Date: 2012 11 30
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Y-2-YO-2012-000092

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

J.S.

REASONS FOR DECISION

of the

HONOURABLE CHIEF JUDGE ROBERT D. GORIN

Heard at:	Yellowknife, Northwest Territories November 23, 2012
Reasons Filed:	November 30, 2012
Counsel for the Crown:	Danielle Vaillancourt
Counsel for the Accused:	Caroline Wawzonek

[Ruling on Application for Review Pursuant to Sections 103 & 109 *Youth Criminal Justice Act*]

(Charged under sections 145(1)(A), 145(5) x 3, 145(5.1), 266, 334(B) of the *Criminal Code* and section 137 of the *Youth Criminal Justice Act*)

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BETWEEN:

HER MAJESTY THE QUEEN

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A. Introduction

[1] J.S., a 17 year old young person, admits having breached "community supervision" conditions of a 120-day custody and supervision order that had been previously imposed on him. It is my task to conduct a review and determine whether or not he should be allowed to serve the remainder of his youth sentence in the community or to order that he serve all or part of the remaining sentence in custody.

[2] The Crown asks that his remaining sentence be converted to custody. J.S., through his counsel, asks that he remain under community supervision with an additional condition requiring that he report to court for the remainder of his sentence.

B. Analysis

Legal Requirements

[3] The first matter that requires determination is the legal requirements for making the orders sought by both counsel.

[4] The 120-day custody and supervision order, to which J.S. is subject, is the result of four consecutive 30-day custody and supervision orders imposed on him at the same sentencing hearing. For reasons that will become apparent, it is important to note that all four of the custody and supervision orders were imposed under s. 42(2)(n) of the *Youth Criminal Justice Act* ("*YCJA*"). The subsection provides:

> (2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, the court shall impose a sanction set out in paragraph (q) or subparagraph (r)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:
>
> . . .
>
> (n) make a custody and supervision order with respect to the young person, ordering that a period be served in custody and that a second period - which is one half as long as the first - be served, subject to sections 97 (conditions to be included) and 98 (continuation of custody), under supervision in the community subject to conditions, the total of the periods not to exceed two years from the date of the coming into force of the order or, if the young person is found guilty of an offence for which the punishment provided by the Criminal Code or any other Act of Parliament is imprisonment for life, three years from the date of coming into force of the order;

[5] There are two sections of the *YCJA* which deal with the review of a sentence by a youth justice court, ss.103 and 109.

[6] Section 103, states:

> 103. (1) When the case of a young person is referred to the youth justice court under section 108 (review by provincial director), the provincial director shall, without delay, cause the young person to be brought before the youth justice

court, and the youth justice court shall, after giving the young person an opportunity to be heard,

> (a) if the court is not satisfied on reasonable grounds that the young person has breached or was about to breach one of the conditions under which he or she was being supervised in the community, order that the young person continue to serve a portion of his or her youth sentence in the community, on the same or different conditions; or
>
> (b) if the court is satisfied on reasonable grounds that the young person has breached or was about to breach one of the conditions under which he or she was being supervised in the community, make an order under subsection (2).

(2) On completion of a review under subsection (1), the youth justice court

> (a) shall order that the young person continue to serve the remainder of the youth sentence the young person is then serving in the community, and when the court does so, the court may vary the existing conditions or impose new conditions; or
>
> (b) shall, despite paragraph 42(2)(n) (custody and supervision order), order that the young person remain in custody for a period that does not exceed the remainder of the youth sentence the young person is then serving, if the youth justice court is satisfied that the breach of the conditions was serious.

(3) Subsections 109(4) to (8) apply, with any modifications that the circumstances require, in respect of a review under this section.

[7] Section 109 provides:

109. (1) If the case of a young person is referred to the youth justice court under section 108, the provincial director shall, without delay, cause the young person to be brought before the youth justice court, and the youth justice court shall, after giving the young person an opportunity to be heard,

> (a) if the court is not satisfied on reasonable grounds that the young person has breached or was about to breach a condition of the conditional supervision, cancel the suspension of the conditional supervision; or
>
> (b) if the court is satisfied on reasonable grounds that the young person has breached or was about to breach a condition of the conditional supervision, review the decision of the provincial director to suspend the conditional supervision and make an order under subsection (2).

