NOVA SCOTIA PROVINCIAL COURT
(YOUTH JUSTICE COURT)
Citation: *R v DA*, 2017 NSPC 95

Date: 20171025
Docket: 2986370, 2986371
Registry: Pictou

Between:

Her Majesty the Queen

v.

DA

SENTENCING DECISION

Restriction on Publication: *Youth Criminal Justice Act*, s. 110 and Restriction on Publication: *Criminal Code*, s. 486.4

Judge: The Honourable Judge Del W. Atwood

Heard: 25 October 2017 in Pictou, Nova Scotia

Charge: Section 155 of the *Criminal Code of Canada*

Counsel: Jody McNeill for the Nova Scotia Public Prosecution Service
Douglas Lloy QC, Nova Scotia Legal Aid, for DA

Publishers of this case please take note that s. 110(1) and s. 111(1) of the *Youth Criminal Justice Act,* S.C. 2002, c. 1 and s. 486.4 of the *Criminal Code* apply and may require editing of this judgment or its headings before publication

Youth Criminal Justice Act

110. (1) - Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the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.

111. (1) - Identity of victim or witness not to be published – Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it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.

Criminal Code

Order restricting publication—sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

Synopsis

[1] DA is a young person within the definition of § 2 of the *Youth Criminal Justice Act (YCJA)*. When DA was 14 years old, he began having sexual intercourse with his then-10-year-old sister. This continued for over two years. DA has pleaded guilty to two indictable counts of incest.

[2] The prosecution seeks a six-to-twelve-month custody-and-supervision order under ¶ 42(2)(n) of the *YCJA*, followed by a period of probation under ¶ 42(2)(k), a primary-designated-offence DNA collection order under § 487.051(1) of the *Criminal Code* and a § 51(1) *YCJA* weapon-prohibition order.

[3] Defence counsel has urged the court to consider a lengthy term of probation, or, alternatively, a deferred-custody-and-supervision order under ¶ 42(2)(p) of the *YCJA*. Ancillary orders are not in dispute.

[4] For the reasons that follow, I place DA on probation for a period of two years, the maximum legal duration for probation under ¶ 42(2)(k) of the *YCJA*; the court grants the ancillary orders sought by the prosecution.

Circumstances of the offences

[5] The prosecution presented the court with a statement of facts supporting the charges, in accordance with § 36 of the *YCJA*. Defence did not dispute the facts.

[6] DA's actions came to the attention of the authorities when the victim revealed to a psychologist that she had been abused sexually by her older brother. The victim said it happened over the course of two to three years, beginning when the victim was ten years old and DA, fourteen. The psychologist reported this promptly to the Department of Community Services. The department contacted the police.

[7] An investigation revealed that DA would contrive to meet his sister in privacy, ostensibly to "play house". In the early stages of the abuse, DA made his sister touch his genital area underneath his clothing; DA would then place his fingers inside his sister's vagina. This happened once or twice each month until the victim turned 11 years old; the frequency increased after that.

[8] When the victim was 11 years old, DA took her to his bedroom and locked the door; he pushed her onto the bed and removed her clothing. DA placed his fingers inside her vagina. The victim was able to push DA away; however, when she tried to leave the bedroom, she found the door locked. DA got the victim prone on the bed again, and had sexual intercourse with her for about fifteen

minutes. Over the next two years, DA had intercourse with his sister on ten occasions.

[9] DA developed a routine for abuse. He would ask his sister to come to his room to help him with some nondescript task or to play house. DA invited his sister to role play: he was to be the "dad", she, the "mom"; DA insisted that they had to act their parts, leading to DA forcing intercourse on the victim. The abuse stopped when the victim was 13 years old; by then, DA had decided to move out of the family home.

[10] The victim described being close to her brother at one time; however, she said DA grew distant and rude after the abuse started.

[11] The victim did not submit a victim-impact statement to the court.

[12] This was a very serious offence against a child, which violated profoundly her bodily integrity, in her very own home, where she had a rightful expectation of safety and security; these acts were committed by her older brother, who should have been her protector.

Psychological and psychiatric assessments

[13] Before describing DA's personal circumstances, it is useful two review two sources of information relied upon by the court in this case: a psychological assessment and a psychiatric assessment.

[14] On the application of counsel, the court ordered the preparation of psychological and psychiatric reports pursuant to ¶ 34(1)(a) of the *YCJA*; the purpose of the reports was to assist the court in making a youth sentence, as covered in ¶ 34(2)(c) of the *YCJA*.

