File No. 32104

IN THE SUPREME COURT OF CANADA
(On Appeal from the Nova Scotia Court of Appeal)

BETWEEN:

S.A.C.

(A YOUNG PERSON WITHIN THE MEANING OF THE YOUTH CRIMINAL JUSTICE ACT)

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER JUSTICE FOR CHILDREN AND YOUTH

Pursuant to *Rule 42* of the *Rules of the Supreme Court of Can*ada

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PART I
OVERVIEW AND STATEMENT OF FACTS

Overview of the Intervener's Position

1. Justice for Children and Youth (JFCY) submits the interpretation and application of s. 39(1)(c) of the *Youth Criminal Justice Act*[1] (*YCJA*) must be narrowly construed in order to ensure the integrity of the *YCJA* objectives of rehabilitation and reintegration, the goals of an individualized approach to meaningful consequences, and of restricting the use of custodial sentences. A young person, who has committed neither a violent offence nor an indictable offence with exceptional circumstances, should not be liable to a custodial sentence if that young person is a first-time offender and has never before been sentenced by a youth justice court.

2. JFCY relies on the *United Nations Convention on the Rights of the Child*[2] (*Convention*) and the special consideration to be given to young people as stated in the preamble to the *YCJA*. Canada's international obligations establish that the principle of the best interests of the child must underlie all decisions affecting young persons under the *YCJA* including making determinations of when a custodial sentence will be imposed, and in the context of creating a factual foundation for such determinations through a Pre-Sentence Report (PSR).

3. JFCY submits that the youth justice court has the responsibility to ensure that a PSR is comprehensive and that there be detailed compliance with the requirements outlined in s. 40 of the *YCJA*, regardless of the approach taken by counsel. Further, the court must make a factually based determination that all available community resources and alternatives have been considered and are not sufficient in all the circumstances.

Facts

4. JFCY accepts the facts as presented by the Appellant and Respondent and takes no position where they might disagree.

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[1] S.C., 2002, c.1.
[2] *Convention on the Rights of the Child*, 20 November 1989, 3 U.N.T.S. 1577, Can. T. S. 1992/3 [*Convention*].

PART II
QUESTIONS IN ISSUE

APPELLANT'S ISSUE 1: The Nova Scotia Court of Appeal erred in its interpretation and application of s. 39(1)(c) of the *YCJA* [that the young person "… has a history that indicates a pattern of findings of guilt…"] in dismissing S.A.C.'s appeal against sentence.

5. JFCY submits that the Nova Scotia Court of Appeal erred in its interpretation and application of s. 39(1)(c) of the *YCJA* particularly with respect to the phrase "… a history that indicates a pattern of findings of guilt …". The phrase must be interpreted narrowly in order not to frustrate the objectives of the Act and the intentions of Parliament.

APPELLANT'S ISSUE 2: The Nova Scotia Court of Appeal erred in its interpretation and application of the law in determining that a custodial sentence was called for, having regard to the Preamble, Declaration of Principles and the sentencing provisions under the *YCJA*.

6. JFCY submits that the object and goals of the *YCJA*, and the intention of Parliament regarding sentencing focus on rehabilitation and reintegration of young people through an individualized approach to imposing meaningful consequences while restricting and reducing the use of custodial sentences.

APPELLANT'S ISSUE 3: The Nova Scotia Court of Appeal erred in its application and interpretation of the law relating to the preparation of Pre-Sentence Reports pursuant to s. 40(1) of the *YCJA*, when it chose to rely upon the combined information of separate Reports.

7. JFCY submits that the PSR may provide the only factual context within which the court decides whether a custodial sentence is appropriate. Given the focus of the *YCJA*'s sentencing principles on crafting individualized sentences that provide meaningful consequences, promoting rehabilitation and reintegration, and restricting and reducing the incarceration of young people, youth court justices must ensure that Pre-Sentence Reports are comprehensive and current.

APPELLANT'S ISSUE 4: The Nova Scotia Court of Appeal erred in its application and interpretation of the law relating to the ordering of a DNA sample for a secondary designated offence under Criminal Code s. 487.051(b).

8. JFCY makes no submissions on this issue.

PART III
BRIEF OF ARGUMENT

ISSUES 1 & 2

9. JFCY will begin by addressing Appellant's Issue 2, putting forward its position regarding the object of the *YCJA*, and the general principles to be applied in sentencing young persons, and will then proceed to address Appellant's Issue 1, with a more detailed discussion of the specific interpretation to be applied to s. 39(1)(c).