(2) On completion of a review under subsection (1), the youth justice court shall order

(a) the cancellation of the suspension of the conditional supervision, and when the court does so, the court may vary the conditions of the conditional supervision or impose new conditions;

(b) in a case other than a deferred custody and supervision order made under paragraph 42(2)(p), the continuation of the suspension of the conditional supervision for any period of time, not to exceed the remainder of the youth sentence the young person is then serving, that the court considers appropriate, and when the court does so, the court shall order that the young person remain in custody; or

(c) in the case of a deferred custody and supervision order made under paragraph 42(2)(p), that the young person serve the remainder of the order as if it were a custody and supervision order under paragraph 42(2)(n).

(3) After a court has made a direction under paragraph (2)(c), the provisions of this Act applicable to orders under paragraph 42(2)(n) apply in respect of the deferred custody and supervision order.

(4) In making its decision under subsection (2), the court shall consider the length of time the young person has been subject to the order, whether the young person has previously contravened it, and the nature of the contravention, if any.

(5) When a youth justice court makes an order under subsection (2), it shall state its reasons for the order in the record of the case and shall give, or cause to be given, to the young person in respect of whom the order was made, the counsel and a parent of the young person, the Attorney General and the provincial director,

(a) a copy of the order; and

(b) on request, a transcript or copy of the reasons for the order.

(6) For the purposes of a review under subsection (1), the youth justice court shall require the provincial director to cause to be prepared, and to submit to the youth justice court, a report setting out any information of which the provincial director is aware that may be of assistance to the court.

(7) Subsections 99(2) to (7) (provisions respecting reports and notice) and 105(6) (report for the purpose of setting conditions) apply, with any modifications that the circumstances require, in respect of a review under this section.

(8) Section 101 (review of youth justice court decision) applies, with any modifications that the circumstances require, in respect of an order made under subsection (2).

[8] Where a sentence is breached, both ss. 103 and 109 allow the court to vary the terms of conditional supervision and also to convert community supervision to custody. Section 109 does not require the breach to be "serious" in order for the court to convert the remaining sentence to custody. Section 103 incorporates portions of s. 109 as applicable to the court's determination of the review. However, s. 103(2)(b), specifically requires that the court must be satisfied that the breach of the conditions be *serious* in order for all or part of the remaining supervisory portion of the sentence to be converted to custody.

[9] On their face, both ss. 103 and 109 appear to have equal applicability to a youth justice court review of a sentence previously imposed. However, the sections both reference another section, s. 108, which in turns refers to and is referred to by further sections and subsections. These provisions in turn refer to yet other provisions of the Act - and so on. As a consequence, the applicability and meaning of both ss. 103 and 109 are considerably more obscure than need be.

Applicability of Section 109 YCJA to Custody and Supervision Orders made under Section 42(2)(n)

[10] As stated, both ss. 103 and 109 refer to s. 108 as the trigger required to engage them. However the wording of s. 108 refers only to a review under s. 109. The section states:

> 108. Without delay after the remand to custody of a young person whose conditional supervision has been suspended under section 106, or without delay after being informed of the arrest of such a young person, the provincial director shall review the case and, within forty-eight hours, cancel the suspension of the conditional supervision or refer the case to the youth justice court for a review *under section 109*.
>
> (emphasis mine)

[11] Section 108 states that a suspension of conditional supervision mandates a referral for a review under s. 109. Also, according to s. 108, in order for s. 108 to apply the suspension of conditional supervision must be under s. 106. Section 106 in its turn requires that in order for the provincial director to suspend the conditional supervision, the order which lead to the conditional supervision must have been made under s. 105(1).

[12] Subsection 105(1) empowers a court to set the terms of a young person's supervision in cases of a breach where a youth sentence was previously imposed

under ss. 42(2)(o), (q) or (r). The subsection does not refer to breaches of custody and supervision orders imposed under s. 42(2)(n). The subsection does not, therefore refer to the type of breaches committed by J.S.

[13] In short, since s. 105(1) does not apply to the custody and supervision order imposed on J.S., neither does s. 109.

Applicability of Section 103 YCJA to Custody and Supervision Orders made under Section 42(2)(n)

[14] The next question to be determined is whether s. 103 is applicable to the present matter.

[15] Section 103 requires a referral pursuant to s. 108. Yet as previously noted, s. 108 specifically requires a suspension under s. 106 which in term requires that the conditional order to be suspended was imposed under s. 105. S. 105 requires the conditional order to have been imposed on particular sanctions none of which was imposed on Mr. Sabourin. Section 108 and therefore s. 103 would appear on their face to be inapplicable. Furthermore, s. 108 speaks only of a referral for a review under s. 109 and not s. 103.

