Citation: *R. v. A.B.W.*, 2023 YKTC 2

Date: 20230105
Docket: 22-03526
22-03527
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Chief Judge Cozens

REX

v.

A.B.W.

Publication of information identifying the young person charged under the *Youth Criminal Justice Act* is prohibited by s. 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by s. 111(1) of the *Youth Criminal Justice Act*.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for the Crown
Robert Dick — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): A.B.W. is before the Youth Justice Court seeking judicial interim release.

[2] A.B.W. is charged on Information 22-03526 with having committed offences contrary to ss. 137 of the *Youth Criminal Justice Act,* S.C. 2002, c. 1 ("*YCJA*"), and 264.1(1)(a) of the *Criminal Code*. The allegations are that between 12:15 a.m. and 12:56 a.m. on December 23, 2022, A.B.W. made numerous phone calls from a private

number to D.W. D.W. did not answer the first two of these calls, but on the third call he did answer. He recognized the caller, from his voice, as being A.B.W. A.B.W. accused D.W. of "talking shit about him". On a fourth call an individual, whose voice D.W. did not recognize, identified himself as D.T., and threatened D.W. with sexual violence. On the fifth call, D.W. again recognized A.B.W.'s voice. A.B.W. told D.W. that he would beat the shit out of him if he did not stop talking about him. The fourth and fifth phone calls were recorded. Several other phone calls were subsequently made which D.W. did not answer. After the 11th call, D.W. turned off his phone.

[3] At the time, A.B.W. was subject to the terms of a probation order which required him to have no contact with D.W.

[4] A.B.W. is also charged on Information 22-03527 with having committed offences contrary to ss. 88 and 129(a) of the *Code*, as well as three charges under s. 137 of the *YCJA*, for failing to abide by a curfew, possessing illegal drugs, and possessing a weapon.

[5] The allegations arise from RCMP investigation into a complaint of a stolen black Dodge Ram pickup truck which was observed travelling in several areas of Whitehorse. At times, the RCMP encountered the truck which was able to successfully avoid being pulled over by fleeing. At one point it appears that certain occupants of the truck committed a robbery at Heather's Haven, in which an employee was injured and required medical care. At approximately 12:00 a.m., the RCMP ultimately tracked the truck by foot patrol to a location in the greenbelt behind Hillcrest. A number of individuals were located in the vicinity of the truck. These individuals were told to

remain where they were, however, they attempted to flee. A.B.W. was one of these individuals who attempted to flee. He was caught and arrested. On a search incident to arrest, an item fitting the description of brass knuckles, although not made of metal, a knife, and a packet of what appeared to be 2.14 grams of magic mushrooms were located. A.B.W. had advised the arresting officer that he had these items on his person prior to the search being conducted.

[6] The s. 137 charges allege breaches of A.B.W.'s probation requirements to abide by a 10:00 p.m. curfew, to abstain from the possession of illegal drugs, and not to carry any weapon.

[7] There is no information before me that A.B.W. was actually an occupant of the truck at the times that it was observed.

[8] Crown counsel is opposed to A.B.W.'s release. Counsel states that the ss. 88 and 264.1(1) offences are serious offences, thus opening the door to allow A.B.W. to be detained, as set out in s. 29(2)(a)(i) of the *YCJA*.

[9] The principles and statutory framework for bail in the *YCJA* context was discussed in the case of ***R.*** v. ***M.T.B.***, [2022] O.J. No. 2061 (C.A.) in paras. 5 to 12 as follows:

> **BAIL IN THE YOUTH CONTEXT**
>
> 5 The diminished responsibility of young persons and the importance of rehabilitation and reintegration for adolescents militate against the overuse of custody, both pre-trial and as part of a sentence. The preamble to the *YCJA* says that Canadian society should have a youth criminal justice system that "reserves its most serious intervention for the most serious

crimes and reduces the over-reliance on incarceration for non-violent young persons."

