IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

P.L.N.B.

REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT D. GORIN

Heard at:	Yellowknife, Northwest Territories
Date:	November 5, 19, 26, 2007
Date of Decision:	January 28, 2008
Counsel for the Crown:	J. Noseworthy
Counsel for the Accused:	J. Brydon

(Charged under s. 267(a) of the *Criminal Code*)

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Introduction

[1] The young person, P.L.N.B, stands charged that he:

> "On or about the 19th day of September, 2007 at or near Yellowknife in the Northwest Territories did in committing an assault on M.M. threaten to use a weapon to wit a knife contrary to section 267(a) of the *Criminal Code*."

[2] Through his counsel the young person has applied for an order granting a judicial stay of proceedings. He makes the application the basis that the Crown was required to consult with him either personally or through his counsel prior to determining that it would not offer him the option of dealing with the matter through alternative measures and did not do so.

The Facts

[3] No evidence was called in support of this application for a judicial stay. However, the facts do not appear to be in issue. Both counsel have provided statements of facts with their written submissions which are in general agreement. Much of what is said in

the statements of facts is corroborated by the court record indicated in the endorsements on the information.

[4] I am prepared to proceed on the basis of the following facts:

1) The within charge was laid on October 24, 2007.

2) The matter first came to court on November 5th at which time it was adjourned to November 19th to allow the Crown time to consider whether it wished to permit the young person to deal with the matter by means of alternative measures.

3) On November 19th the matter was again adjourned to November 26th to allow the Crown more time for further consideration of the same issue. Defence counsel provided his view that the young person was entitled to participate in the determination of alternative measures.

4) On Saturday, November 25th the Crown advised defence counsel by email that it would not "divert" the young person.

5) On November 26th the Crown advised the Court that the prosecution would proceed and the matter would not be dealt with by way of alternative measures. At that time counsel for the applicant applied for a judicial stay of proceedings on the basis that the provisions of the *Youth Criminal Justice Act* require the Crown to consult with the young person or his counsel prior to a determination on diversion being made and that no such consultation had occurred. I then adjourned the matter for written submissions and argument which I have since received and heard.

[5] To summarize the facts, the matter was adjourned twice at the request of the Crown in order to determine whether or not it was prepared to deal with the matter by means of alternative measures. The Crown ultimately chose not to "divert" the young person. The young person and his counsel did not participate in the determination of whether the young person would be offered the option of dealing with the matter through alternative measures.

Issues

[6] The young person, through his counsel, takes the position that in determining whether or not this court should grant a judicial stay of proceedings, the issue which must first be decided is whether the provisions of the *Youth Criminal Justice Act* require that the Crown consult with the young person or his counsel prior to making a determination on alternative measures and whether the young person has a right to be heard by the Crown on the issue.

[7] In my view, the question of whether or not the Crown is required to consult with a young person or his counsel is part of the larger question of whether or not a young person has a right to be heard by the Crown prior to the Crown determining whether or not to offer alternative measures as an option.

The Positions of the Parties

The Applicant's Position

[8] Mr. Brydon, on behalf of the applicant, argues that extrajudicial sanctions, including alternative measures, are an important component of the *Youth Criminal Justice Act*. Section 4 the *Youth Criminal Justice Act* contains the declaration of the principles to be applied in applying extrajudicial measures. Defence counsel points out that subsection (d) of section 4 provides:

(d) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extra judicial measures is consistent with the principles set out in this section, nothing in this *Act* precludes their use in respect of a young person who;

(i) has previously been dealt with by the use of extra judicial measures, or

(ii) has previously been found guilty of an offence.…

[9] Defence counsel submits that it is difficult to conceive how a determination of whether the prerequisites set out in subsection 4(d) can be fully canvassed without the input of the young person or of persons acting on his behalf. He also points out that section 25 of the *Youth Criminal Justice Act* deals with a young person's right to counsel and that subsection (1) of section 25 states:

25(1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing proceedings against a young person under this *Act,* to use an extrajudicial sanction to deal with the young person.

(Emphasis mine.)

[10] Defence Counsel is certainly correct when he states that a young person has the right to counsel at any stage of the proceedings. The subsection clearly states that the accused has the right to retain and instruct counsel and to exercise that right before and during any consideration of whether, instead of starting or continuing proceedings

against a young person under the *Act*, to use an extrajudicial sanction to deal with the young person.