[15] The court received a psychological assessment, dated 31 October 2016; the court received psychiatric reports dated 2 November 2016 and 27 March 2017.

[16] After the reports came in, proceedings took a somewhat incongruous and prolonged turn. Defence counsel sought a number of adjournments to arrange to have the psychiatrist come to court and give *viva voce* evidence challenging the methodology used by the psychologist in assessing DA. Once the psychiatrist was able to get to court and give his evidence challenging the psychologist, the prosecution proceeded to cross-examine him at length, and quite vigorously—but entirely fairly—and sought to challenge the psychiatrist's questioning of the psychologist's methodology.

[17] The incongruity is that, as much as defence counsel sought to challenge the methodology of the psychologist, defence counsel asked ultimately that the court

accept the sentencing recommendations found at the conclusion of the psychologist's report; further, although the prosecution challenged the psychiatrist's attack on the methodology of the psychologist, the prosecution advanced the position that the court ought not to accept the recommendations of the psychologist which flowed from the assessment method which the psychologist used in preparing her report. One might question whether this battle of experts was an effective or efficient use of court resources, given the positions taken ultimately by counsel.

[18] The report of the psychologist contains a number of biographical details about DA which were not disputed. I do not intend to go into those details, which reveal profoundly private information about DA and his family. Suffice it to say that I have reviewed the report thoroughly.

[19] I am prepared to accept the clinical impressions of the assessing psychologist as accurate; I am unable to accept the opinion of the assessing psychiatrist which challenged the psychologist's report. My reasons for this are as follows.

[20] First of all, the psychologist prepared her report under court order as a "qualified person", defined in § 34(14) of the *YCJA*. In such circumstances, a *voir dire* into her expertise is not required: *cf R v Bingley* 2017 SCC 12 at ¶ 11 and 27

[*Bingley*] on the reception of expert opinion without a qualificational *voir dire* when that common-law requirement is superseded by statute. This does not bar the court from assessing critically the methodology of the psychologist or her conclusions and recommendations. Further, the court retains a gatekeeper role in invigilating against the reception of dubious, biased, irrelevant, confusing or unnecessary expert evidence: *Bingley*, at ¶ 50; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at ¶ 24 and 47. Finally, the expert does not become a surrogate decision-maker for the court: *Keresturi v Keresturi*, 2017 ONCA 162 at ¶ 7; *R v MacBeth*, 2017 NSPC 46 at ¶ 74.

[21] I am satisfied that the psychologist followed a methodology well familiar to the court, having reviewed many § 34 psychological assessments prepared for youth-justice sentencing hearings. The psychologist's conclusions appeared to flow logically from the evidence which she collected, and the psychologist applied actuarily verified risk-assessment instruments which the court encounters regularly in § 34 assessments.

[22] The psychiatrist's evidence, on the other hand, is problematic. While he, too, is a "qualified person" under the statute, and while his direct-examination evidence was clear in its implication—that the psychologist had been unnecessarily confrontational in interviewing DA, which led to DA's reticence and apparent

resort to minimising the seriousness of his conduct—cross-examination revealed many vulnerabilities.

[23] First off, it was abundantly clear to me that the psychiatrist found it intolerable to have his opinion challenged. The tension in the court room during the cross-examination of the psychiatrist by the prosecution—which, while insistent and direct by times, was inherently fair and well within the bounds of permissible advocacy—was palpable.

[24] Further, the psychiatrist appeared to adopt positions on cross-examination that were of uncertain logical rigour. Emblematic of this were answers given in response to questions asked by the prosecution about DA's use of condoms and whether it signified planning.

[25] It is not necessary to reproduce the cross-examination of the psychiatrist on this point, as it had to do with the interpretation of evidence that did not require an expert's opinion: the court can quite easily draw its own inferences about whether conduct was planned.

[26] Finally, I observe that the psychiatrist based a good part of his opinion about the quality of the interview the psychologist conducted with DA on information which the psychiatrist obtained from DA's aunt.

[27] The allegation advanced by the psychiatrist is that the psychologist employed "offensive" and "inductive" questioning of DA which led to her reaching unsupportable conclusions. I should consider that to be a fairly serious accusation of professional malfeasance. And, yet, this sweeping judgment was not based on a direct consultation with the psychologist, not based on a review of her meeting notes or other records, not even based on DA's recollection of his session with the psychologist. No. The psychiatrist's judgment is based on an impression of an interested family member—hardly a sound basis for an evidence-based expert opinion.