6 The law thus favours release in the context of young persons, even those charged with very serious offences, as supported by the principles set out in s. 3 of the *Act* and the principles of fundamental justice recognized by the Supreme Court of Canada that relate to young persons: *R. v. R.D.,* 2010 ONCA 899, at para. 56.

THE STATUTORY FRAMEWORK

7 Section 29(2) of the *YCJA* sets out the circumstances in which the court may order that a young person be detained in custody. Section 29(2) contains three parts:

*gateway offence or circumstances: s. 29(2)(a);

*the grounds for detention: s. 29(2)(b); and

*no viable alternative to detention exists: s. 29(2) (c).

If the three parts are not satisfied, the young person must be released.

THE GATEWAY

8 A young person may be detained in custody "only if" charged with:

*a serious offence, or

*an offence other than a serious offence if they have a history that indicates a pattern of either outstanding charges or findings of guilt: s. 29(2).

9 A "serious offence" is an indictable offence for which the maximum punishment is imprisonment for five years or more: s. 2 of the *YCJA*.

10 What constitutes "a history that indicates a pattern of either outstanding charges or findings of guilt" is not defined. However, the phrase "history that indicates a pattern of findings of guilt," in the previous version of s. 39(1)(c), was held to require a minimum of three prior findings of guilt, unless the court can find that the offences are so similar that a pattern can be found in only two prior convictions: *R. v. S.A.C.,* 2008 SCC 47, at paras. 12-33.

11 In M.'s case, the attempted murder charge certainly qualifies as a "serious offence". His criminal record, with nine findings of guilt, also reveals a "history" of the sort referred to in s. 29(2)(a)(ii). Thus, I find that both of the "gateways," for detention, are engaged on these facts.

THE GROUNDS FOR DETENTION

> 12 The grounds for detention in s. 29(2)(b) are similar to, but not the same, as the primary, secondary and tertiary grounds enunciated in the *Criminal Code*.

[10] In A.B.W.'s case, as he has only been sentenced on one prior occasion for ss. 264.1(1)(a), 266, and 271 offences, he does not have a history that indicates a pattern of either outstanding charges or findings of guilt, as required by s. 29(2)(a)(ii). On October 6, 2022, following a joint submission, A.B.W., after being credited for 5 months' time served, was sentenced on the s. 271 offence to a further supervision order of 2.5 months, which was delayed by an additional week of custody to allow for the supervision order to be properly structured, to be followed by 15 months of probation. On the s. 264.1(1)(a) offence and the s. 266 offence he was sentenced to 15 months' probation.

[11] As the Crown has elected to proceed by summary election on all A.B.W.'s charges, the ss. 88 and 264.1(1) offences carry a maximum sentence of two years less one day. Had the Crown not yet made its election, or had elected to proceed by indictment, then the maximum sentences of five and ten years would clearly qualify these as serious offences.

[12] This raises the question, as the Crown has elected to proceed summarily, as to whether these two offences are serious offences for the purpose of allowing the Court jurisdiction to detain A.B.W. under s. 29(2)(a)(i).

[13] Crown counsel submits that the Crown election does not change the nature of the offence, and that therefore A.B.W. has been alleged to have committed two serious offences. As such, the gateway to a detention order is open.

[14] Counsel relies on the case of ***R.*** v. ***Connors*** (1998), 102 B.C.C.A. 1 and s. 34 of the *Interpretation Act*, R.S.C. 1985, c. I-21 for his position.