[16] All of that said however, it would appear that the s. 103 is rendered applicable to breaches of custody and supervision orders imposed under s. 42(2)(n) by the section which immediately precedes it. Section 102 states:

> 102. (1) If the provincial director has reasonable grounds to believe that a young person has breached or is about to breach a condition to which he or she is subject under section 97 (conditions to be included in custody and supervision orders), the provincial director may, in writing,
>
> (a) permit the young person to continue to serve a portion of his or her youth sentence in the community, on the same or different conditions; or
>
> (b) if satisfied that the breach is a serious one that increases the risk to public safety, order that the young person be remanded to any youth custody facility that the provincial director considers appropriate until a review is conducted.
>
> (2) Sections 107 (apprehension) and 108 (review by provincial director) apply, with any modifications that the circumstances require, to an order under paragraph (1)(b).

[17] Section 102 refers to conditions imposed under s. 97. Section 97 in turn deals with conditions imposed on custody and supervision orders that have been made under s. 42(2)(n). Therefore s. 102 is applicable to the case before the court.

[18] However, s. 102, regrettably, does not specifically refer to a s. 103 review. Neither do any of the other provisions that I have covered. Nonetheless, s. 103 would appear to apply to the current circumstances by default. The applicability of s. 103 to breaches of community supervision conditions, in the case of sentences imposed under s. 42(2)(n) is made more apparent by the fact that s. 103 immediately follows the section that deals with breach of such orders.

[19] Also, while s. 108 itself contemplates only a review under s. 109, s. 102 renders s. 108 applicable "*with any modifications that the circumstances require".* Where s. 103 speaks of "a case referred to the youth justice court under section 108", it is referring to the provisions of s. 108 as they apply *mutatis mutandis*.

[20] Finally, it is noteworthy that s. 103(2)(b) provides that "*despite paragraph 42(2)(n)*" the court must order that the young person serve all or part of his remaining sentence in custody where there is a serious breach. Clearly, s. 103 contemplates a breach of a sentence made under s. 42(2)(n). (Having said all of this I would be remiss if I did not acknowledge that Ms. Carnogursky, the youth worker who originally filed the present application on behalf of the Director, has, in the Director's written application, correctly identified s. 103 as being the applicable section.)

Requirements of Subsection 103(2)

[21] Because, s. 103 and not s. 109 applies to these proceedings, it is clear that I must be satisfied that the breaches admitted by J.S. were "*serious*" before I can order that he remain in custody for all or part of the remainder of his merged custody and supervision order. However, while I have found that section 103 and not s. 109 applies, s. 103(3) provides, that ss. 109(4) to 8 apply, to this review *with any modifications that the circumstances require.* Subsection 109(4) in particular states:

> (4) In making its decision under subsection (2), the court shall consider the length of time the young person has been subject to the order, whether the young person has previously contravened it, and the nature of the contravention, if any.

[22] The applicability of s. 109(4) to these proceedings begs the question of how the factors referred to should be considered when determining the outcome of these proceedings. In particular, how do those factors impact on the applicability of ss. 103(2)(a) and (b), when determining the outcome of this review? Subsection 103(2) sets out the two options that the court has when it determines that a breach of conditions has occurred or was about to occur. Once again, the subsection states:

> (2) On completion of a review under subsection (1), the youth justice court
>
> (a) shall order that the young person continue to serve the remainder of the youth sentence the young person is then serving in the community, and when the court does so, the court may vary the existing conditions or impose new conditions; or
>
> (b) shall, despite paragraph 42(2)(n) (custody and supervision order), order that the young person remain in custody for a period that does not exceed the remainder of the youth sentence the young person is then serving, if the youth justice court is satisfied that the breach of the conditions was serious.

[23] As stated, this court may only order that J.S. remain in custody if it is satisfied that the breach of the conditions was "*serious*". However, if I am satisfied that the breach was serious, the word *"shall"* in s. 103(2)(b) means that I have no discretion. I must order that he remain in custody for at least part of the remainder of his sentence. I also note that s. 103(2)(b) refers to *"the breach"*. While it contemplates the possibility of more than one condition being breached at the same time, it clearly contemplates a single serious breach as opposed to a number of breaches that in their totality are serious.