[28] Finally, I would note that the psychiatrist's opinion was unnecessary and its reception uneconomical in this case. This is because, as I observed earlier in my decision, as much as defence counsel might have taken issue with the psychologist's methodology, defence counsel endorsed almost entirely the psychologist's recommendations which flowed from that methodology. Furthermore, getting the psychiatrist into the court room necessitated a number of adjournments, which delayed this sentencing hearing unduly. In the official report, *Spiralling out of Control: Lessons Learned from a Boy in Trouble: Report of the Nunn Commission of Inquiry* (Halifax: Commission of Inquiry, 2006) at 171-182, the commissioner underscored the need for prompt outcomes in youth-justice

cases. The judiciary of this province have adopted the *Report* as a mandate; counsel are bound to follow it, as well. That mandate was not fulfilled in this case.

[29] This appears to have been a singular and isolated aberration from the usual good cooperation the court enjoys with counsel in advancing cases promptly and efficiently.

Legal sentencing outcomes for young persons

[30] The *YCJA* makes clear that criminal justice for young persons in conflict with the law is different to that for adults:

> 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 ...*
>
> (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; ...

(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.)

[31] The *Act* describes the purposes and principles of youth-justice sentencing:

Purpose

38 (1) *The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public*.

Sentencing principles

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;

(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

(d*) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons*, with particular attention to the circumstances of aboriginal young persons;

(e) subject to paragraph (c), the *sentence must*

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and

(f) subject to paragraph (c), the sentence *may* have the following objectives:

(i) to denounce unlawful conduct, and

> *(ii) to deter the young person from committing offences.*
>
> Factors to be considered
>
> (3) In determining a youth sentence, the youth justice court shall take into account
>
> (a) the degree of participation by the young person in the commission of the offence;
>
> (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
>
> (c) any reparation made by the young person to the victim or the community;
>
> (d) the time spent in detention by the young person as a result of the offence;
>
> (e) the previous findings of guilt of the young person; and
>
> (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.
>
> (Emphasis added.)

[32] Read as a comprehensive whole, § 3 and 38 evince a clear legislative intent that young persons be sentenced differently to adults; specifically, the *YCJA* excludes any concept of general deterrence, and admits of denunciation and specific deterrence as optional criteria, not mandatory as in ¶ 718(a) and (b) of the *Code*.

[33] A supporting case on this point in Nova Scotia is *R v CNT [BMS]*, 2016 NSCA 35, a successful defence appeal from a youth-justice sentence imposed by me. In its reasons, the Court of Appeal stated:

> 29 Over the years, the Supreme Court of Canada has repeatedly emphasized that there are two sentencing regimes, one for young persons and one for adults. See, for example, *R v DB*, 2008 SCC 25 [*DB*] where, at para 1, Abella J. described how young people are "differently accountable" and, at para 41, she reiterated that Canada has *"a separate legal and sentencing regime for young people" because of their vulnerability, and lower maturity and capacity for moral judgement which*

> *"entitles them to a presumption of diminished moral blameworthiness or culpability."*
>
> . . . .
>
> 33 Section 3 of the *YCJA* speaks of meaningful consequences to the individual young person given his needs and level and development, and where appropriate, involving the parents and other supports for rehabilitation and reintegration. Section 38 requires the meaningful consequences to accord with the other purposes and principles of sentencing, including the least restrictive sentence which is capable of achieving that provision's objectives.
>
> 34 In *R v CD,* 2005 SCC 78, Bastarache J. noted at para 48 that the YCJA "was designed, in part, to send a clearer message to those involved in the youth criminal justice system about restricting the use of custody for young offenders". At para 50, he stated that "the object and scheme of the YCJA, as well as Parliament's intention in enacting it, all indicate that the YCJA was designed, in part, to reduce over-reliance on custodial sentences for young offenders".
>
> (Emphasis added.)