[15] In ***Connors***, a situation involving fingerprinting for the purposes of the *Identification of Criminals Act*, in considering how the Crown election could impact upon the obligation of an accused to provide fingerprints, Cumming J. stated:

> 66 Hybrid or Crown-electable offences are offences which may be prosecuted by indictment. Thus, where an enactment provides that certain powers, such as the power to fingerprint, apply in the case of indictable offences, such enactment is deemed to apply to hybrid offences by virtue of the provisions of s. 34 of the Interpretation Act.
>
> 67 That reading of s. 34 of the Interpretation Act has consistently been applied in this province and in Ontario. Thus, in R. v. B. (1980), 8 C.C.C. (3d) 185 (B.C.C.A.), Seaton J.A., writing for the Court, referred to what was then numbered s. 27(1) of the Interpretation Act, and commented at p.188:
>
> > The words seem clear. I had always understood that an indictable offence was an offence that could be dealt with on indictment, not just those that must be dealt with on indictment, and I see that that has been the view of others.
> >
> > In R. v. Toor (1973), 11 C.C.C. (2d) 312, [1973] 4 W.W.R. 442, Ruttan J. dealt with the Identification of Criminals Act to an offence which was triable by summary conviction or by indictment. I quote this from the headnote:
> >
> > > An offence in respect of which the Crown has a election whether to prosecute by indictment or on summary conviction is, by virtue of s. 27(1)(a) of the Interpretation Act, 1967-68 (Can.), c.7 (now R.S.C. 1970, c. I-23), deemed to be an indictable offence until the Crown otherwise elects.

> 68 To similar effect, see Re Abarca and The Queen (1980), 57 C.C.C. (2d) 410 (Ont. C.A.); R. v. Ellerbeck (1981), 61 C.C.C. (2d) 573 (Ont. C.A.); R. v. Tshernish (1990), 62 C.C.C. (3d) 382 (Que. C.A.); and R. v. Gallagher (1981), 62 C.C.C. (2d) 3 (B.C. Co. Ct.).
>
> 69 Counsel for the appellant submits that the passage from the headnote to R. v. Toor quoted by Seaton J.A. in R. v. B. is correct save for the concluding phrase "until the Crown otherwise elects". At least for the purposes of the Identification of Criminals Act the term "indictable offence" includes offences which may be prosecuted summarily, but they retain their character as indictable offences no matter how the Crown elects. The Crown election has an impact procedurally on how and in what court the charge proceeds and, as well, on the maximum penalty that may be imposed, but does not change the character of the offence. It remains an indictable offence. I agree.
>
> …
>
> 77 … With respect to the second point, as I have already indicated in the preceding section of these reasons, a hybrid offence is by virtue of s. 34(1) of the Interpretation Act an indictable offence regardless of the election of the Crown. The Crown's election affects the procedure which will be used at trial and the penalties which will be available upon conviction, but it does not change the nature of the offence itself.

[16] Therefore, counsel submits, the ss. 88 and 264.1(1)(a) offences remain indictable for the purpose of the consideration as to whether A.B.W. has committed a serious offence, regardless of the Crown's decision to proceed on these charges by summary election.

[17] In ***R.*** v. ***Singh***, 2016 QCCM 228, this approach of ***Connors*** was considered. In paras. 58 to 64 the Court stated:

> **The consequences of the Attorney General's election to proceed summarily**
>
> 58 Once the Attorney General decides on the method of procedure and makes the election, there are consequences. If that choice is to pursue by summary conviction, the hybrid offense is no longer considered or treated as indictable. This was clearly stated by Justice Fish in *Dudley* [***R.*** v. ***Dudley***, 2009 SCC 58] at paragraphs 18, 21, 22 and 39:

[18] Pursuant to s. 34(1)(*a*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, an offence is presumed indictable "if the enactment provides that the offender may be prosecuted for the offence by indictment". **Hybrid offences are therefore treated as indictable -- unless the Crown elects, or is deemed to have elected, to try them summarily** [...]