[11] Defence Counsel refers to the decision of Judge S. Whelan, P.C.J. of the Saskatchewan Youth Court in *R. v. K.P.A.* [2004] S.J. No. 47 (Sask. Youth Ct.). In that case, the young person had applied for the reinstatement of the community supervision portion of his sentence, pursuant to section 103 of the *Act*. He had been released on the supervision portion of his sentence and in keeping with the statute, the terms of that supervision had been set by his youth worker acting on behalf of the provincial director. However, the terms were set without the young person being advised of his right to counsel and, as a consequence, without the presence of counsel. At paragraph 22 of the decision, Judge Whelan states:

> ……. Section 25(1) of the *Youth Criminal Justice Act* makes clear that the young person is entitled to representation at 'any stage of proceedings'. In my view the term "at any stage of proceedings" is very broad and includes the point at which a decision is made which significantly affects the liberty and security of the young person. It includes a decision to set conditions for community supervision and a decision to review the community supervision and possibly change those conditions or remand the young person for review by a court. These decisions have the potential of considerably impacting upon the physical and psychological liberty and security of a young person. They can affect the conditions under which a young person remains in the community for a considerable period of time in the event of an alleged breach of those conditions, whether he/she is returned to custody.

[12] At paragraph 24 she further states:

> In my view the setting of discretionary conditions prior to release into the community is a 'stage of proceedings' within the meaning of s. 25(1).

> Pursuant to s. 97(2) the provincial director may set conditions 'that support and address the needs of the young person, promote the reintegration of the young person into the community and offer adequate protection to the public from the risk that the young person might otherwise present'. In keeping with this guideline, conditions affecting: residence, curfew, treatment, education and abstention regarding drugs, may be imposed. Consequently the right to be heard and represented by counsel has application at this stage. It is elemental to fundamental justice at this stage as well that the decisions pursuant to s. 97(2) be made by an impartial arbiter. It is this court's understanding that this decision-making has been delegated in Saskatchewan by the provincial director to the youth worker assigned to work closely with the young person. Whether or not the provincial director is impartial may depend upon the circumstances of the case. However, the role of the provincial director and the functions assigned to the person who sets the conditions pursuant to s. 97(2) may be determinative of this issue.
>
> (Emphasis mine.)

[13] I find it appropriate to note that the court in *K.P.A.* correctly distinguished between the right to be heard and the right to be represented by counsel. The court stated that both rights are present when the provincial director is in the process of determining the conditions for supervision under a custody and supervision order.

[14] Defence counsel argues that although the decision of the court in *K.P.A*. involved the determination of the terms supervision in a custody and supervision order, its facts, reasoning and conclusion are directly analogous to the present case. He argues that this is so since, as the court in *K.P.A* held, "These decisions have the potential for considerable impact upon the physical and psychological liberty and security of a young person."

[15] In his written submissions defence counsel states: “In the instant case, the impact is whether the Young Person will have to suffer a trial, whether he will potentially accumulate a criminal record, whether he will potentially suffer imprisonment or, in any event, have his liberties restricted by court order”.

[16] One might further argue that the facts and issues in K.P.A. and the present matter are also analogous in the following sense. Both involve the exercise of the right to counsel and the right to be heard in relation to decisions to be made by the executive branch of government and not the judiciary.

[17] Although not expressly stated, it seems implicit in the submissions of the Applicant that the real question I must determine is as follows:

> *Does the right to retain and instruct counsel without delay, and to exercise that right personally, during the Crown’s consideration of whether to offer alternative measures require that the young person be afforded the opportunity to be heard?*

[18] If that is his position then I agree.

[19] For the reasons already set out, the Applicant argues that the rights set out in subsection 25(1) necessarily provide a young person the right to be personally involved, whether through himself or his counsel, in the Crown’s determination of whether or not it should attempt to deal with the matter through alternative measures. His fundamental argument is that because a prosecution has the potential of having considerable impact upon the physical and psychological security of a young person, the right to counsel necessarily includes the right to be heard.

