IN THE YOUTH COURT OF NOVA SCOTIA
Citation: *R. v. C.L.*, 2014 NSPC 79

Date: 20140717
Docket: 2652590; 2652591;
2652592;2685261; 2682625;
2682626; 2722618; 2722622;
and 2691807; 2691809

Registry: Sydney

Between:

Her Majesty the Queen

versus -

C.L.

DECISION

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Oral Decision Heard: July 17, 2014

Written Decision: **September 24, 2014**

Counsel: Steve Drake for the Crown
Alan Nicholson and Tony Mozvik, Q.C. for the Defence

I. Facts

DATE OF OFFENCE: SEPTEMBER 24, 2013 – s. 266(B) CC

[1.] On September 24, 2013 the police were called to Sydney Academy. There was a bit of a disturbance between C.L. and his ex-girlfriend, A.B. That morning before school they had assaulted each other and he grabbed her hair bow and grabbed her by the arm. When they started walking away from each other she turned around, went back and punched him in the face. He indicated that he had gone to school, basically to confront her. They have a baby together, who was born May […], 2013 birthdate. A knife was found on C.L. He accepted responsibility but entered a not guilty plea. A trial was held and he was found guilty of assault.

DATE OF OFFENCE: NOVEMBER 12, 2013 to DECEMBER 3RD, 2013 - s. 266(B) CC; S. 271 CC

[2.] C.L. entered a guilty plea to count number two which is a 266 count, an assault on A.B., and count number three which is a 271, a sexual assault on A.B. Police were called by A.B.'s mother, T.B. with respect to a situation between her daughter and the accused.

[3.] Police spoke with A.B. who revealed that she had left her mother's residence at […] with her then boyfriend, the accused. They were staying at a place on […] with a T.C., J.B., X.B., M.B. and E.F..

[4.] Approximately four days later she indicated to the police that C.L. started mistreating her at that location. He came home a number of times intoxicated. There were arguments over her allegedly cheating on him. One argument went from verbal to a physical assault during that time frame and he pushed her, causing her to fall into the wall leaving a hole in the wall. She indicated also that she had no serious injuries but she did have a bruise on her back.

[5.] Approximately three days after that incident she was again at […] and there were only two people in the house, herself and X.B.. C.L. came home later and accused her of cheating on him with X.B.. Again there was an argument and it became physical. He grabbed her by the hair and was threw her around. She ended up falling to the ground at which point he began hitting her head off the floor. He grabbed her, threw her into the door casing and she bumped her head. There was a large bump on her head.

[6.] On the last night that they were staying at […] before she went home there was another incident. C.L. wanted to have sex with her and she didn't want to. She indicated to C.L. that she was tired. She was trying to sleep, he became forceful with her. In her words, he began to touch her on the vagina and the breasts and she kept telling him to stop and he proceeded to be somewhat forceful until she started crying. At that point he began kicking her in the stomach and the

legs. He then left the room to cook some hot dogs, and she went to sleep. He woke her up by shoving hot dogs in her ears and in her mouth. The police did note that she did have a bruise on the inside of her left arm.

DATE OF OFFENCE: DECEMBER 6, 2013 to DECEMBER 8, 2013 – s. 264.1(2)(b) CC

[7.] This count was initially a threat by Facebook and it was amended to a s. 264 by consent to a 264 harassment. The basis of this is a number of threatening messages over Facebook. The police initially got a call to respond to […] in Sydney on December 8, 2013 with respect to threatening messages from C.L. over Facebook to his ex-girlfriend A.B. and it went for a two day period. She provided the police with some information and she also had the officer view the Facebook messages and the names attached to the messages. The name attached was C.L. and C.L. has indeed admitted that by his guilty plea that these are his messages. The police printed off the messages and those messages are now on the record (Exhibit C-1). There is some very explicit language.

DATE OF OFFENCE: JANUARY 18, 2014 – s. 430(4)(b) CC and s. 137 YCJA

[8.] On January 18th, 2014 police responded to […] in […], there was an unwanted male at that location. Police got some information that a C.L. had

smashed the window and the door to that residence at […]. C.L. was eventually located on […], the main street in […]. Police could smell alcohol from his breath, his speech was slurred and he was unsteady on his feet. He was on probation with a valid order at the time not to consume alcohol and police noted that there were two warrants for his arrest. There was a party going on across the street and the residence where C.L. smashed the window was not connected at all to the other residence. It seemed like it was random. He ran across the street, smashed the window and then he ran away.

DATE OF OFFENCE: JANUARY 18, 2014 – s. 266(B) CC; s. 137 Y.C.J.A.

[9.] On that date police responded to […] in […], and spoke with the resident there, P.A., who indicated that she was at […] in […] with some friends including C.L. He had fallen asleep in the bedroom and she went in to wake him up at 4:30 in the morning because her friend's mother was on the way home.

[10.] P.A. knows him personally through work at […]. It is not an intimate relationship and not domestic in nature.