[21] As mentioned earlier, **hybrid offences are deemed to be indictable unless and until the Crown elects to proceed summarily**. Thus, speaking for the Nova Scotia Court of Appeal in *R. v. Paul-Marr*, 2005 NSCA 73, 199 C.C.C. (3d) 424, at para. 20, Cromwell J.A. (as he then was) explained that "where an offence may be prosecuted by either indictment or on summary conviction at the election of the Crown, **the offence is deemed to be indictable until the Crown elects to proceed by way of summary conviction**". Likewise, in *R. v. C. (D.J.)* (1985), 21 C.C.C. (3d) 246, at p. 252, MacDonald J., speaking for the Prince Edward Island Supreme Court, Appeal Division, stated that "**in the case of a hybrid offence once the Crown elects to proceed by way of summary conviction the offence is no longer deemed to be an indictable offence**". And in *Canada (Attorney General) v. Trueman, P.C.J.* (1996), 83 B.C.A.C. 227, at para. 13, once more for a unanimous court, McEachern C.J.B.C. held that **hybrid offences "are deemed** by s. 34 of the *Interpretation Act ...* **to be indictable [and] remain indictable unless the Crown elects to proceed by summary conviction**". (Emphasis added throughout.)

[22] Other appellate courts across the country have reached the same conclusion: *Trinidad and Tobago v. Davis*, 2008 ABCA 275, 233 C.C.C. (3d) 435, at para. 14; *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.), at p. 328; *Mitchell*, [1997] O.J. No. 5148, at para. 4; *R. v. Gougeon* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), at p. 234; *R. v. Tontarelli*, 2009 NBCA 52, 348 N.B.R. (2d) 41, at para. 55; *R. v. D. (S.)* (1997), 119 C.C.C. (3d) 65 (Nfld. C.A.), at para. 34; *R. v. O'Leary* (1991), 64 C.C.C. (3d) 573 (Nfld. C.A.), at p. 575; *R. v. Shiplack* (1993), 109 Sask. R. 311 (C.A.), at para. 9. See also *Ahmed v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 672, 81 Imm. L.R. (3d) 116, at para. 40. [...]

[39] In virtue of s. 34 of the *Interpretation Act*, **hybrid offences are deemed indictable unless and until the Crown has elected to proceed summarily**.

> [emphasis by underlining in the original; bold print added by me]

59 When a hybrid offence is no longer deemed indictable, it is treated in all respects as a summary conviction offence. This was clearly and unequivocally stated by Justice Fish in *Dudley* at par. 2:

> Where the Crown elects to proceed by way of summary conviction, or "summarily", the hybrid (or "dual procedure") offence is treated in all respects as a summary conviction offence.
>
> [emphasis added]

60 At par. 18, Justice Fish reaffirmed this by approving a doctrinal statement to that effect in *Manning*, *Mewett* & *Sankoff* :*Criminal Law* (4th ed. 2009) at p. 44:

> In these cases, it is the prosecution that first decides how to proceed. If it chooses to proceed by indictment, the offence is treated in all respects as an indictable offence and the accused has the normal rights of election; if it chooses otherwise, the case proceeds in all respects as a summary conviction offence.
>
> [emphasis added]

61 The repeated use of the words "in all respects" leaves little room for exceptions. However, it is arguable that Justice Fish left the door open for a fingerprint exception in par. 23:

> Justice Charron cites *R. v. Connors* (1998), 121 C.C.C. (3d) 358 (B.C.C.A.), for the proposition that "dual procedure offences retai[n] their character as indictable offences in the context of the *Identification of Criminals Act*" (para. 73). As my colleague points out, the *Identification of Criminals Act* is not before us on this appeal. For present purposes, it will therefore suffice to emphasize that *Connors* stands alone in this regard. Other courts have reached the opposite conclusion. See, for example, *Re Abarca and The Queen* (1980), 57 C.C.C. (2d) 410 (Ont. C.A.), at p. 413. [emphasis added]

