receive a custodial sentence. It limits judicial sentencing discretion in the sense that a custodial sentence can be imposed only if the condition is met.

44) There are two aspects of the interpretation.

1. When the section makes reference to custodial sentences does that mean more than one probation order or can it mean a single probation order reflecting the consequences for separate incidents?

45) If two probation orders are drawn up in a sentencing to respond to two minor theft charges appearing on two informations, with the same incident date, and the young person by one curfew violation breached both, that can be interpreted as a failure to comply with "non-custodial sentences". The young person would then be eligible to be considered for a custodial sentence. It doesn't mean that sentence will be imposed.

46) If one probation order is drawn up in a consolidation sentencing, that responds

to a variety of offences, some including violence, that occurred over a period of ten months, with different victims at different locations, which is then breached repeatedly by the commission of other offences, that, according to the argument put forward, would not be a “failure to comply with non-custodial sentences”. That is because there is only one probation order.

47) Respectfully that seems privilege form over substance and through principle to the wind. The way in which the paperwork was done would decide what options would be open for a sentencing judge. Judicial discretion in determining a sentence that reflected the unique circumstances of the young person would be sacrificed, not only to paperwork but to a simple counting of the papers. Paperwork is not irrelevant. I’m not using the term to be dismissive of it. It records what happened. That is critically important. The form of recording what happened should not overshadow what really happened.

48) Courts have expressed differing views on the matter. In Halifax at least, the practice has been to interpret s. 39(1)(b) as permitting the consideration of custody when a single probation order that is the result of a consolidation sentencing has been

breached. That order is one document that reflects sentences for a number of offences or incidents. Elsewhere, that has not been the interpretation.

49) In R. v. W.S.C. [2003] S.J. No. 810, 2003 SKPC 183, 240 Sask. R. 117, Justice Whelan was dealing with a bail application for a 14 year old. She had been charged with a number of offences, including 4 counts of possession of a stolen vehicle, a breach of probation, several breaches of undertaking charges, and two charges of obstructing a police officer. She had previously been granted a conditional discharge for theft. The crown argued that a custodial sentence was an available sentence because W.S.C. had failed to comply with that non-custodial sentence. Justice Whelan held at para. 24, that:

> The plain reading of this section restricts its application to failures to comply with non-custodial sentences. There must be more than one failure to comply with a non-custodial sentence. It suggests that two failures to comply with one previous non-custodial sentence would not qualify, but rather there must have been a failure to comply with two separate non-custodial sentences. This is consistent with the pattern that is referred to in s. 39(1)(c). It would include a breach of probation or a failure to complete a community service sentence.

50) In R. v. E.S.A. [2003] A.J. No. 571, 2003 ABPC 86, 57 W.C.B. (2d) 461 the

young person pleaded guilty on a charge of sexual contact with a child. He had a record including a prior conviction for sexual assault for which he was sentenced to serve a period of probation. He failed to attend counseling regularly. The Crown argued for a custodial order on the basis that he had failed to comply with that non-custodial order. Having regard to the principles of the YCJA and in fact the entire scheme of the legislation, the court concluded that the reference to failure to comply with non-custodial sentences must be read in the plural and must include failure to comply with more than one order.

51) In R. v. J.E.C. [2004] B.C.J. No. 2244, 2004 BCSC 1341, 67 W.C.B. (2d) 22, the British Columbia Supreme Court dealt with the requirements of s. 39(1)(b). Justice Taylor held that there must have been at least two prior non-custodial sentences with which the youth did not comply. “The subsection refers to “sentences” in the plural.” Para.36.

52) In R.v. J.H. [2004] O.J. No. 5151, 2004 ONCJ 330, 64 W.C.B (2d) 537 (Ont. C.J.) Justice Kurkin concluded that the young person would have to have failed to comply with more than one non-custodial sentence in order for custody to be a

sentence that was available.

> Whether a young person has failed once, twice, three or more times to comply with the same non-custodial sentence does not seem to matter for purposes of counting under s. 39(1)(b). Multiple incidents of non-compliance are irrelevant if there is only one non-custodial sentence which has been breached. Nor does it matter if it is the same condition of the same sentence that is breached several times, or as in J.H.'s case, different conditions of the same order at different times. The language of s. 39(1)(b) is unequivocal in requiring non-compliance of more than one custodial sentence. Para18

53) In R. v. G.M.S. [2004] N.J. No. 468, 2004 NLSCTD 141, 242 Nfld. & P.E.I.R. 220, the Newfoundland and Labrador Supreme Court dealt with an appeal from a young person who had been sentenced to 60 days closed custody, followed by 90 days supervision in the community and a 12 month probation order. A probation order was imposed in October 2003. He breached that order first, in November by being under the influence of alcohol and again, in December, by being found in possession of marijuana. The trail judge found that two breaches of that one probation order were

sufficient to satisfy the requirements of s. 39(1)(b) and imposed a custodial sentence.