ISSUE 2 – The interpretation and application of the law in determining that a custodial sentence was called for, having regard to the Preamble, Declaration of Principles and the sentencing provisions under the *YCJA*.

Objectives of the *YCJA*

10. JFCY submits that a determination that a custodial sentence is appropriate under the *YCJA* must be consistent with the Act's objectives, specifically:

a) a focus on rehabilitation and reintegration in order to promote the long term protection of the public;

b) an individualized approach to tailoring sentences that provide meaningful consequences for the offender recognizing developmental needs and differences; and

c) restricting and reducing of the use of custodial sentences and maximizing the use of the least restrictive community based resources.[3]

11. The primary objective of the *YCJA* is the rehabilitation of youthful offenders in order to ensure the long term protection of the public. The *YCJA* is not simply an amendment to the *YOA*, but is a replacement significantly different from the *YOA*. Specifically, there has been an express shift from previous considerations of deterrence and denunciation to a focus on the principles of rehabilitation and reintegration as the mechanisms for the long-term protection of the public.[4] These principles establish an individual youth-focused approach that is corrective rather than punitive.

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[3] *Supra* note 1 Preamble, ss. 3 and 38 and 39; and *R. v. B.W.P.*; *R.v. B.V.N.*, 2006 SCC 27, [2006] 1 S.C.R. 941 at paras 4, 19, 31, 35. [*BWP*]

[4] *Ibid*.

12. As articulated in the Preamble of the *YCJA* the goal of restricting and reducing the use of custodial sentences was a response to Canada's significant over-incarceration of young people under the *YOA.* The Preamble also emphasizes an individualized approach that responds to the young person's needs and developmental challenges, addresses underlying circumstances of offending behaviour, focuses on meaningful consequences effective rehabilitation and reintegration, reserves the most serious intervention for the most serious crimes and reduces over reliance on incarceration for non-violent young persons.[5]

13. The Preamble incorporates by reference the *Convention*.[6] Art. 37(b) of the *Convention* reads in part:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. [emphasis added][7]

14. The specific goal of the reduction and restriction of the use of custodial sentences is further articulated in the *YCJA* in ss. 38 and 39. Section 38(2)(e) mandates that a "sentence must (i) be the least restrictive sentence … capable of achieving the purpose set out in subsection (1), [and] (ii) be the one that is most likely to rehabilitate the young person…" and s. 38(2)(d) requires that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons …".

15. Whereas the Respondent draws on adult sentencing principles to argue for a more expansive interpretation of ss. 38 and 39, adult sentencing provisions are not relevant and should not be read into the *YCJA*, which is a complete and distinct code that minimizes the use of custody, and mandates an individualized approach where general and specific deterrence do not apply.[8]

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[5] *Ibid*. Preamble.
[6] *R. v. R.C.*, [2005] 3 S.C.R. 99 at para. 41
[7] *Supra* note 2.
[8] *BWP*, *supra* note 3 at paras. 4, 22 (adult factors not applicable), and 24-26 (no deterrence); *R. v. C.D.; R. v. C.D.K.*, 2005 SCC 78, [2005] 3 S.C.R. 668 at 34-37 and 44-48 (restrict overuse of custody) [*CD*].

16. This Honourable Court has provided a thorough analysis of all of the above and regarding the intention of Parliament in *CD*[9] and has stated that while the *YCJA* is generally concerned with the rehabilitation and reintegration of young people in order to promote the long-term protection of the public, it also has some immediate goals. A significant goal of the *YCJA* is to reduce and restrict the use of custody, as evidenced by the object and scheme of the *YCJA* and by the intention of Parliament. The reasoning and conclusions of this Court in *CD* are directly applicable and should be followed in this case.

Scheme of s. 39

17. Section 39(1) provides that the youth justice court can only consider a custodial sentence if one of four preconditions are met:

> (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 findings of guilt 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.

18. Where a youth justice court has found that the pre-conditions required by any of (a)-(c) have been met, ss. (2) then prohibits the imposition of a custodial sentence unless a determination has been made that there is no reasonable alternative consistent with s. 38. Subsection (3) sets out factors that must be considered in determining whether there is a reasonable alternative, and ss. (9) requires the youth justice court to give reasons why a non-custodial sentence is not adequate if imposing a custodial sentence. A custodial sentence therefore will be available only when it is factually demonstrable that there is no reasonable alternative and custody is the last resort.