62 That very small crack left open in the door is the only thing that gives any chance of success to the Crown's position in the case at bar. In *Dudley*, the justices of the Supreme Court of Canada did not deal with the *Identification of Criminals Act*, because it was not the issue before them. However, everything else in the majority opinion in *Dudley* goes diametrically against the decision of the British Columbia Court of Appeal

in *Connors*. It is therefore likely that *Connors* can no longer be considered good law. As Chief Justice Bauman of the Supreme Court of British Columbia said in *R. v. McCartie*, 2012 BCSC 928 (at par. 41), it may well be that *Dudley* has overtaken *Connors*:

> Charges under *ITA* sections 239(1)(a) and (d) and of evasion under the *ETA* are hybrid offences. The Crown points to the decision of the Court of Appeal in *R. v. Connors* (1998), 49 B.C.L.R. (3d) 376 (CA) as authority for the proposition that hybrid offences are "indictable offences" for the purposes of s. 2(1)(c) of the *ICA*. In general, I am in agreement with this position. However, where *Connors* holds that hybrid offences are "indictable" for the purposes of the *ICA* even when the Crown has already elected to proceed summarily, it may well be that *Connors* has been overtaken by the decision of the majority of the Supreme Court of Canada in *R. v. Dudley*, 2009 SCC 58 (CanLII) (at paras. 18-23). Where the offence in issue is a hybrid offence and the Crown has elected to proceed by summary conviction, the charged offence may not be an "indictable offence" for the purposes of the *ICA*. I need not decide this point, as in the case at bar, neither the information nor the summons states what the Crown's election is, and the Crown submissions indicate that this election has yet to be made (para. 63 of Crown argument). Accordingly, s. 2(1)(c) of the *ICA* was properly invoked.
>
> [emphasis added]

63 I agree. Justice Fish made a point of emphasizing that "*Connors* stands alone" in regard to the *Identification of Criminals Act* while "[o]ther courts have reached the opposite conclusion", including the Court of Appeal for Ontario in *Abarca*. It is useful to note that in this latter decision, Justice Lacoursière said: "Once the Crown elects to proceed by way of summary conviction, it cannot compel the appearance of an accused for fingerprinting."

64 In *Dudley*, the majority's acceptance of the reasoning of Justice Fish, including his use of the words "in all respects", and the clear rejection of Justice Charron's minority opinion (which was relied on *Connors*) lead me to conclude that *Dudley* has indeed overtaken *Connors*.

[18] I note, however, that in the decision of ***R.*** v. ***Lapointe***, 2921 QCCA 360, it appears that the Court has taken a position consistent with ***Connors*** with respect to the *Identification of Criminals Act*.

[19] A somewhat similar conclusion as to the impact of a Crown decision to proceed by summary election on a hybrid offence was reached by Gorman J. in a youth sentencing context in ***R.*** v. ***J.S.***, [2016] N.J. No. 271 (Prov. Ct.). In considering whether a custodial disposition was available, he stated:

> 26 Section 39(1) of the *Youth Criminal Justice Act* sets out the only circumstances in which the Court has the authority to impose a period of custody:
>
> > (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.

> 27 Thus, in order for a custodial sentence to be imposed upon a young person, the young person must have committed an offence that fits within one of the following categories:
>
> 1. it was a violent offence;
>
> 2.it involves a failure to comply with non-custodial sentences;
>
> 3.it is an indictable offence, for which an adult could be sentenced to imprisonment for more that two years, involving a pattern of findings of guilt and/or violations of extrajudicial sanctions; or
>
> 4.it is an indictable offence which constitutes an exceptional case.
>
> 28 The Crown proceeded by way of summary conviction in relation to all of the offences committed by JS. Thus, neither sections 39(1)(c) or (d) of the *Youth Criminal Justice Act* apply (see ***R. v. N.R.*** (2005), 248 Nfld. & P.E.I.R. 146 (N.L.C.A.)). JS has not been convicted of breaching a non-custodial sentence and thus section 39(1)(b) does not apply….