[11.] She told the police that she went to wake him up and he punched her in the face. She went flying over the bed and hit her hand off the wall. He was pretty loaded, in her words, and she said that she was there over the evening and watched him drink about a quart of rum by himself. Police noted that she had an injury to

her right eye, some scratches on her left arm and an injury to her right hand, (the knuckle of her right hand) police took photographs.

DATE OF OFFENCE: APRIL 22, 2014 – s. 267(a) CC; s. 173 YCJA

[12.] A.B. was a witness in this and when the police were called they interviewed A.B. and R.N.. A.B. indicated that they were at […] and C.L. got off the bus and jumped over the railing at […] and took out a knife. She thought that he was cleaning the knife and he came across and went over to R.N. and put the knife to the side of R.N.'s neck and said "should I kill ya"; and just kept repeating "should I kill ya". A.B. indicated to the police that C.L. was her baby's father. She walked over and pushed C.L. away and told him to leave. She described the knife: brownish with a silver blade, approximately the size of a pocket knife.

[13.] R.N. was interviewed and he gave the same information to the police.

2. ISSUES

[14.] The Crown is seeking a six month period of deferred custody and supervision to be followed by 15 months probation. One of the conditions is a total ban of the use of "social media" [s.55(2)(h) Y.C.J.A]. This is a joint recommendation. Is the proposed disposition a fit and proper sentence?

3. THE LAW

[15.] (i.) Declaration of Principle from Section 3(1) of the ***Youth Criminal Justice Act***:

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:

(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,

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

(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 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,

(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,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

[16.] In ***R. v. B. (D.)***, (2008), 231 C.C.C. (3d) 388 (S.C.C.) the court held the ***Youth Criminal Justice Act****i* is based on the fundamental principles of justice that young persons are entitled to a presumption of diminished moral blame worthiness. Young persons are entitled to a justice system that is separate from that of adults. The intention of the ***Youth Criminal Justice Act*** is to protect the public by holding

young persons accountable for criminal offences through proportionate measures that promote their rehabilitation and reintegration.

[17.] (ii) Purpose and Principles (Sentencing) from Section 38 of the ***Youth Criminal Justice Act***:

> 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.
>
> Marginal note: 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
>
> (1) (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
>
> (2) (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
>
> (3) (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.

Marginal note: 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.

See ***R. v. K.(S.)*** *2007, 73 W.C.B. (2d) 232;* ***R. v. S.(S.)*** *(2008), 232 C.C.C. (3d) 158;* ***R. v. W.(D.)*** *(2011), 269 C.C.C. (3d) 541.*

[18.] At page 4-2 of the ***Youth Criminal Justice Act*** Manual, Harris and Bloomenfeld state:

> The basic question to be asked of any criminal justice system is: what is the balance to be struck between the twin aims of the system – punishment and treatment? While punishment can be inflicted under the guise of treatment, for the most part these common purposes exist in a state of tension in virtually all modern judicial systems. These twin aims are sometimes referred to as control and care, deterrence and reformation and more generally as the public interest and the individual's interest. Under the **YCJA**, the purpose of sentencing in s. 38(1) is comprised of *dual aims*, which are referred to as "accountability" and "rehabilitation", and they are secondary to and contribute to the overriding goal – the *long-term protection of the public*.

[19.] And later at page 4-3:

> …general deterrence is not a principle of youth sentencing under the new regime…. The Supreme Court held that parliament sought to promote the long-term protection of the public by 'addressing circumstances underlying the person's offending behavior through rehabilitation and reintegration and by reserving custodial sentences for the most serious crimes'.

[20.] Section 39 of the ***Youth Criminal Justice Act*** deals with committal to custody:

> Committal to custody
>
> **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.
>
> **Marginal note: 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.
>
> **Marginal note: 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.

Marginal note: Imposition of same sentence

(4) The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.

Marginal note: 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.

Marginal note: Pre-sentence report

(6) Before imposing a custodial sentence under section 42 (youth sentences), a youth justice court shall consider a pre-sentence report and any sentencing proposal made by the young person or his or her counsel.

Marginal note: Report dispensed with

(7) A youth justice court may, with the consent of the prosecutor and the young person or his or her counsel, dispense with a pre-sentence report if the court is satisfied that the report is not necessary.

Marginal note: Length of custody

(8) In determining the length of a youth sentence that includes a custodial portion, a youth justice court shall be guided by the purpose and principles set out in section 38, and shall not take into consideration the fact that the supervision portion of the sentence may not be served in custody and that the sentence may be reviewed by the court under section 94.

Marginal note: Reasons

(9) If a youth justice court imposes a youth sentence that includes a custodial portion, the court shall state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1), including, if applicable, the reasons why the case is an exceptional case under paragraph (1)(*d*).