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[9] *CD*, i*bid.* at paras. 34-50.

ISSUE 1: The interpretation and application of Section 39(1)(c) of the *YCJA*, in particular the phrase a young person "… has a history that indicates a pattern of findings of guilt…".

Section 39(1)(c) exists to address recidivism

19. JFCY submits that the purpose of s. 39 is to restrict the imposition of custodial sentences to violent or exceptional offences, and serious repeat offenders who have not been rehabilitated by non-custodial sentences. For non-violent and non-exceptional offences, custody is only to be considered with respect to young persons who have been sentenced by a youth justice court before and have demonstrated resistance to rehabilitation.

20. Each of the four subsections of s. 39 reference precise and separate circumstances where custody may be considered. Subsections (a) and (d) concern offences, specifically violent and exceptional offences, while ss. (b) and (c) address recidivism.

21. For non-violent and non-exceptional offences, courts are to impose sentences that provide a young person with opportunities to be rehabilitated in the community before resorting to the most restrictive sentence. Section 39(1)(b) permits a custodial sentence as a last resort where a young person has failed to comply with non-custodial sentences, and s. 39(1)(c) where a young person has complied with sentences but has demonstrated that rehabilitation is not being achieved by continuing to commit serious offences.

22. This statutory reluctance to impose custody for young people charged with non-violent, non-exceptional offences who may benefit from rehabilitation in the community reflects the serious concerns that exist as to whether custodial dispositions further rehabilitation in any way. Research has shown that imposing short periods of custody (a "short sharp shock") on offenders who had never been sentenced by the court before resulted in a dramatic increase in recidivism rates (compared with those who had not been incarcerated). Further, while there is little data on the long-term psychological consequences of incarceration, there is evidence of the negative long-term developmental

effects, in particular dropping out of school, job instability in adulthood and marital instability.[10]

23. Thus, JFCY argues that custodial sentences may undermine Parliament's rehabilitative objectives. It follows then that custodial sentences must be used only in the most restricted way, and in the case of non-violent offenders, must be reserved for young people for whom rehabilitation attempts in the community have failed.

Detailed aspects of s. 39(1)(c)

24. Section 39(1)(c) makes a custodial sentence possible in relation to an indictable offence - either straight indictable, or a hybrid offence if the crown has elected to proceed by way of indictment - where an adult could receive a sentence of more than two years, and where the records shows "…a history that indicates a pattern of findings of guilt."

25. The phrase "… a history that indicates a pattern of findings of guilt…" is to be read "in [its] entire context and in [its] grammatical and ordinary sense harmoniously with the scheme [and] object of the Act, and the intention of Parliament."[11]

History

26. A "history" is clearly intended to refer to a record of past events. This is supported by dictionary, common use and judicially constructed definitions. JFCY submits that in s. 39(1)(c) the "history" referred to is a legal history, not merely a behavioral history. The history in question is a history of having been held responsible by a court, in partcular having a history of attempts at rehabilitation.

27. This interpretation is supported by the use of the words "findings of guilt" in the phrase. It is not a history of accusations or a history of involvement with the police – it is of a court history, or a legal history. Considerations of a young person's behavioral history are to be considered at other procedural stages, such as in a PSR under s. 40(2)(d).

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[10] Anthony N. Doob & Carla Cessaroni, *Responding to Youth Crime in Canada*, (Toronto: University of Toronto Press, 2004) at 44-45, 228-229 and at 236-239.

[11] *CD*, *supra* note 8 at para. 27 (citing *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at para.26).

28. Where the *YCJA* uses the word "previous" it is interchangeable with "history". There is no significance to the use of one instead of, or with the other. The French version of the *YCJA* is also not instructive as there are several different expressions used at various places.

Pattern

29. "Pattern" is equally straightforward in terms of dictionary and common meanings, and there seems to be very little controversy between the parties on this issue.

30. JFCY submits that for there to be a pattern within the meaning of s. 39 there must be three or more offences, thereby demonstrating regularity, repetition and similarity to the offences. The offences in question must form a recognizably consistent pattern of behaviour such that they are similar in nature, repeat with some persistence and without significant gaps in time.[12]

A narrow interpretation is necessary to preserve *YCJA* goals and objectives

31. As this Honourable Court reasoned in *CD* a narrow interpretation must be applied to the preconditions listed in s. 39 if they are to give effect to the *YCJA*'s goal of restricting the use of custody, especially since the scheme of s. 39 specifically reflects this broad goal.[13] This Court's analysis, which supported a narrow interpretation of the term "violence" in *CD*, also supports a narrow interpretation of the phrase "… a history that indicates a pattern of findings of guilt…" in this case especially because the underlying question of when a gateway to custody should be opened is identical.