54) Justice Handrigan reviewed the principles of the YCJA and noted that custody should be imposed as a last resort. He noted that s. 39 of the YCJA imposes "severe limitations on a Youth Justice Court that is inclined to impose custodial sentences on young persons." Para 17. He reviewed the case law to that date on the matter, which supported the view that s. 39(1)(b) should be read as requiring the breach of more than one non-custodial sentence. He reviewed the legal commentary, from the Youth Criminal Justice Act Manual (Harris), and A Guide to the Youth Criminal Justice Act (Tustin and Lutes). Justice Harris, in the YCJS Manual stated that there must be a least two previous failures to comply with non-custodial sentence orders. Tustin and Lutes declined to answer the question directly, but as Justice Handrigan said, inferred that "a young person would not need to have two separate non-custodial sentences as two breaches of any sentence would suffice even if they both arise from the same sentence".

55) Justice Handrigan said that if s. 39(1)(b) was open to two alternative readings, one of which could result in a higher incidence of custodial sentences, the other

reading should be adopted. He determined that custody could not be imposed on a young person who has failed to comply with only one non-custodial sentence, regardless of the number of times he has failed to comply.

56) R. v. C.P. [2005] N.J. No. 120, 64 W.C.B. (2d) 672 (Nfld. Lab. Prov. Ct.) is a particularly interesting case. Judge Wayne Gorman expressed his frustration with the limitation he held to be imposed by the restrictive interpretation of the YCJA. In October, 2004, the young person, C.P., had been sentenced to a nine month open custody and supervision order. He had been convicted of break and entry, possession of stolen goods, breach of an undertaking and 8 breaches of an earlier probation order from February 2004. After the October 2004 sentencing he was transferred to a youth home in Corner Brook. In January 2005 he went unlawfully at large. When apprehended he was released on an undertaking. The reports indicated that he needed a period of open custody because he required the stability of a group home setting. Both the young person and his counsel supported that recommendation. The young person actually wanted the open custody order. Judge Gorman believed that it was a good recommendation.

57) The Crown in that case submitted that the court did not have the authority to make that order. Crown counsel cited Justice Handrigan's Supreme Court decision in R. v. G.M.S. supra. Judge Gorman reviewed the principles of sentencing and cited his comments from an earlier case on the proper approach to sentencing under the YCJA. Those are comments with which I agree. He said that the YCJA mandates:

> …a very individualistic judicial approach to sentencing. The circumstances of the young person must be the primary focus and the sentence must be fashioned with the personal circumstances of the specific young person in mind. The circumstances of the offence will normally be a secondary consideration, though not always so. Certainly it plays a lesser role than it does in sentencing adults. R. v. D.L.C., [2003] N.J. No. 94

58) Judge Gorman acknowledged the direction that a sentencing judge must consider all reasonable and available sanctions other than custody. He also noted that the YCJA requires courts to impose sentences that promote accountability and that constitute meaningful consequences. He said that in that case, a non-custodial sentence would not hold C.P. accountable. It would fail to impose a meaningful consequence and it would, most importantly, fail to promote his long term rehabilitation. Judge Gorman reviewed the case law to that date and in particular the decision in R. v. G.M.S. He felt bound at that precedent and imposed another period

of probation.

> This interpretation does however, lead to some absurd results. For instance, C.P. can breach any of the conditions of the probation order of February 11th, 2004, as many times as he wishes without ever having to be concerned that a period of custody will be imposed. I cannot believe that this was Parliament's intent. Para 32

59) The British Columbia Court of Appeal in R. v. S.T. [2009] B.C.J. No. 1206, 2009 BCCA 274, 273 B.C.A.C. 90, dealt with the issue head on, even though the Crown did not "press its position". The court held that there was no ambiguity in the wording of s. 39(1)(b). If there were, the provision would have to be interpreted to resolve the ambiguity in favour of the liberty of the accused person.

> "The appellant failed to comply, it appears on multiple occasions, with his non-custodial sentence. There was however, only one such sentence, and thus he cannot be said to have failed to comply with more than one custodial sentence." Para 35

60) The circumstances of S.T. bear consideration. In May 2007 he took a pick-up

truck and set it on fire. He was placed on an Undertaking. He failed to report. He was found guilty of breaching that undertaking in June 2008 and sentenced to a conditional discharge. He was found guilty of the theft and arson offences in September 2008 and sentenced in November. Prior to all of that, he had no record at all.

61) While the sentencing judge did not address the basis upon which custody was warranted, the Court of Appeal inferred that he considered that S.T., "having failed to comply with a custodial sentence, (the conditional discharge of 18 June 2008), met s. 39(1) (b) of the YCJA."