[21.] At page 4-42 of the ***YCJA*** Manual (Restrictions on Custody) it states:

This section is designed to cause judges and counsel to ponder the question of whether custody is really necessary. Youth courts are encouraged to use non-custodial sentences under s. 39(4) where there is a likelihood that a youth will comply with a non-custodial sentence based on previous compliance with that type of sentence (s. 39(3)(b)). Judges are urged to consider available reasonable alternatives to custody (s. 39(2) and (3)(a)) that have been used in similar circumstances (s. 39(3)(c)). To further emphasize the need for restraint in imposing custody, youth courts are obliged to give reasons by a non-custodial sentence is inadequate to achieve the purpose set out in s. 38(1);….

V. Youth Sentences

[22.] Section 42:

42. (1) A youth justice court shall, before imposing a youth sentence, consider any recommendations submitted under section 41, any pre-sentence report, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person, and any other relevant information before the court.

Marginal note: Youth sentence

(2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, the court shall impose a sanction set out in paragraph (*q*) or subparagraph (*r*)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:

…

(*k*) place the young person on probation in accordance with sections 55 and 56 (conditions and other matters related to probation orders) for a specified period not exceeding two years;

…

(*n*) make a custody and supervision order with respect to the young person, ordering that a period be served in custody and that a second period — which is one half as long as the first — be served, subject to sections 97 (conditions to be included) and 98 (continuation of custody), under supervision in the community subject to conditions, the total of the periods not to exceed two years from the date of the coming into force of the order or, if the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other

Act of Parliament is imprisonment for life, three years from the date of coming into force of the order;

…

(*p*) subject to subsection (5), make a deferred custody and supervision order that is for a specified period not exceeding six months, subject to the conditions set out in subsection 105(2), and to any conditions set out in subsection 105(3) that the court considers appropriate;….

[23.] Section 51: Mandatory prohibition order

51. (1) Despite section 42 (youth sentences), when a young person is found guilty of an offence referred to in any of paragraphs 109(1)(*a*) to (*d*) of the *Criminal Code*, the youth justice court shall, in addition to imposing a sentence under section 42 (youth sentences), make an order prohibiting the young person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance during the period specified in the order as determined in accordance with subsection (2).…

Marginal note: Reasons for the prohibition order

(5) When a youth justice court makes an order under this section, it shall state its reasons for making the order in the record of the case and shall give or cause to be given a copy of the order and, on request, a transcript or copy of the reasons to the young person against whom the order was made, the counsel and a parent of the young person and the provincial director.

[24.] Conditions that must appear in orders

55. (1) The youth justice court shall prescribe, as conditions of an order made under paragraph 42(2)(*k*) or (*l*), that the young person

(*a*) keep the peace and be of good behaviour; and

(*b*) appear before the youth justice court when required by the court to do so.

Marginal note: Conditions that may appear in orders

(2) A youth justice court may prescribe, as conditions of an order made under paragraph 42(2)(*k*) or (*l*), that a young person do one or more of the following that the youth justice court considers appropriate in the circumstances:

(*a*) report to and be supervised by the provincial director or a person designated by the youth justice court;

(*b*) notify the clerk of the youth justice court, the provincial director or the youth worker assigned to the case of any change of address or any change in the young person's place of employment, education or training;

(*c*) remain within the territorial jurisdiction of one or more courts named in the order;

(*d*) make reasonable efforts to obtain and maintain suitable employment;

(*e*) attend school or any other place of learning, training or recreation that is appropriate, if the youth justice court is satisfied that a suitable program for the young person is available there;

(*f*) reside with a parent, or any other adult that the youth justice court considers appropriate, who is willing to provide for the care and maintenance of the young person;

(*g*) reside at a place that the provincial director may specify;

(*h*) comply with any other conditions set out in the order that the youth justice court considers appropriate, including conditions for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences; and

(*i*) not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as authorized by the order.

[25.] In ***R. v. J.R.L.*** [2007] NSJ No. 214 the Appeal Court upheld conditions imposed pursuant to Section 55(h) stating:

> "Furthermore, it is clear based on the evidence that J.R.L. needed to abstain from alcohol and drug use and that these conditions will help secure his good conduct and prevent the commission of other offences."

[26.] In ***R. v. S.J.L.*** [2005] BCJ No. 273, defence counsel submits that the condition should be eliminated because "…it provides no limits or standards that define the scope of the authority granted to probation officers…." The Youth Court amended the condition stating:

> "To fit the circumstances of the offender, it is possible to craft a condition similar to that of the condition in ***R. v. A.D.*** *supra*. However. S. 55(2)(h) allows youth court judges to impose probation conditions that they 'consider appropriate… for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences."