[20] See also ***R.*** v. ***D.C.*** (2014), 117 W.C.B. (2d) 568 (NLPC) at para. 28 where Gorman J. stated:

> **Is DC Charged With a Serious Offence?**
>
> 28 DC is charged with offences contrary to sections 266 [two counts] and 267(a) [two counts] of the *Criminal Code.* A "serious offence" is defined in the *Youth Criminal Justice Act* as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more." The maximum penalty for a breach of section 267(a) of the *Criminal Code*, if proceeded with by way of indictment, is ten years imprisonment. The Crown proceeded by way of summary conviction in relation to one of the section 267(a) offences and the two section 266 offences. **However, it has not yet made its election in relation to the section 267(a) offence (which is a hybrid offence)** alleged to have occurred on June 19, 2014. In *S.B.*, at paragraph 32, I noted that section 34 of the *Interpretation Act*, R.S.C. 1985, indicates that a hybrid offence is "deemed to be an indictable offence." Thus, the section 267(a) charge laid against DC in relation to June 19, 2014, constitutes a "serious offence" for the purpose of judicial interim release.

[21] In ***R.*** v. ***N.R.***, 2005 NLCA 43, in considering the availability of a custodial disposition for a youth under s. 39(1) of the *YCJA*, stated that:

> 7 First, the trial judge applied paragraph (d) where the Crown had elected to proceed by way of summary conviction. It is clear on the face of the legislation that paragraph (d) applies only where the Crown proceeds by way of indictment. It follows that, for those offences where the Crown proceeded by way of summary conviction, the sentence of secure custody must be set aside. Accordingly, of the 16 months secure custody ordered by the trial judge, 8 months, which is the time related to summary conviction offences, is set aside.

[22] In ***R.*** v***. C.P.***, 2021 SCC 19, the Court notes that in the context of youth justice that "promptness and enhanced procedural protection are both core tenets of the youth criminal justice system" (para. 151).

[23] In my opinion, it would seem that to open the gateway to the finding that an offence is serious notwithstanding the Crown election to proceed summarily, by allowing an offence to be treated as though it remained indictable nonetheless, is inconsistent with the purpose and principles of the *YCJA*, and inconsistent with the decision in ***Dudley***, ***C.P.***, and the other cases I have referenced, recognizing that we are dealing with bail and not a sentencing hearing as in some of the cases referred to.

[24] However, in fairness, this issue has not been fully argued before me, and I do not feel it to be appropriate to render a decision on this point until counsel have had the opportunity to properly prepare for and argue the issue.

[25] In the circumstances of this case, however, I do not consider it necessary to do so, as I am prepared to release A.B.W. on conditions regardless of whether detention is available or not. I have considered s. 29 of the *YCJA*, in particular s. 29(c), and am

satisfied on a balance of probabilities that a release plan which effectively separates A.B.W. from Whitehorse and the persons and the issues that are present here, offers adequate protection, not perfect but as required adequate, to the public, including D.W. and his family, and that public confidence in the administration of justice is maintained, in particular given the purpose and principles behind the *YCJA* and A.B.W.'s young age.

[26] I have reviewed the materials filed, as well as my decision on bail, ***R.*** v. ***A.B.W.*** 2021 YKTC 58, and have also listened to the DARS recording of the sentencing hearing conducted on October 6, 2022. I have reviewed what I noted with respect to A.B.W.'s circumstances, which included the s. 34 Risk Assessment Report.

[27] I am aware that the s. 34 Risk Assessment Report in which A.B.W. was determined to be at a moderate range for the commission of future acts of violence if no efforts were made to manage his risk, is of somewhat limited value. It specifically limited its risk determination to a six-month period after October 2021 date:

> The following assessment of risk should only be considered valid for 6 months after the date of this report. If there is a significant change to this young person's clinical presentation, or family and educational/vocational characteristics within 6 months of this report, then this assessment of risk should also be considered invalid.

[28] It is also noteworthy that none of A.B.W.'s criminal charges at the time were taken into account in the Risk Assessment Report as they had not yet been adjudicated.