32. Further, it has been made clear by this Honourable Court that where there are two possible interpretations of a provision that affect the liberty of an accused person, one of which is favorable and less restrictive to the accused and his liberty, then the Court should adopt the more favorable interpretation.[14] A narrow interpretation of the phrase "a history that indicates a pattern of findings of guilt" – one that requires that the young

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[12] *R.v. C.D.J.*, 2005 ABCA 293, [2005] A.J. No. 1190 at paras. 25-28 (regularity etc.); *R. v. D. N.*, [2003] O.J. No. 3736 (QL) at para. 6 (nature of pattern); see also *infra* note 18.
[13] *Supra* note 8 at para. 41.
[14] *Ibid.* at para 50, (citing *R. v. McIntosh*, [1995] 1 S.C.R. 688 at para.29).

person has been sentenced by a youth justice court before – is more favorable to the accused and is required as part of limiting the circumstances in which custody will be a sentencing option.

Impact of a narrow interpretation of s. 39(1)(c)

33. JFCY submits that an analysis of the various aspects of what is required under s. 39(1)(c) must constantly refer back to the goals and objectives as broadly defined. A narrow interpretation that gives effect to the purpose and goals of the *YCJA*, Parliament, and of s. 39(1)(c) requires that:

a) The court may not consider the offences currently before the court when determining whether a young person has a "history";
b) the court may only consider indictable offences for which an adult could receive a sentence of more than two years when making a determination that a pattern exists; and
c) where the youth justice court has determined that a history indicating a pattern of findings of guilt exists the court may only impose a custodial sentence for indictable offences where an adult could receive a sentence of more than two years.

a) The court may not consider the offences currently before the court when determining whether a young person has a history

34. JFCY submits that the sentencing court can not consider the offences that are currently before the court (i.e. the offences that are the subject of the sentencing consideration), and can only consider the offences that have been the subject of sentencing decisions in the past in order to ensure that the most restrictive sentence (custody) is not imposed before less restrictive rehabilitation has been attempted.

35. An interpretation of s.39(1)(c) that allows the court to consider all of the offences currently before the court is the widest possible interpretation, not the narrow interpretation to be applied when the liberty of a young person is at stake. Such a broad interpretation is inconsistent with entire context of the *YCJA*, its objects and the intention of Parliament.

36. This Court and academic commentaries have recognized that subsections 39(1)(b) and (c) are not intended to apply to first time offenders. JFCY submits that a first time

offender is someone who is facing a court imposed sanction for the first time, that is, one who has never been sentenced by a court before.

37. As Justice Bastarache said in *CD*: "…two of these gateways (i.e. s. 39(1)(b) and (c)) could not be used in the case of a first time offender …".[15]

38. The Respondent relies on a recommendation of The Nunn Commission of Inquiry that reads "… pattern of findings of guilt be changed to read pattern of offences so that a young person's findings of guilt and pending charges can be considered when determining the appropriateness of pre-trial detention."[16] A quote from Justice Peter Harris' looseleaf *Youth Criminal Justice Manual* offers the paraphrase "…a prior record of at least three similar offences".[17] Both statements appear to accept the interpretation that /the offences currently before the court are not to be considered when determining the availability of a custodial sentence.

39. The Nova Scotia Court of Appeal in this case concurred (at para. 17) with the reasoning of Franklin, Prov.Ct.J. in *R. v. A.E.A.*:[18]

> To interpret the Act as opening the gateway to custody when the young person pleads guilty or is found guilty on different days for offences separate in time and event but closing it if the accused pleads guilty or is found guilty of offences separate in time and event all on the same day is to create a legal fiction … This cannot be a reasonable interpretation of the Act.

40. With respect, JFCY submits it is a reasonable interpretation. There is a significant difference between these two circumstances. In one there has been a sentence imposed by a youth justice court before and in the other not. The young person in the first situation has had the opportunity to engage in rehabilitation through services and resources in the community and to reflect and develop; the second has not. It is important to remember that the offences in question are non-violent, not exceptional, and the young person has not failed to comply with previous sentences. While proportionality is enumerated as a required consideration in sentencing under the YCJA, it is only one among numerous considerations.