[27.] In ***R. v. T.M.*** [2003] S.J. No. 722 the Youth Court held that the condition imposed for the purpose of punishment doesn't come within the "Ambit of the credence in S. 55(2)(h). At para. 26 the court stated:

> The discretionary conditions listed in s. 55(2)(a) to (g), do not include a house arrest provision. Section 55(2)(h) grants the sentencing judge considerable discretion in imposing any other conditions provided they are designed to secure the young person's good conduct or prevent further offending. A condition imposed for the purpose of punishment does not come within the ambit of the criteria in s. 55(2)(h). In this instance the house confinement condition does not advance the purposes of securing the young person's good conduct or preventing his re-offending, particularly where there is a curfew in place. It is consistent with the sentencing principles of the Act and in particular s. 38(2)(e)(i), which calls for the use of the least restrictive sentence which is capable of carrying out the principles in s. 38(1), that a house confinement provision not be utilized, certainly in the context of a probation order. Furthermore when imposing a condition in a probation order, it is important to consider whether or not that condition has a clear relationship with the cause of the young person's criminal behaviour. He has not demonstrated the need to be confined in order to prevent criminal behaviour, however a curfew will certainly assist the parents and his assigned youth worker in providing the level of supervision needed to secure his good conduct and prevent further offending.

[28.] In ***R. v. Walker*** (unreported March 25, 2013, Man. Prov. Ct.) Combs, J., ordered the young person to delete his Facebook account and not to access Facebook during the period of probation. She had used this social media to utter threats to two girls.

[29.] In ***R. v. A.S.B.***, 2013 NSPC (unreported October 30, 2013 - #2580026) Youth Court Judge Ryan imposed a condition that the young person provide all of her passwords to the probation officer so that he/she could monitor her social network activities.

(v) Joint Recommendations

[30.] Quoting extensively from ***R. v. Sinclair***, 185 C.C.C. (3d) 564 (MBCA) beginning at paragraph 4:

> It is accepted that while a joint submission cannot bind the discretion of the judge, sentencing judges should normally not deviate from a joint submission unless they have clear and cogent reasons for doing so.
> …
>
> If a sentence recommended by both counsel is outside the range of sentence established by precedent, then the sentencing judge need not follow the joint recommendation.
>
> > However, even in that situation, a sentencing judge should exercise caution before ignoring a sentence carefully negotiated by experienced counsel. As stated by the Nova Scotia Court of Appeal in *R. v. MacIvor* (2003), 176 C.C.C. (3d) 420, 2003 NSCA 60 (CanLII) (at para. 32):
> >
> > > Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.
> …
> Plea bargaining has become a routine part of the process of handling criminal cases. The bargaining process is undermined if the joint recommendation is too readily rejected by the sentencing judge. This was recognized by the Martin Committee in 1993, which suggested that the proper test for justifying departure is whether the proposed sentence brings the administration of justice into disrepute or is otherwise contrary to the public interest (Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993), Recommendation 58 (Chair: The Honourable G. Arthur Martin)). The test is weighted in favour of enhancing the objective of certainty of outcome, and it has been adopted by the Ontario Court of Appeal and, more recently, the British Columbia Court of Appeal. See, for example, *R. v. Cerasuolo* (2001), 2001 CanLII 24172 (ON CA), 151 C.C.C. (3d) 445 (Ont. C.A.), *R. v. Dorsey (C.)* (1999), 1999 CanLII 3759 (ON CA), 123 O.A.C. 342,

and *R. v. T.M.N.* (2002), 172 B.C.A.C. 183, 2002 BCCA 468 (CanLII). The test has been acknowledged to be:

> … [A] high threshold and is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge.
>
> [*Cerasuolo*, at para. 8, per Finlayson J.A.]

Other provinces, including Manitoba, have used different language in describing the appropriate test for departing from a joint submission. In *R. V. C. (G.W)*, 150 C.C.C. (3e) 513, 2000 ABCA 333 (Alta C.A.), the Alberta Court of Appeal stated that joint submissions should be accepted unless they are unfit or unreasonable. That case was adopted by the Saskatchewan Court of Appeal in *R. v. Webster* (2001), 207 Sask, R. 257,2001, SKCA 72 (Sask. C.A.).

In Manitoba, in Pashe, our court has stated that the joint recommendation should not be rejected unless there is a good reason for doing so and the reason is stated in a clear and cogent manner.

Perhaps, in the end, the different terminology is more a matter of form than substance. Fish J.A. (as he then was) expressed it best in the case of *R. v. Douglas* (2002), 2002 CanLII 63573 (QC CA), 162 C.C.C. (3d) 37 (Que. C.A.), when, in comparing the stated requirements for rejecting joint submissions in different provinces, he concluded (at paras. 42-43 and 51):

…

> Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are "unreasonable", "contrary to the public interest", "unfit", or "would bring the administration of justice into disrepute."

In my view, a reasonable joint submission cannot be said to "bring the administration of justice into disrepute". An unreasonable joint submission, on the other hand, is surely "contrary to the public interest". Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the Ontario standard [i.e., that the jointly recommended sentence is contrary to the public interest and would bring the administration of justice into disrepute] departs substantially from the test of reasonableness articulated by other courts, including our own. [The] shared conceptual foundation [of these various formulations of the principle] is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty – provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.

The court went on to state:

When deciding whether to depart from a joint recommendation, a court should consider the following factors.