62) The court concluded that because there was only one order, S.T. had not failed to comply with non-custodial sentences, in the plural. That is hardly surprising. He had committed one offence that got him the non-custodial sentence, the conditional discharge.

63) There appears to be a fairly strong consensus, at least of reported judicial opinion, that the YCJA should be interpreted in a way that custody is available as a sentence under s.39(1)(b) only when there are breaches of more than one non-

custodial sentence order.

64) In A Guide to the YCJA 2012 Edition (Tustin and Lutes: LexisNexis) the authors maintain that there remains some uncertainty on this issue.

> Custody is to be used only if a young person has been found guilty of a violent offence, fails to comply with previous sentences, or has a history of offences, or in exceptional cases where a non-custodial sentence would be inconsistent with the principles of the Act. What needs to be clarified is whether the failure "to comply with non-custodial sentences" refers to a breach of different court orders, or whether two breaches of the same order can qualify. If the intent of this paragraph is to reinforce the principle that non-custodial sentences should be used before using custody, a young person would not need to have two separate non-custodial sentences, as two breaches of any sentence would suffice even if they both arise from the same sentence" p. 86

65) The case law suggests, once again, somewhat of a consensus of reported judicial opinion. Sometimes that consensus is achieved with a nod to the potential for absurd results. That absurdity reflects poorly on the other principles of the YCJA. While the concern for avoiding custody is an important principle, it should not entirely negate the others. An interpretation that allows for and in fact encourages those results in its practical application should be avoided. An interpretation that sets up a barrier to custody that is in some respects arbitrary does not reflect the principles of the YCJA,

nor does it inspire confidence.

66) If it is in accord with the principles of the YCJA, it is only to the extent that it is more difficult to order custody for some young people, only because of the way their papers were completed. It is inconsistent with the principle that people in similar circumstances be treated similarly. It is inconsistent with basic sentencing principles that young people should be sentenced having regard to their own circumstances. It is inconsistent with the concern that custody be imposed because it is in the long term interests of the young person's rehabilitation and reintegration into society. There are times when a non-custodial sentence does not achieve that purpose, yet, according to this interpretation the young person must be released again, having learned only that sometimes you do get away with it, and only because of good luck in how probation was recorded.

67) When considering the principles of the YCJA it is important to consider them all, while of course acknowledging the fundamental importance of the presumption against incarceration.

68) It would seem that an interpretation that allows for individuals to be treated as individuals would be more consistent with the regime of the YCJA than one that would perhaps treat them based on how the paperwork happened to be done. When a young person fails to comply with one probation order, and that order is a consolidation of sentences for different matters, it is, in my view, a breach of more than one sentence. The YCJA makes reference to non-custodial sentences. A single order may reflect the sentence for multiple matters.

69) I acknowledge that this interpretation of the wording of s. 39(1)(b) is not consistent with much of the precedent from across the country. I believe the interpretation I have adopted is the most reasonable interpretation of s. 39(1)(b) in the context of the principle based legislative scheme. Respectfully differing with the view of the British Columbia Court of Appeal for example, is not something that is done lightly. The practical implications of adopting that interpretation, in youth justice court in Halifax, would be so unfortunate that I cannot impose them, in good conscience, upon the system. I recognize that after more complete legal argument and thoughtful and thorough legal analysis at another level, the contrary view may be taken. Until faced with that direction, the interpretation I have adopted in this case is

the one I will use.

2. When the section refers to failure to comply with non-custodial sentences does that include breaches that are before the court for sentencing at that time?

70) The same practical context applies. A young person can come before the court pleading guilty to a raft of breaches. Those could have taken place over a period of many months and are only then consolidated.

71) If the breaches must have been in court before the matter giving rise to the consideration of a custodial sentence, it would provide for another quite unusual result. If a young person has breached non-custodial sentences 10 or 15 times, and they are all saved up and dealt with at one sentencing hearing, they could not be used in that sentencing hearing to open the gateway to custody. That is the case even if the breaches were serious and showed a total disregard for authority of the legal system. Those numerous, in your face breaches, could be dealt with only by yet another probation order. Fifteen breaches of a non-custodial sentence result in another non-custodial sentence. It is difficult to envision how that reflects the need for meaningful

consequences or for that matter, any respect for what would be seen as a system that is pretty easily manipulated.

72) Yet, if a young person entered guilty pleas to two minor breaches, and for some reason those two breaches were before the court before the sentencing date when the issue of custody arises, that person would be eligible for a custodial disposition.

73) That once again, privileges form over substance. It allows court scheduling to drive the issue of eligibility for custody. A young person who is able to maintain a not guilty plea long enough, and then put off disposition long enough, can just keep breaching the order with impunity, knowing that as long as they all make it to court on the same day, there is nothing anyone can do except put him or her on another probation order.