[24] Obviously, the Crown argues that the requirements of s. 103(2)(b) are made out and the defence maintains that the they are not. In particular the Crown argues that the breaches were "serious". The defence argues that none of the breaches committed by the Mr. J.S. met that criterion.

The Application of Subsection 103(2) to the Facts of the Present Case

[25] J.S. was released from custody, on November 7th. I note that this was following a prior review that resulted in an order that he remain in custody for 14 days following a number of earlier breaches of the conditions of his community supervision. It is four of the additional conditions which were set by the Director under s. 97(2) of the Act that J.S. is said to have breached. Those conditions were that he:

- *report as directed by the youth worker;*
- *not consume and/or possess any alcohol and non-prescription drugs unless prescribed ..;*
- *attend counseling as directed by youth worker;*
- *reside at the Side Door (Youth Centre) and follow all lawful rules of the program; and*
- *obey a curfew and be at the Side Door Youth Center between the hours of 11:00 p.m. and 7:00 a.m.*

[26] On November 8th, it was determined that he did not stay at the Side Door Youth Centre, the night before. He attended his meeting with his counselor 20 minutes late and attended for only 10 minutes. He advised his youth worker that he was too busy to attend a full session and that it had been too cold for him to walk back to the Side Door, the day before.

[27] He was directed to attend his appointment on November 9th. He did so. It was also confirmed with the Side Door that he had resided there on the night of November 8th.

[28] However, he did not stay there on the night of the November 9th. On November 11th, he showed up at the Side Door in the early hours of the morning in an intoxicated state and was not allowed to stay there that evening. Technically speaking, I am unsure that I can find that he breached the actual residency term on those nights he spent away from the Side Door. However, the issue is rendered academic since the curfew term specifically required that he be at the Side Door during the hours of his curfew. It would, also, seem likely that he breached the requirement that he follow the rules of the Side Door when he attended there while intoxicated.

[29] I believe that I am dealing with a number of separate breaches. I will assume for the sake of argument that I can take into account the past breaches of his community supervision in determining the seriousness of each of the present breaches. Clearly the most serious of the breaches occurred when he showed up intoxicated at the Side Door in the early morning hours of November 11th. He was in breach of three of the conditions to which I have referred. However, on this occasion he was at least attempting to return to the Side Door for the night as required. It was a Saturday night – or rather a very early Sunday morning. He was out past his curfew. To be precise, he was, according to the report, approximately one hour and 13 minutes late. Although he was in an intoxicated state and not allowed to stay at the Side Door due to his condition, I am unable to determine his level of intoxication without knowing more about the indicia of intoxication that were displayed at the time.

[30] No definition for the word *"serious"*, as it is used in s. 103, is provided for in the Act. *The Canadian Oxford Dictionary* (2d ed.), provides the following applicable definition. "…2 important, demanding consideration (*this is a serious matter*). 3 not slight or negligible (*a serious injury; a serious offence*)..." The applicable synonyms set out in the *Concise Oxford Thesaurus* (3d ed.), are the words: *"important, significant, consequential, momentous, weighty, far-reaching, major, grave, urgent, pressing, crucial, critical, vital, life-and-death, high-priority*".

[31] I am of the view that the word *"serious"* used, in s. 103(2)(b) requires more than the breach simply being "not slight or negligible". Rather, I think that it requires that the breach be an "important" or "weighty" breach. After all, it is the interpretation of "serious" that will often make the difference between a young person remaining in the community or being ordered into custody.

[32] I note that the adjective "serious" in other instances where the word has been used in the *Criminal Code, YCJA*, or other statutes, has been statutorily defined and judicially interpreted to require much more than simply "not slight or negligible". Examples found in *the Canadian Dictionary of Canadian Law* (4th ed.), by Daphne A. Dukelow (Toronto: Thomson Carswell; 2011.), are referred to in *Appendix "A"* to this judgment. I note that in all of the examples I refer to, the interpretation of the word "serious" has penal consequences.

[33] I think that where the interpretation of the word "*serious*" can result in the subject being ordered into custody, a more restrictive definition with a higher threshold must apply. As pointed out by Ms. Wawzonek, the provisions of the *YCJA* make it abundantly clear the sanctions it allows are not to be used as a substitute to fill a gap in Social Services.

[34] The case for a more restrictive approach to the application of s. 103(2)(b) is to some extent bolstered by s. 98. Section 98 deals with an application to a youth justice court - prior to the expiry of the custodial portion of a custody and supervision – for an order that the young person remain in custody for all or part of the remaining sentence. Subsection 98(3) requires that for such an order to be made, the court must find that the young person is likely to commit a serious violent offence prior to the expiry of the sentence and that anything short of custody would not be adequate to prevent the commission of such a crime.