There is a continuum in the spectrum of plea bargaining and joint submissions as to sentence. In some cases, the Crown's case has some flaw or weakness and the accused agrees to give up his or her right to a trial and to plead guilty in exchange for some consideration. This consideration may take the form of a reduction in the original charge, withdrawal of other charges or an agreement to jointly recommend a more lenient sentence than would be likely after a guilty verdict at trial. Evidence always varies in strength and there is always uncertainty in the trial process. In other cases, plea negotiations have become accepted as a means to expedite the administration of criminal justice. … The clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge. See. *R. v. Broekaert*, 170 Man R. (2d) 229, 2003 MBCA 10 (Man. C.A.), at para. 29, and *Booh*, at para. 11.

> Recognizing that cases fall at various places in the continuum, the essence of the plea bargain or joint submission should be placed on the record in open court. The judge must have a solid factual basis on which to make an independent, reasoned decision. If a trial judge is not given or fails to inquire into the circumstances underlying a joint sentencing submission, then he or she will be hard pressed to determine whether there is good cause to reject that joint submission…

If the joint submission is as a result of, for example, an evidentiary gap in the Crown's case or the absence of an essential witness, this is information that should be provided to the court by counsel, and particularly Crown counsel.

If, after being provided with that information and those submissions, the judge is still considering departing from the joint recommendation, he or she should advise counsel of that fact and provide them with an opportunity to make further submissions, if they so wish. Counsel may be able to respond to concerns the sentencing judge may have for departing from the recommended sentence. See. *R. v. Thomas (O.)* (2000), 153 Man. R. (2d) 98, 2000, MBCA 148 (Man. C.A.), at para 7, *Broekaert*. at paras. 10 -11, *Booh*, at para. 13, and *R. v. Hatt* (2002), 163 C.C.C. (3d) 552, 2002 PESCAD 4 (P.E.I.. C.A.), at para . 15.

If after those submissions, the sentencing judge remains of the view that the joint submission is unfit or unreasonable, the judge may impose a different sentence, but must give clear reasons for doing so.

Thus, the law with respect to joint submissions maybe summarized as follows:

(1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.

(2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

(3) In determining whether cogent reasons exist (i.e. in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary consideration, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.

(4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.

(5) The sentencing judge must then provide clear and cogent reasons from departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

IV. Victim Impact Statement

[31.] The complainant did not file a Victim Impact Statement but her responses to C.L.'s communications are indicative of the emotional harm that he caused:

(i.) After C.L. calls her a "ho" her reply is a "sad face";

(ii.) "just stop plz"; "just goo"

(iii.) block me plz

(iv.) "like that stuff hurts"

V. Pre-Disposition Report

[32.] C.L. is now 18 years old but was 17 years old at the time of the offences. He is one of three children. He has had no contact with his biological father. When he was younger his family moved a lot. He did not experience any violence or abuse in the home but was exposed to drugs and "lots of partying". He stated he "did not want to be there [home] a lot."

[33.] At 14 years of age he moved in with his sister but eventually Children's Services became involved with his own child and he could not stay with his sister any longer. He lived with friends, on his own, but eventually returned to his grandmother's home.

[34.] C.L. says now he and his mother are "closer" and he plans to return to her residence upon his release. His mother reported no violence or excessive drinking in the home. She expressed no "real issues or concerns" when C.L. was growing up. They get along better now that he is no longer using drugs.

[35.] C.L. has a girlfriend, and he has one child, a daughter, from a previous relationship. The mother of this child is also the complainant in the matter before the court.

[36.] C.L. has not completed Grade X. He had difficulties at school including attendance problems but not "learning disabilities."

[37.] C.L. has worked in the past. He was employed at a restaurant for eight months before being "let go" in September of 2013. He wants to work in the […] in the future.

[38.] While in custody C.L. has been attending sessions in addiction and anger management. Prior to his incarceration he was drinking every weekend and using drugs. He had previously completed two programs offered by Addiction Services. C.L. agrees he needs to continue with counseling and programs upon his release.

[39.] C.L. says he was under the influence of alcohol and drugs and does not recall most of the incidents.

[40.] C.L. has been on previous probation orders. C.L. started out well with the last order but eventually began using alcohol and drugs again, quit school and got into further trouble with the law.

Previous Dispositions

[41.] April 24, 2013 – s. 177 CC; 334(b) CC; 137 YCJA x 3,
Probation 15 months

July 7, 2012 -s. 349(1) CC; 334(b) CC; 145(3) x 2 CC;
430(4)(b) CC, 266(b) CC
Probation 18 months

November 2, 2011 - s. 137 YCJA x 2; 354(1)(a) CC; 334(b) CC
Probation 12 months

July 7, 2012 -s. 349(1) CC; 334(b) CC; 145(3) x 2 CC;

430(4)(b) CC, 266(b) CC
Probation 18 months

Aggravating Factors

[42.] (1) Alcohol involved

(2) Complainant is his ex-girlfriend and mother of his child

(3) Violence (S.A.)