74) Again, courts have taken different views on this interpretation.

75) In R. v. S.A.C. [2008] S.C.J. No.48, [2008] SCC 47, [2008] 2 S.C.R. 675, the Supreme Court of Canada dealt with the issue of whether s. 39(1)(c) should be

interpreted in a manner that permits consideration of the offences before the court to determine whether there has been a pattern of findings of guilt. The court concluded that only those offences for which there had been a finding of guilt prior to the commission of the offences before the court could be used to establish such a pattern. That interpretation deals with the issue of a pattern of findings of guilt. It does not deal with the phrase, "failure to comply with non-custodial sentences." Had Parliament intended to restrict consideration to failures to comply as determined previously, and not including those before the court at the time, presumably a reference would have been made to a pattern of such failures having been established.

76) Judge Gorman in Corner Brook, Newfoundland was confronted with the issue in R. v. M.S. [2005] N.J. No. 199, 65 W.C.B. (2d) 691. M.S. pled guilty to offences contrary to s. 335(1), taking a vehicle without consent, s.177 prowling at night, s. 334 theft, and s. 145(5.1) breach of an undertaking. He had been convicted previously of having failed to comply with a custodial sentence contrary to s. 137 of the YCJA. Counsel for M.S. argued that the court had no authority to order a custodial sentence because at the time that the sentence was being imposed, the person must stand convicted of having breached two separate sentences. Because M.S. was awaiting

sentence on only one breach, custody would not be an option. Judge Gorman disagreed. He concluded that one previous breach is sufficient. If the young person has breached two sentences, including the one for which he or she is about to be sentenced he concluded that there was authority in that case to impose a custodial sentence.

77) Judge Gorman's view was also adopted in R. v. P.G. [2006] N.W.T.J. No. 70, 2006 NWTTC 17, 71 W.C.B. (2d) 546 (N.W.T. Youth Ct.). The court found that the section required a past failure to comply in the past and not a finding of that, in the past.

78) Both judges disagreed with the position taken in R. v. J.H. supra. In that case the court concluded that the "enough is enough" philosophy applies when there has been an historical pattern of non-compliance. There the court held that it was "inappropriately low" to set the minimum threshold at one prior instance of non-compliance apart from the non-compliance that could be inferred from the facts of the offence before the court.

79) The YCJA does not require a pattern of non-compliance in s. 39(1)(b). It requires that the young person has failed to comply with non-custodial sentences. When the person arrives in court and pleads guilty to breaches of those sentences, he or she has failed to comply. An interpretation that would require guilty findings in advance of that, would be overly restrictive. A young person could potentially avoid meaningful consequences by delaying matters long enough. A person who showed up for sentencing having pleaded guilty to two breaches in the past would be eligible for consideration for custody. A person who came into court, with many more breaches, occurring over a longer period of time, being sentenced for them all on the same time, would not be eligible for custody. If the YCJA is interpreted that way, one of its principles could be seen as arbitrariness.

80) In my view, s. 39(1)(b) permits the consideration of breaches then before the court and is not limited to those for which findings of guilt had been made before.

Summary

81) The principles of the YCJA require that custody be considered as a last resort. It

is not imposed whenever the gateway to custody is open. It is a last resort. It isn't imposed as punishment and is not a form of general or specific deterrence. It is imposed only for the purposes mandated by the YCJA.

82) If the YCJA is interpreted in a way that arbitrarily limits custody as a sentencing option it does not reflect the principles or the values of the system and the legislation. A limit is arbitrary if it depends not on what a person has done but on how those actions have been reflected on paper. If the same situation can result in one, three or nine probation orders, with no reason capable of rational articulation for why that number should be as it is, and the young person is treated differently based on that number, it is difficult to see that as being fair. It is hard to see it as responding to the needs and circumstances of the young person. It is difficult to see it as a way to ensure that the system is regarded with respect. That is especially true if it means that a sentence that is required to provide meaningful consequences cannot be imposed simply because of the number of orders.

83) The YCJA should not be interpreted in a way that encourages form over substance and leaves young people with a multiplicity of confusing orders in order to

preserve custody eligibility at a future court appearance.

84) Similarly, the YCJA should not be interpreted in a way that allows scheduling to drive the result. A person who pleads guilty to breaches should not be treated worse than one who is able to save them up for a consolidation.

85) I am satisfied here that R. D. needs a DCSO. He has shown a failure to comply with the efforts to control his behaviour through non-custodial measures. He was sentenced with respect to three different matters, from two different dates. He breached consistently and repeatedly. A non-custodial option is just more of the same. I am satisfied that the DCSO that I have outlined is both a proper and legally permissible sentence.

Judge Jamie S. Campbell
Judge of the Provincial Court of Nova Scotia