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[15] *Ibid.* at para 63.
[16] Lee Tustin & Robert E. Lutes, *A Guide to the Youth Criminal Justice Act 2007 Edition* (Toronto: LexisNexis Canada, 2006) at 78.
[17] (Toronto: Canada Law Book, May 2007) paras.4-16 Part 39:00000.
[18] [2007] A.J. No. 360 (QL) at para. 28.

41. If this Court agrees with the Respondent's position that the youth justice court may consider the offences on which the young person is currently being sentenced when determining whether there is a history indicating a pattern of findings of guilt, JFCY submits that this Court should specify that custody is **not** an appropriate sentence under s. 39(2) for a non-violent non-exceptional offences committed by a young person who has never been sentenced before.

b) The court may only consider indictable offences for which an adult could receive a sentence of more than two years when making a determination that a pattern exists

42. When looking at the young person's history for the purposes of s. 39(1)(c), only certain offences may be considered in establishing that a pattern exists. The sentencing court can only include any indictable offences for which an adult could get a sentence of more than two years when seeking to evaluate or determine the existence of a pattern.

43. While of course all offences will form part of an accused's history, the court must also find that a pattern exists. In order to give meaning to a restrictive approach to s. 39(1)(c) as described, the section must be interpreted such that the pattern must be related to indictable offences for which an adult could get more than two years.

44. To establish that a pattern exists, the court must find three or more offences where there is regularity, repetition and similarity. A pattern can only be established where there are a number of broadly similar offences. An interpretation that limits a youth justice court's consideration to a pattern of indictable offences for which an adult could receive a custodial sentence of more than two years supports the purpose of the YCJA and is consistent with Parliamentary intent.

c) Where the youth justice court has determined that a history indicating a pattern of findings of guilt exists the court may only impose a custodial sentence for indictable offences where an adult could receive a sentence of more than two years

45. A custodial sentence imposed under s.39(1)(c) can be imposed only for indictable offences for which an adult could receive a sentence of more than two years. The parties and JFCY agree on this issue.

ISSUE 3 - The application and interpretation of the law relating to the preparation of Pre-Sentence Reports pursuant to s. 40 of the *YCJA*

Section 40 is directive and purposeful

46. JFCY submits that youth justice court judges have a specific obligation to ensure that Pre-Sentence Reports comply with both the letter and the spirit of the law. Section 40 of the *YCJA* is directive, not permissive, and mandates specific content. Pre-Sentence Reports (PSRs) must be comprehensive and meet **all** of the statutory requirements.[19]

47. Section 39(6) requires that a youth justice court consider a PSR before imposing a custodial sentence. JFCY submits that the requirement that the PSR provide comprehensive information regarding the young person and the community resources at the time of the request for a PSR is should be a very high standard.

48. The PSR should provide "carefully compiled information" not only for the purpose of providing the youth court justice with information, and as a mechanism for the young person's participation in the process,[20] but also to ensure that the sentence is rehabilitative for the individual young person in order to ensure the long-term protection of the public.

49. JFCY further submits that the youth court justice must be satisfied that the statutory requirements are comprehensively met regardless of any position taken by crown or defence counsel. Even if the young person and the prosecutor wish to dispense with the PSR, the court can only do so if the court is satisfied that the report is not necessary.

PSRs must be comprehensive as it informs the factual foundation of the court's sentencing determination

50. Section 38(1) of the *YCJA* requires sentences to provide meaningful consequences that promote reintegration and rehabilitation, while applying specific principles and

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[19] The Appellant quotes the crown attorney at trial as saying "In terms of his criminal [sic] record, it is not attached to any of the PSRs that are before the court." (para 45). Sections 40(2)(d)(iii) and (iv) require that the PSR detail the young persons youth court record. As such a youth court justice should not accept a PSR that does not include all of the requirements of s. 40.

[20] *R.* v. *J.L.M.*, 2005 SKPC 28, 265 Sask. R. 84, [2005] S.J. No. 362 at paras. 75-76.

considering specific factors for an individualized sentence. Therefore, the decision about the appropriate sentence must have a factual and contextual foundation which is typically provided to the court through the PSR.