(4) Weapon (knife)

(5) Degrading and abusing language.

Mitigating Factors

[43.] (1) Change of plea to all but one assault

(2) Some insight into cause of his difficulties

VI. Analysis

[44.] Professor A. Wayne MacKay, C.M. Q.C., wrote a report on behalf of the *Nova Scotia Task Force on Bullying and Cyberbullying* entitled: "***Respectful and Responsible Relationships: There's No App For That"***. At page 1 he stated:

> Bullying is a major social issue throughout the world and is one of the symptoms of a deeper problem in our society: the deterioration of respectful and responsible human relations. The magnitude of the problem is daunting and there are no simple solutions on the horizon. There are, however, some effective strategies.
>
> The advance of technology and the prevalence of social media are profoundly changing how we communicate, and in so doing, they are also changing who we

are. While the mandate of the Task Force is to focus on youth, the underlying problems are no unique to them.

[45.] Then at p. 4:

> Schools are in many ways a microcosm of the larger society and this is also true in respect to the problems of bullying. The programs of bullying, and cyberbullying in particular, are a world-wide phenomenon and are growing in prominence. As the Task Force did its work there was barely a day that passed when there was not some mention of these issues. It is in the news, the basis of television crime dramas and it is affecting the lives of young people around the world. In a presentation to the Senate Human Rights Committee on Bullying and Cyberbullying, the President of Bullying.org indicated that there are 252,000 cases of bullying per month in Canadian high schools.
>
> Suicides are complex issues of mental health and there is rarely a clear cause and effect. However, the negative consequences of bullying in all its forms and extensive: loss of self-esteem, anxiety, fear and school drop-outs are a few examples. As the title of this report suggests, there is no quick fix to this problem; or to put it in modern terms, there is no app for that. The problems of bullying and cyberbullying raise some of the largest and most complex issues in society. At the core of the bullying issue is the need for respectful and responsible relationships among young people and in society generally. While there is lots of blame to go around, bullying is not just about unacceptable individual conduct but rather a complex web of relationships and attitudes that permeate all aspects of modern society. It is about values, community (or the loss of it), a breakdown in respect for other people, and the need for citizens young and old to take responsibility for their actions and inactions. As in insightful Grave 4/5 student stated, "Other people's feelings should be more important than your own. If everybody thought that way, there wouldn't be any bullying."
>
> The lack of respect for other people and their property, a failure to take responsibility for individual and collective actions, the loss of a sense of community and core values were all too evident in these high profile displays of violence and irresponsibility. Problems of bullying and cyberbullying are not confined to youth and in many respects the mandate of this Task Force intersections with some of the largest and most troubling issues of our time.

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[46.] Then at page 7:

> However, according to a 2010 report produced by the Ontario Ministry of Children and Youth Services, "Children who engage in bullying…are at risk of developing long-term problems with aggression, anti-social behaviour and substance abuse." Researchers have approached the study of bullying within the same theoretical frameworks that have been used to study youth violence. In both cases no one theory explains all cases and no single risk factor predicts with 100% specificity.
>
> Any serious exploration of the causes of bullying and cyberbullying are beyond the scope of this report, but it is a matter that needs more study. Time permits the Task Force to take only a quick glance at the causal issues, which are linked to general issues about the roots of youth violence. As discussed earlier, bullying behavior is just one manifestation of a society which, in rushing to embrace technology, has challenged human relationships and possibly diminished both respect and a sense of responsibility. There also appears to be a loss of community and less recognition of core social values and it is in this context that both young and old have problems adjusting to the rapid pace of change.

[47.] At page 8:

> There are many modern studies on adolescent brain development that suggest that children at that stage in their lives do not operate well at an emotional level and have difficulty feeling empathy for others. A possibly related factor is the failure of the adults in children's lives to properly instill core values and empathy for others beyond themselves. This is not to blame the parents and the teachers exclusively, as young people must also take responsibility for their actions. However, adult behaviour and adult role models play a significant role in bullying and cyberbullying among the young.
>
> Too often the adults in the families, schools and broader communities within which our children grow and develop have failed to nurture in them the attitudes and skills essential to a civil society – that is, compassion and responsibility. As a result, children who bully lack the social skills, perceptions and responsibility that would allow them to be less aggressive and self-centered in their interactions with others. According to developmental psychologists such as Jean Piaget and Richard Tremblay, children are born aggressive. Aggression is a survival mechanism. As they grow, they learn alternative ways of getting their needs met. But that maturation process doesn't happen naturally; it must be nurtured. And that nurturing process is part of the role of parents – to tame the natural impulses to harm others or to act selfishly. Children learn what the adults in their lives teach them. They need adults to help them understand bullying and promote development of essential skills, perceptions and responsibility.