[35] The threshold that must be met in order for the supervisory portion of a custody and supervision order to be converted to custody is very high when the application is made during the custodial portion of the order. It follows that where the application is made during the supervisory portion of the order, the requirements should also be quite high – although perhaps not to the same degree.

[36] As well, to some extent s. 102(1)(b) may inform the meaning of the word *"serious"* as it is used in s. 103(2)(b). Subsection 102(1)(b) requires that in order for the director to remand a young person for a s. 103 review, *"the breach ..(be) a serious one that increases the risk to public safety*." I recognize that unlike s. 102(1)(b), s 103(2)(b) simply requires that the breach be *"serious"* without requiring that it increase the risk to public safety. Still, I think that one must, when determining the seriousness of a breach, consider whether or not it increases the risk to public

safety. Some breaches which appear on their face to be relatively minor may, when public safety is taken into account, be very serious. There will undoubtedly be cases where any breach of a no-alcohol condition will be "*serious*" for the purposes of a s. 103 review. There certainly are cases where the use of alcohol contributes strongly to a young person's criminal behaviour. That may well be the case with J.S. However, I have no real indication that this is so. I'm not the judge who first sentenced him. I'm not the judge who conducted his last review. There are no transcripts of those proceedings on the court file. There is no pre-sentence report. There are only the materials accompanying the present application, which as I have noted, are silent on the issue. I am not prepared to infer that the consumption of alcohol has been a substantial criminogenic factor in the case of J.S. simply because the no-alcohol condition was previously imposed.

[37] Were any of the breaches "serious"? I certainly find that some of them were neither slight nor negligible. As well, I certainly understand any frustration that may have been experienced by those in the youth justice system who have been involved in this matter. I also appreciate that they have, throughout, been attempting to do what they think is best for J.S.

[38] However, at the end of the day, after taking into account the nature of each breach, their repeated nature and proximity to each other as well as the fact that J.S. has previously been returned to custody and had been released for a very brief period of time when he committed his first breach, I am unable to conclude that any of the breaches were *"serious"* within the meaning of that word as it is used in s. 103(2)(b) of the *YCJA.* Therefore, I am unable to order that he remain in custody.

[39] As required by s. 103(2)(a), I order that he serve the remainder of the custody and supervision order in the community. Given the very short duration of his remaining period of community supervision, I am not going to vary any of the existing conditions or order any further conditions.

Robert D. Gorin
C.J.T.C.

Dated at Yellowknife, Northwest Territories
this 30th day of November, 2012.

Appendix "A"

D. Dukelow, *The Dictionary of Canadian Law*, 4th ed., (Toronto:Thompson Carswell, 2011.) *sub verbo* "serious bodily harm", "serious personal injury offence", "serious violent offence".

Serious Bodily Harm - *"*….[F]or the purposes of the section [264.1 of the Criminal Code, RSC 1985, c. C-46] is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant." *R. v. McCraw*, 66 CCC(3d) 517 at 523.

Serious Personal Injury Offence - "(a) An indictable offence, other than high treason, treason, first degree murder or second degree murder, involving (i) the use or attempted use of violence against another person; or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict sever psychological damage on another person, and for which the offender may be sentenced to imprisonment for 10 years or more; or (b) an offence or attempt to commit an offence mention in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault)." *Criminal Code* RSC 1985, C-46, s 752.

Serious Violent Offence - "1. An offence in the commission of which a young person causes or attempts to cause serious bodily harm. *Youth Criminal Justice Act*, SC 2002 C.1, s. 2.2. {t}he determination than an offence was a serious violent offence [pursuant to s. 2(1) of the *Youth Criminal Justice Act*, S.C. 2002, c.1] must be made if the facts, properly proven or agreed to, convince the youth justice court judge beyond a reasonable doubt that, in the determination of the offence, the young person caused physical or psychological injury or hurt and such injury or hurt interfered in a substantial way with the physical or psychological integrity, health or well-being of a victim; or, in the commission of the offence, the young person attempted to cause physical or psychological injury or hurt that, if caused, would reasonably be expected to have interfered in a substantial way with the physical or psychological integrity, health or well-being of a victim." *R. v. B.(K.G.)*, 2005 NBCA 96.

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