51. Both the crown and defence are able to make submissions regarding sentence, including under s. 40(6), the right, on application to the court, to cross-examine the person(s) who prepared the PSR. As a practical matter however, courts are typically presented with this information without any cross-examination and a great deal of weight and authority is accorded to the PSR and to the expertise of the person who prepared the PSR.

52. After finding that the gateway to custody has been opened under s. 39(1), a youth justice court must still make determinations under ss. 39(2) and (3) that a custodial sentence is appropriate, and that the court has considered all alternatives to custody and has determined that there is no reasonable alternative that accords with the purpose and principles set out in s. 38.

53. This determination is informed by the PSR which must detail the "availability and appropriateness of community services …" and "any information that may assist the court is determining … whether there is an alternative to custody…".[21] PSRs must include a thorough consideration of all available alternatives to custody in order that the youth court justice - not the report writer - may make a fact-based conclusion about what the appropriate sentence will be for the individual youth.[22]

PSRs must be current

54. PSRs must fully evaluate the young person's current as well as historical circumstances. A court should be very reluctant to accept a previous PSR, even modified, especially where the PSR was drafted months prior to the sentencing. Young people develop throughout their adolescence, and what was true at one point in time may have changed dramatically. With gaps in time, there might well be significant

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[21] *Supra* note 2, s. 40(2)(d)(v) and (e).
[22] *R.* v. *N.R.*, 2005 NLCA 43, 248 Nfld. & P.E.I.R. 146 (Nfld.C.A.) at paras. 16, 19-20, and 25-26.

differences in circumstances, attitudes and even capacities, for example if there has been addiction treatment in the interval.

55. To a certain extent, the same is true of community services and resources, many of which rely on project funding. New and evolving resources may be available that better suit the needs of the young person. Judges often rely on PSR report writers to be knowledgeable about what is available in the broader community at the time of sentencing.

56. The PSR will typically set out the critical factual context on which the youth court justice will determine that custody is or is not the appropriate sentence. To give effect to the *YCJA* objects of rehabilitation and reintegration, and to ensure individually crafted sentences that only use custody as a last resort, PSRs must be detailed and provide comprehensive information about community services and resources so the youth court justice can make well-informed factually based decisions.

ISSUE 4 - The Nova Scotia Court of Appeal erred in its application and interpretation of the law relating to the ordering of a DNA sample for a secondary designated offence under *Criminal Code* section 487.051(b), when it affirmed the taking of such a DNA sample from the Appellant, S.A.C.

57. JFCY makes no submissions on this issue.

PART IV
SUBMISSIONS RELATING TO COSTS

58. JFCY does not seek costs and asks that costs not be ordered against it.

PART V
ORDER REQUESTED

59. JFCY respectfully requests permission to present oral argument.

60. JFCY joins the Appellant in requesting this court grant the appeal.

All of which is respectfully submitted

Dated at Toronto this 26th day of March, 2008.

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Mary Birdsell

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PART VI

TABLE OF AUTHORITIES

PART VII

STATUTORY PROVISIONS

Youth Criminal Justice Act

2002, c. 1
[Assented to February 19, 2002]

An Act in respect of criminal justice for young persons and to amend and repeal other Acts

Preamble

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms;

AND WHEREAS 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, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

Declaration of Principle

Policy for Canada with respect to young persons

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

(*a*) the youth criminal justice system is intended to

(i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,

(ii) rehabilitate young persons who commit offences and reintegrate them into society, and

(iii) ensure that a young person is subject to meaningful consequences for his or her offence

in order to promote the long-term protection of the public;

(*b*) the criminal justice system for young persons must be separate from that of adults and 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.

Act to be liberally construed

(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).

Sentencing - **Purpose and Principles**

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.

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; and

(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.

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.

Commital 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 findings of guilt 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.

(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.

Custody as a 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.

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.

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.

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.

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).

Pre-sentence Report

40. (1) Before imposing sentence on a young person found guilty of an offence, a youth justice court

(*a*) shall, if it is required under this Act to consider a pre-sentence report before making an order or a sentence in respect of a young person, and

(*b*) may, if it considers it advisable,

require the provincial director to cause to be prepared a pre-sentence report in respect of the young person and to submit the report to the court.