[48.] At page 9:

> We show respect and love for our children by allowing them to make mistakes and learn how to recover from them. However, misconduct does need to have consequences. Young people themselves do need to take responsibility for their actions, but in order to do so, they need rules and guidance from the adults in their lives. However, adults often favour punishment over discipline. Both Barbara Coloroso and Michael Unger view punishment as a quick-fix way to meet adult needs for control and consequences, rather than children's needs for accountability and learning. Punishment teaches children to obey but then they cannot think for themselves. It teaches them to be selfish and self-centered; to put the responsibility for civil behaviour in the hands of adults. They are more interested in figuring out how to avoid punishment, and wonder how old they have to be before they can get their own way. Children learn to be accountable by being treated with respect and by being given opportunities to make decisions, and then learning from both their successes and their mistakes.

[49.] Then at pages 83 and 84:

> **The Threat to Community and Positive Human Relations**
>
> It is remarkable to what extent the virtual community has replaced the community of real people in the neighbourhood. This is true for adults as well as young people but it is more pronounced among the young. Many members of the younger generation have more frequent and positive relations with their computers and other electronic devices than they have with either their peers or adults. This is likely to have a negative effect on young people's abilities to engage in human interactions in the real world.
>
> Bullying and cyberbullying are symptoms of larger problems in our schools. At the root of these problems is the deterioration of respectful and responsible relations with other people. These problems may start online but they are also evident in face-to-face contact as well. Many who are online bullies are also bullies in the more traditional off-line ways as well. Counteracting these anti-social and disrespectful attitudes and practices is the number one non-academic problem facing schools and is also a major problem for society at large. To add to the magnitude of the problems themselves, there are also significant problems in how both schools and society responds.
>
> Cyberbullying poses a particular challenge to the community because it happens in a sort of "no man's land". The cyber-world is a public space which challenges our traditional methods of maintaining peace and order in public spaces. It is too vast to use traditional methods of supervision. It easily crosses jurisdictional boundaries. It takes place 24 hours a day, seven days week, and does not require simultaneous interaction for communication to take place. If we continue to rely on traditional methods of responding to bullying, these challenges will be too

> daunting. To turn the problem on its head, cyberbullying could serve as a trigger for a new approach to teaching, building, and supporting positive human relationships. By letting policy be guided by the growing evidence of effective, proactive, educational models and complimentary interventions, a new approach can emerge – one that universally engages the building of competencies that promote and protect positive human relationships among all of the key players.
>
> The ultimate goal is the engagement of young people in upholding the norms of acceptable behaviour among themselves, rather than an elaborate policing system which imposes consequences. Young people must be inspired to seek out, create and perpetuate positive and productive relationships among themselves and others.138 They need to be equipped with the skills and tools to engage in holding each other accountable in a safe and constructive manner. A paradigm shift such as this can be consciously precipitated by putting into place the mechanisms and resources to help build community at every opportunity and to help young people experience firsthand the value of positive and supportive human relationships. This is one of the reasons that peer involvement in responding to bullying and cyberbullying is vital.

[50.] And lastly at page 86:

> Not surprisingly, young women are particularly susceptible to cyberbullying that is sexually focused and aimed at exploiting their sexuality. This was a point that was also emphasized by the presentation to the Task Force by the Nova Scotia Advisory Council on the Status of Women. Cyberbullying is a large and pervasive problem with high human costs.
>
> In a 2001 updated survey on cyberbullying, Kids Help Phone140 discovered that more girls are involved as both perpetrators and victims of cyberbullying, while more boys were involved in traditional bullying. Young women seem better suited to the subtlety of online bullying, while young men are still more physical in their approach. This survey notes that social networking sites like Facebook or Formspring are where cyberbullying is most rampant, and texts have replaced emails as the major means of cyberbullying. Respondents to this survey also expressed the view that reporting incidents of cyberbullying did not produce any solutions.

[51.] C.L. and A.B. had been in a relationship "on and off" for three years. They have one child (a year old) as a result.

[52.] The September 24, 2013 and November 12 to December 3, 2014 incidents were physical and sexual assaults against A.B. These assaults were precipitated by

arguments about the baby and infidelity. He grabbed her, threw her around and hit her head off the floor. She sustained bruising and a lump on her head. He exerted his power over her when she refused to have sexual intercourse with him. He humiliated her by shoving hot dogs in her ears and mouth.

[53.] A few days later between December 6th and December 8th, 2014 C.L. began a long, insulting, misogynist diatribe on Facebook towards A.B. The repetitive, vile nature clearly shows he wanted to cause harm, fear and humiliation.

[54.] There are 22 references to words like "dead", "die" or "death", clearly trying to provoke A.B. to commit suicide. There are 25 references to "pedo" and "bitch". There are 27 incidents of C.L. calling A.B. a "ho".

[55.] On January 18, 2014 the young person was drinking and he smashed a window in a house down the street from a party he was attending. He also punched a friend, P.A., when she tried to wake him from a "drunken stupor".

[56.] On April 22, 2014 he took out a knife and held it to R.N.'s neck while stating over and over "should I kill ya". This took place at […].