[29] It would seem to me that including the October 6, 2022, convictions for the offences, as well as the present allegations, would likely lean towards an increased risk above the moderate level for A.B.W. to commit future acts of violence.

[30] As I stated in para. 43 of ***A.B.W.***, referencing the decision of ***R.*** v. ***K.F.***, [2021] O.J. No. 4546 (O.N.C.J.):

> 43 The Court considers key observations with respect to the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"), on bail starting at paras. 37 to 39:
>
> > 37 The *YCJA* fundamentally modifies the provisions for judicial interim release applicable to adults as a presumption in favour of release is much stronger. Further, the Supreme Court of Canada in *R. v. D.B.*, [2008] 2 S.C.R. 3, recognized a diminished moral blameworthiness of young persons is a principle of fundamental justice given their level of immaturity, lack of experience and sophistication and diminished judgment making capabilities to appreciate the significance of poor decisions.
> >
> > 38 The preamble to the *YCJA* states that Canadian society should have a youth criminal justice system that "reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-viole[n]t young persons". "Further, the codified Declaration of Principles contained in s. 3 of the *YCJA* emphasize the promotion of rehabilitation and reintegration of young persons".
> >
> > 39 Young persons are entitled to enhanced procedural safeguards which prescribe that the onus for establishing that bail should be denied rests with the Crown. There is no reverse onus provision which establishes a presumption in favour of detention. Additionally, the gateway for detention is very narrow as are the grounds for detention. There is a prohibition against detention as a "substitute for appropriate child protection, mental health or other social measures", a requirement further to seriously consider the availability of a responsible person as an alternative to detention as well as a bail de novo procedure before a Provincial Court Youth Judge prior to initiating a bail review at the Superior Court level.

[31] I am aware from both the bail decision and the sentencing hearing of A.B.W., that the s. 264.1(1)(a) offence currently before the Court takes place in a context that increases the seriousness of this alleged offence. The assault for which A.B.W. was sentenced, in which D.W. was a victim, as well as two other victims from a separate incident that were rolled into the assault count, included the following facts:

> A.B.W. was at the skate park in Whitehorse on August 14, 2021. In the course of a dispute with D.W. that arose when A.B.W. took D.W.'s skateboard and would not return it, A.B.W. pulled out what was stated to be a black handgun, and pointed it at D.W.'s head from about two feet away. He threatened to shoot D.W. in the head and kill him. D.W. said he believed the handgun was real, and he believed that A.B.W.'s threat to kill him was real.

[32] I appreciate that there was no evidence provided by the RCMP following any investigation that an actual handgun was used. That does not meant that is was not. We simply do not know.

[33] So, while on their own the present allegations do not appear to be particularly serious or aggravating, in the context of the previous assault A.B.W. committed against D.W., the threat allegations are considerably heightened.

[34] I have heard today from D.W.'s mother as to the impact that the earlier offense, and now that these allegations have had, appreciating that they remain as allegations only, on D.W. and his family. These impacts are not to be understated. I have no problem referring to the impact on D.W. from the s. 266 offence for which A.B.W. was convicted. The present allegations, are they to be proven, simply magnify the extent of that impact.

[35] As a parent myself, I can appreciate what a parent goes through when they fear for the physical and mental health of their child. Again, this cannot be understated. Sometimes youth do not appreciate the impact of their actions. It is a very real factor.

[36] I have heard submissions on the plan to have A.B.W. released to live with his grandmother in the community of Watson Lake, as preferential to him being released to live with his mother in Whitehorse. At first instance, this seemed counterintuitive to me as there are fewer structural supports In Watson Lake as compared to Whitehorse. However, upon further reflection it seems to me that this is the only plan that can work, because of the need to separate A.B.W. from D.W. and others.