Contents of report

(2) A pre-sentence report made in respect of a young person shall, subject to subsection (3), be in writing and shall include the following, to the extent that it is relevant to the purpose and principles of sentencing set out in section 38 and to the restrictions on custody set out in section 39:

(*a*) the results of an interview with the young person and, if reasonably possible, the parents of the young person and, if appropriate and reasonably possible, members of the young person's extended family;

(*b*) the results of an interview with the victim in the case, if applicable and reasonably possible;

(*c*) the recommendations resulting from any conference referred to in section 41;

(*d*) any information that is applicable to the case, including

(i) the age, maturity, character, behaviour and attitude of the young person and his or her willingness to make amends,

(ii) any plans put forward by the young person to change his or her conduct or to participate in activities or undertake measures to improve himself or herself,

(iii) subject to subsection 119(2) (period of access to records), the history of previous findings of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt for offences under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or under this or any other Act of Parliament or any regulation made under it, the history of community or other services rendered to the young person with respect to those findings and the response of the young person to previous sentences or dispositions and to services rendered to him or her,

(iv) subject to subsection 119(2) (period of access to records), the history of alternative measures under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or extrajudicial sanctions used to deal with the young person and the response of the young person to those measures or sanctions,

(v) the availability and appropriateness of community services and facilities for young persons and the willingness of the young person to avail himself or herself of those services or facilities,

(vi) the relationship between the young person and the young person's parents and the degree of control and influence of the parents over the young person and, if appropriate and reasonably possible, the relationship between the young person and the young person's extended family and the degree of control and influence of the young person's extended family over the young person, and

(vii) the school attendance and performance record and the employment record of the young person;

(*e*) any information that may assist the court in determining under subsection 39(2) whether there is an alternative to custody; and

(*f*) any information that the provincial director considers relevant, including any recommendation that the provincial director considers appropriate.

Oral report with leave
(3) If a pre-sentence report cannot reasonably be committed to writing, it may, with leave of the youth justice court, be submitted orally in court.

Report forms part of the record
(4) A pre-sentence report shall form part of the record of the case in respect of which it was requested**.**

Copies of pre-sentence report
(5) If a pre-sentence report made in respect of a young person is submitted to a youth justice court in writing, the court

(*a*) shall, subject to subsection (7), cause a copy of the report to be given to

(i) the young person,

(ii) any parent of the young person who is in attendance at the proceedings against the young person,

(iii) any counsel representing the young person, and

(iv) the prosecutor; and

(*b*) may cause a copy of the report to be given to a parent of the young person who is not in attendance at the proceedings if the parent is, in the opinion of the court, taking an active interest in the proceedings

Cross examination
(6) If a pre-sentence report made in respect of a young person is submitted to a youth justice court, the young person, his or her counsel or the adult assisting the young person under subsection 25(7) and the prosecutor shall, subject to subsection (7), on application to the court, be given the opportunity to cross-examine the person who made the report.

Report may be withheld from private prosecutor
(7) If a pre-sentence report made in respect of a young person is submitted to a youth justice court, the court may, when the prosecutor is a private prosecutor and disclosure of all or part of the report to the prosecutor might, in the opinion of the court, be prejudicial to the young person and is not, in the opinion of the court, necessary for the prosecution of the case against the young person,

(*a*) withhold the report or part from the prosecutor, if the report is submitted in writing; or

(*b*) exclude the prosecutor from the court during the submission of the report or part, if the report is submitted orally in court.

Report disclosed to other persons
(8) If a pre-sentence report made in respect of a young person is submitted to a youth justice court, the court

(*a*) shall, on request, cause a copy or a transcript of the report to be supplied to

(i) any court that is dealing with matters relating to the young person, and

(ii) any youth worker to whom the young person's case has been assigned; and

(*b*) may, on request, cause a copy or a transcript of all or part of the report to be supplied to any person not otherwise authorized under this section to receive a copy or a transcript of the report if, in the opinion of the court, the person has a valid interest in the proceedings.

Disclosure by the provincial director
(9) A provincial director who submits a pre-sentence report made in respect of a young person to a youth justice court may make all or part of the report available to any person in whose custody or under whose supervision the young person is placed or to any other person who is directly assisting in the care or treatment of the young person.

Inadmissibility of statements
(10) No statement made by a young person in the course of the preparation of a pre-sentence report in respect of the young person is admissible in evidence against any young person in civil or criminal proceedings except those under section 42 (youth sentences), 59 (review of non-custodial sentence) or 71 (hearing — adult sentences) or any of sections 94 to 96 (reviews and other proceedings related to custodial sentences).

Convention on the Rights of the Child
Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 37

States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.