[34] In addition to the summary offered by the Court of Appeal, it is useful in this case to examine more closely what the majority of the Supreme Court of Canada held in *R v DB,* 2008 SCC 25:

> 61 Having concluded that a presumption of diminished moral blameworthiness for young persons is a legal principle, the next question is whether there is a consensus that this principle is fundamental to the operation of a fair legal system. In my view there is little doubt that such general recognition exists. Fish J., for the majority, noted in *R. v. R.C.*, [2005] 3 S.C.R. 99, 2005 SCC 61, at ¶ 41, that "[i]n creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons".
>
> 62 It is widely acknowledged that age plays a role in the development of judgment and moral sophistication. Professor Allan Manson notes that "[t]he general principle that applies to youthful offenders ... [is] that a lack of experience with the world warrants leniency and optimism for the future" (*The Law of Sentencing* (2001), at pp. 103-4). And Professor Bala describes the *YCJA* as *premised on a recognition that to be a youth is to be in a state of "diminished responsibility" in a moral and intellectual sense.* Adolescents, and even more so children, lack a fully developed adult sense of moral judgment. Adolescents also lack the intellectual capacity to appreciate fully the consequences of their acts. In many contexts, youths will act without foresight or self-awareness, and they may lack empathy for those who may be the victims of their wrongful acts. Youths who are apprehended and asked why they committed a crime most frequently respond: "I don't know."

> Because of their lack of judgment and foresight, youths also tend to be poor criminals and, at least in comparison to adults, are relatively easy to apprehend. ... This is not to argue that adolescent offenders should not be morally or legally accountable for their criminal acts, but only that their accountability should, in general, be more limited than is the case for adults.
>
> (*Youth Criminal Justice Law*, at pp. 3-4 (footnotes omitted))
>
> 63 The following observation by Justice Gilles Renaud in *Speaking to Sentence: A Practical Guide* (2004), at p. 10, is also apt:
>
> > Stated simply, offenders who act out of immaturity, impulsiveness, or other ill-considered motivation are not to be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals. The less elevated the degree of moral blameworthiness, the greater the reach of leniency. By way of limited example, the relative youth of an offender will be emphasized in those cases in which an individualized disposition is selected ...
>
> 64 As Professor Bala explains, "adolescents generally lack the judgment and knowledge to participate effectively in the court process and may be more vulnerable than adults" (*Youth Criminal Justice Law*, at p. 5). There is, moreover, evidence suggesting that as a result of this reduced judgment and maturity, young persons respond differently to punishment than adults, and that harsher penalties do not, by themselves, reduce youth crime. See A. N. Doob, V. Marinos, and K. N. Varma, *Youth Crime and the Youth Justice System in Canada: A Research Perspective* (1995), at pp. 56-71.
>
> 65 This helps explain why, in s. 3(1)(b)(i) of the *YCJA*, "rehabilitation and reintegration", not general deterrence, are emphasized and why, in s. 3(1)(b) (ii), accountability should be "fair and proportionate ... consistent with the greater dependency of young persons and their reduced level of maturity".
>
> (Emphasis added.)

[35] In *R v RCWM*, 2004 BCCA 502, the Court allowed sentence appeals brought by a number of young persons who had been charged jointly with violent offences; it stated, at ¶ 17:

> The *Act* is premised on the fact that adolescent offenders have in general less moral culpability than adult offenders because their character and their personalities are not fully formed and they tend to act impulsively without full regard to the consequences of their actions. The sentencing judge overlooked these important factors.

[36] Here is one more important distinction. The *YCJA* deals with sentencing parity differently than the *Code*: ¶ 718.2(b) of the *Code* provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" with no restrictions upon geographic scope; compare ¶ 38(2)(b) of the *YCJA*, which directs that a "sentence must be similar to the sentences imposed in the region". This makes sense. Young people are likely more aware of how things play out in courts in their own communities: they might know the people who are before local courts, or might hear about hometown cases through social media or other peer interaction. But a sentence imposed halfway across the country is unlikely to offer meaningful guidance to a youthful audience. Accordingly, it is a statutory mandate that I pay close attention to cases that have been decided right here.

[37] It is significant that the *YCJA* addresses custodial outcomes with a formulation of prohibition, displaceable only under limited exceptions—*ie*, "shall not commit a young person to custody unless"—as compared to a more permissive may-if construction. This underscores the fact that the *YCJA* imposes a presumption against custody—rebuttable, yes, but not easily— as the provisions of § 39 make clear:

> 39 (1) A youth justice court *shall not commit a young person to custody* under section 42 (youth sentences) *unless*

(a) the young person has committed a violent offence;

(b) the young person has failed to comply with non-custodial sentences;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this *Act* or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

Alternatives to custody

(2) If any of paragraphs (1)(a) to (c) apply, a youth justice court *shall not impose a custodial sentence under section 42 (youth sentences) unless* the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

Factors to be considered

(3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

(a) the alternatives to custody that are available;

(b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and

(c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

. . . .

Custody as social measure prohibited

(5) A youth justice court shall not use custody as a substitute for appropriate child protection, mental health or other social measures.

(Emphasis added.)