[37] A.B.W. has greater family support in Watson Lake, and he would be separated from his negative peer associations in Whitehorse, as well as from D.W., who is the victim of the prior s. 266 offence, as well as the alleged victim of the current s. 264.1(1)(a) offence, and from certain unspecified young persons who I have been told are in some conflict with A.B.W. He wants to participate in recreational activities, such as skiing (although the ski hill is not yet open due to lack of snow) and hockey, which is at least available on a drop-in basis. He wants to spend time with his family members and pro-social friends he has in Watson Lake.

[38] The largest downside to this plan is that while A.B.W. has been able to attend at the YAC to pursue his education in Whitehorse, there is no such assisted educational plan for him to follow in Watson Lake that has been established or put before me. That is not to say that one cannot be arranged. Currently, the proposal is that he continue his educational pursuits through remote learning, something that, frankly, and in particular

for a teenager, can be quite difficult. Subsequent to the bail hearing I received information that A.B.W. is scheduled to attend an educational psych assessment on January 10. This assessment can be completed if A.B.W. continues to be in custody or through the Youth Achievement Centre if he is released to reside in Whitehorse. It cannot be completed if A.B.W. is in Watson Lake.

[39] A.B.W.'s counsel has advised me that A.B.W. is prepared to consent to his remand in custody until this assessment is completed, after which he would go directly to Watson Lake. This is of some assistance to me as, in my opinion, any release of A.B.W. into the Whitehorse community would increase the risk.

[40] I have considerable concern about A.B.W.'s motivation and ability to comply with court ordered conditions. His track record to date is not impressive.

[41] He is, however, only 14 years old with one set of prior convictions, and the allegations here, while serious, in particular given the past history with D.W., are not so egregious as to, of necessity, warrant the further detention of A.B.W.

[42] I find that the plan for A.B.W. to reside in Watson Lake appears to be the best that can be put in place at the moment, with an exception to allow for the psych/educational assessment to take place.

[43] A.B.W. will therefore be released on the following terms:

1. You must not communicate, directly or indirectly, with D.W., P.W., G.W. and J.W.;

2. You are not to have any contact or communication with specific individuals as identified to you in writing by your Youth Probation Officer;

3. You must not go to or enter any known place of residence, employment, or education of D.W., P.W., G.W. or J.W.;

4. You must reside with your grandmother, N.D., at her residence at [redated], abide by the rules of the residence and not change that residence without the prior written permission of your Youth Probation Officer;

5. While residing in [redated], you must abide by a curfew by being inside your residence between 6:00 p.m. and 7:00 a.m. daily, except with the prior written permission of your Youth Probation Officer or except in the actual presence of N.D. or another responsible adult approved in advance by your Youth Probation Officer. You are to answer the door or the telephone within reasonable hours to ensure that you are in compliance with this condition;

6. You must report to a Youth Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by the Youth Probation Officer.

7. You will be released into the custody of your grandmother, N.D., and travel with her directly to [redacted], following the completion of the Educational Psychiatric Assessment on January 11, 2023, or as soon thereafter as M.D. arrives at the Young Offenders Facility to take you into her care;

8. You must not possess or consume alcohol and/or illegal drugs that have not been prescribed for you by a medical doctor;

9. You must not possess any firearms, ammunition, explosive substance, or any weapon as defined by the *Criminal Code*;

10. You must actively participate in educational activities either in person or remotely as directed by your Youth Probation Officer. You are to provide consents to release information to your Youth Probation Officer regarding your participation in educational activities you have been directed to do; and

11. You are not to attend within 50 kilometres of the City of Whitehorse, Yukon, except as is necessary for the purposes of court or otherwise without prior written permission of your Youth Probation Officer. At all times when you are to attend in Whitehorse for the purposes of court,

you are to advise your Youth Probation Officer of the date and time when you are arriving and leaving. The Youth Probation Officer is authorized to provide G.W. and J.W. information with respect to the dates and times you are to be in Whitehorse.

_____
COZENS C.J.T.C.