The Respondent’s Position

[20] Mr. Noseworthy on behalf of the Crown points out that subsection 11(1) of the now repealed *Young Offenders Act,* contained a provision very similar to that presently set out in section 25(1) of the *Youth Criminal Justice Ac*t and has previously been considered in a number of cases. Subsection 11(1) of the *Young Offenders Act* stated:

> A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing proceedings against a young person under this *Act*, to use alternative measures to deal with the young person.
>
> (Emphasis mine.)

[21] The only difference between the two subsections is that the words "alternative measures" were used in the repealed subsection rather than the words "an extrajudicial sanction".

[22] In *R. v. W.(T.), (*1986) 25 C.C.C. (3d) 89 (Sask. Q.B.) it was held that subsection 11(1) of the *Young Offenders Act* simply provided that a young person should have the benefit of counsel, if desired, when considering whether or not to accept responsibility for an act or omission that forms the basis of the offence, which is a prerequisite to the employment of alternative measures, and secondly, in deciding whether or not to refuse alternative measures. The court went on to say that when the Crown is considering alternative measures, the young person is not entitled to a hearing and an opportunity to participate in and be heard in respect of the decision.

[23] Crown counsel submits further that to impose the requirements suggested by the Applicant would fundamentally alter the historical prerogative of the Attorney General and that if Parliament had intended to so alter the common law it would have done this clearly and directly.

[24] Crown counsel fairly concedes that in *R. v. J.B.* (1985) 20 C.C.C. (3d) 27 (B.C. Prov Court) it was held that the Crown may be required to consult a young person in the decision as to whether or not to divert. However, he also submits that *W.(T.)* is a more recent decision of higher authority and more persuasive in its reasoning.

[25] Crown counsel states that it is important to note the clear difference between the wording now used in subsection 3(1)(d)(i) of the general "Declaration of Principle" in the *Youth Criminal Justice Act* and the wording of subsection 3(1)(e) of the *Young Offenders Act.*

[26] Subsection 3(1)(e) of the *Young Offenders Act* stated:

> Young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms* or in the *Canadian Bill of Rights*, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;
>
> (Emphasis mine).

[27] Subsection 3(1)(d)(i) of the *Youth Criminal Justice Act* currently states:

> (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 leads to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(Emphasis mine).

[28] The Crown submits that based on the wording of subsection 3(1)(d)(i) it is clear that Parliament intended to codify the principles set out in such cases *R. v. W.(T.),* supra. He submits that subsection 3(1)(d)(i) provides that a young person does not have a right to be heard in relation to the decision to prosecute or in the Crown's consideration of whether to offer alternative measures. The decision is exclusively a matter of prosecutorial discretion.

Conclusion

[29] In my view the wording now contained in subsection 3(1)(d)(i) of the *Youth Criminal Justice Act* is dispositive. I agree with the Crown that it is abundantly clear that in enacting the subsection Parliament intended to provide that a young person does not have a right to be heard in relation to the Crown's decision on whether or not to prosecute. The decision on whether or not to prosecute covers a decision on whether or not to attempt alternative measures either before or after the initial charge has been laid. Consequently, the Crown need not consult with the young person or his counsel when deciding whether or not to offer alternative measures.

[30] The facts of *K.P.A.* are quite distinguishable. The wording of subsection 3(1)(d)(i) provides that there is a right to be heard during the provincial director's determination of the terms and conditions to be imposed in the supervisory portion of a custody and supervision order. It also clearly provides that there is no such right during the determination of whether or not to prosecute.

[31] However, while there is no right to be heard during the determination of whether or not to prosecute, the right to retain and instruct counsel certainly does exist. Should

the Crown determine that alternative measures are appropriate, the young person has the right to consult counsel on whether or not that option should be pursued. For example, it may be that the young person maintains that he bears no responsibility for the offence alleged. Under such circumstances, diversion should clearly not be pursued further by the young person or by the Crown.

[32] On the other hand, should the Crown determine that alternative measures are not appropriate, it remains completely open to the young person or his counsel to ask the Crown to reconsider its decision and to provide facts and submissions to the Crown on why it should do so. Moreover, there is no reason why the young person or his counsel could not do so in the present case.

[33] The application for a judicial stay of proceedings is denied.

[34] I thank counsel for their capable submissions and assistance in this matter.

Robert D. Gorin
T.C.J.

Dated at Yellowknife in the Northwest Territories
this 28th day of January, 2008.