[38] Judicial interpretation of this provision suggests that there exists, in effect, a presumption against the imposition of custodial sentences, even in circumstances

when the imposition of custody would meet the statutory criteria in ¶ 39(1)(a)-(d) of the *YCJA*—*R v RJD*, 2011 NSPC 78 at ¶ 32, varied, 2012 NSSC 286.

[39] However, it is important to observe that the presumption of diminished responsibility does not mean that young persons who commit serious offences enjoy impunity.

[40] A young person who commits a crime of sufficient harm may be sentenced to a period of custody to promote accountability.

[41] In *R v SS*, 2004 BCCA 94, the Court dismissed a sentence appeal brought by a young person who sought review of an 8-month custodial sentence imposed following a finding of guilt for a criminal-negligence charge which had resulted in a fatality. The Court held:

> 9 The reasons of the sentencing judge refer to numerous matters emerging from the evidence which justify the conclusion that, without imposing a custodial sentence, there was no reasonable hope of achieving the purpose set out in s. 38(1) of holding the person accountable for his offence through the imposition of just sanctions which might have meaningful consequences for him. There could hardly be a clearer case for concluding that nothing short of imprisonment could induce a young person to develop a sense of responsibility.

[42] Part of the time frame for one of the counts before the court today—case number 2986370—predates an important amendment to the *YCJA*. For the time period 1 January 2012 to 22 October 2012 in that case, § 42(9) of the *YCJA* provided:

> (9) On application of the Attorney General after a young person is found guilty of an offence, and after giving both parties an opportunity to be heard, the youth justice court may make a judicial determination that the offence is a serious violent offence and endorse the information or indictment accordingly.

[43] That provision was repealed by the *Safe Streets and Communities Act*, SC 2012, c 1, § 174(4), in force 23 October 2012 in virtue of SI/2012-48.

[44] No application was brought by the prosecution in relation to that time frame to have DA's conduct classified as a serious violent offence.

[45] DA has just turned 20 years of age. However, he remains, for the purposes of this hearing, a young person under the *YCJA*, as § 2 of the *Act* provides:

> *young person* means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this *Act* with having committed an offence while he or she was a young person or who is found guilty of an offence under this *Act*.

[46] The § 34 *YCJA* assessment prepared by the psychologist includes a sentencing recommendation for a term of supervision in the community. Unlike, say, the provisions of § 40 of the *YCJA*—or its analog in § 721 of the *Code*—which spell out what must be contained in a presentence report, § 34 does not enumerate what a qualified person may include permissibly in a psychological or psychiatric assessment. Customarily, these reports do include sentencing recommendations. In my view, that sort of content is entirely appropriate. First of all, reports ordered for a ¶ 34(2)(c) purpose are intended to assist the court in

making a sentence. Second, a qualified person, as defined in § 34(14), would be well situated to address those factors that should be at the forefront of a youth-justice sentence, when general deterrence has no application, and specific deterrence and denunciation are not mandatory factors. I have in mind factors such as risk of reoffending, the availability of rehabilitative services and the likelihood of those services accomplishing the objective of preventing a young person from coming into conflict with the law. Finally, I would observe that even § 40 presentence reports may incorporate sentencing recommendations—see ¶ 40(2)(c), (d) and (f).

[47] Clearly, recommendations of a qualified person in a § 34 report do not work as a proxy from the court; the court must still make the final sentencing decision. However, as in any case with an opinion from a statutorily qualified person, a court ought not to reject an opinion without a sufficient reason: *R v Sualim*, 2017 ONCA 178, at ¶ 37.

[48] In my view, the recommendations of the psychologist offer a weighty opinion regarding the type of sentence the court ought to consider in this case; they are supported by the evidence, and conform to the sentencing principles in the *YCJA*. The court can adapt the recommendations to develop a sentence that will offer DA a meaningful consequence.

[49] The sentence of the Court is as follows:

- DA is placed on probation for a term of 2 years, effective immediately, with terms set out in the checklist which I am providing to the clerk of the court.

- DA will be subject to a 2-year weapon-prohibition order under § 51 of the YCJA.

- This is a primary-designated offence under the DNA-collection provisions of § 487.04 of the Code. Applying the principles set out in the majority opinion in R v RC, 2005 SCC 61, I am not satisfied that the public interest is clearly outweighed by DA's privacy and security interests. In any event, DA did not strongly advance a case against the collection of DVA. The Court will grant a primary-designated-offence DNA-collection order.

Atwood, JPC