[57.] C.L.'s behavior meets the definition of cyberbullying (s. ***Cyber Safety Act***) cited by the Crown but his behavior went well beyond that to criminal behaviour.

He exhibited a “complete breakdown in respect for others”, particularly the three victims.

[58.] His mother was shocked and even gasped at times when she heard the facts being read into the record.

[59.] When children are born they are a blank slate. It is up to the adults in their lives to teach them what is and is not acceptable behaviour. This is a major problem for society as a whole. The courts only form one part of that whole, and quite frequently that is not at the front end.

[60.] Children do what they know. Society must do their part to teach our children to become productive and respectful individuals. The “know” comes from adult behaviour. As Maya Angelou once said: “*Once you ‘know’ better you do better.”*

[61.] In arriving at an appropriate disposition the court has to consider the following:

(a) How serious is the offence
(b) Aggravating and mitigating circumstances
(c) Proportionality
(d) All reasonable sanctions other than custody
(e) Meaningful sanctions

(f) Least restrictive sentence that is most likely to rehabilitate and promote responsibility

(g) Whether the objectives of the sentence should include denunciation/ specific deterrence.

(h) If non-custodial is rejected, is deferred custody appropriate.

(i) Custody Sentence.

[62.] This is a joint recommendation for a six month deferred custody and supervision order, to be followed by a period of probation for 15 months.

[63.] C.L. has pled guilty to offences, the most serious of which are the sexual assault, harassment and assault with a weapon. That is not meant to diminish the others but, based on the facts that is my finding. C.L. was the sole perpetrator. I have listed the aggravating and mitigating factors in paragraphs 42 and 43. I cannot state specifically what harm was caused to the complainants as there were no Victim Impact Statements filed. However, the Facebook responses of A.B. indicate the "emotional" pain caused by C.L.'s actions. P.A. suffered some physical injuries.

[64.] C.L. spent four months in custody prior to being sentenced. [See ***R. v. T (D.D.)*** (2010), 265 CCC (3d) 49 (Alta.C.A.)] C.L. appeared before the Youth Court "clean and sober".

[65.] I have considered all the reasonable sanctions, keeping in mind that they must represent meaningful consequences and promote responsibility and accountability.

[66.] C.L. is 17 years of age. He has his whole life ahead of him. In order for him to be a productive citizen he must change his ways, be "rehabilitated". This will contribute to the long-term protection of the public.

[67.] I find, given all of the circumstances, that a deferred custody and supervision order, followed by probation , is the least restrictive sentence that is most likely to rehabilitate C.L. and also promote responsibility.

[68.] It will also address the "public safety objectives". There will be more intrusive conditions that will serve to control C.L.'s behaviour and restrict his liberty - not only to move about in the community, but to communicate with his peers on "social media".

[69.] In particular, a full social media ban in accordance with Section 55(h). I agree with the Crown's analogy that if you commit an offence with a motor vehicle, you lose driving privileges; if you commit an offence with a weapon, you lose the privilege to use, possess or own same. And so it should be with "social media". Until C.L. understands the need for "respectful and responsible

relationships among young people and society in general, he will be prohibited from using any "social media".

[70.] This is not a panacea for all that is wrong with the prevalence of social media among young people. It is, I hope, an effective solution for C.L.

VII Disposition

[71.] The following is the sentence of this court:

(a) A six (6) month deferred custody and supervision order with, among others, the following conditions:

> … (17) You shall delete your Facebook, Twitter and Instagram accounts immediately (within 24 hours).
>
> (18) You shall not access any internet based social media sites including but not limited to Facebook, Twitter, or Instagram during the entire term of this Order.
>
> (19) You shall not, at any time during the term of this Order, open a social media account of any type, including Facebook, Twitter or Instagram, under an alias or an assumed name.
>
> (20) You shall provide your probation officer with your current user names and passwords for all social media accounts and provide your probation officer with authorization to conduct random checks on your social media activity.
>
> (21) During the term of this order you shall advise and keep your probation officer current on the number of social media accounts opened in your name.
>
> ….

(b) A period of fifteen (15) months probation with among others, the following conditions:

… (o) You shall delete your Facebook, Twitter and Instagram accounts immediately (within 24 hours).

(p) You shall not access any internet based social media sites including but not limited to Facebook, Twitter, or Instagram during the entire term of this Order.

(q) You shall not, at any time during the term of this Order, open a social media account of any type, including Facebook, Twitter or Instagram, under an alias or an assumed name.

(r) You shall provide your probation officer with your current user names and passwords for all social media accounts and provide your probation officer with authorization to conduct random checks on your social media activity.

(s) During the term of this order you shall advise and keep your probation officer current on the number of social media accounts opened in your name.

….

(c) DNA Order on the Section 271 charge.

(d) Section 109 Weapons Prohibition Order for two (2) years.

(e) No Victim Fine Surcharge.

_____

The Honourable Judge Jean M. Whalen, JPC