W A R NI N G

The court hearing this matter directs that the following notice be attached to the file:

This is a case under the *Youth Criminal Justice Act* and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

> **110. IDENTITY OF OFFENDER NOT TO BE PUBLISHED —**(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> . . .
>
> **111. IDENTITY OF VICTIM OR WITNESS NOT TO BE PUBLISHED —**(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.
>
> . . .
>
> **129. NO SUBSEQUENT DISCLOSURE —** No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the *Youth Criminal Justice Act,* which deals with the consequences of failure to comply with these provisions, states as follows:

> **138. OFFENCES —** Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published) . . . or section 129 (no subsequent disclosure) . . .
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (b) is guilty of an offence punishable on summary conviction.

2024 ONCJ 257 (CanLII)

ONTARIO COURT OF JUSTICE

CITATION: *R. v. T.M.*, 2024 ONCJ 257
DATE: 2024 05 29
COURT FILE No.: 998 23 Y4710326
Hamilton, Central West

2024 ONCJ 257 (CanLII)

B E T W E E N :

HIS MAJESTY THE KING

— AND —

T.M., a young person

Before Justice Amanda J. Camara
Heard on December 6, 2023 and April 19, 2024
Reasons for Judgment released on May 29, 2024

Ryan Dorsman .....counsel for the Crown
Dean D. Paquette & Lauren M. Wilhelm…….counsel for the accused T.M.

CAMARA J.:

[1] T.M. has brought an application to challenge the constitutionality of sections 42(2)(p) and 42(5)(a) of the *Youth Criminal Justice Act (YCJA*). The Crown seeks an order dismissing the application arguing that neither section infringes on T.M.'s *Charter* rights.

Factual Background

[2] The parties are in agreement about the factual basis of the application.

[3] On December 6, 2023, T.M. pled guilty to one count of dangerous driving causing the death of Jiale Tan. The facts in support of the guilty plea are that on June 19, 2023 at approximately 1:30 am, T.M.'s vehicle collided into the rear end of the vehicle driven by Mr. Tan as Mr. Tan entered the Lincoln Alexander Parkway. T.M. was driving 232 km/hr. The impact propelled Mr. Tan's vehicle forward. It rolled several times and caught fire. T.M.'s vehicle rolled onto its roof and slid approximately 340 meters[1] before coming to rest. T.M. ran from his vehicle to Mr. Tan's vehicle and was able to pull Mr. Tan out of his vehicle and away from the fire. Mr. Tan was taken to hospital but sadly he died of his injuries two days later. T.M. was charged with dangerous driving causing death and criminal negligence causing death.

[4] On June 19, 2023, T.M. was 16 years of age. He has no prior youth record. He

is of both Indigenous and black Canadian descent.

[5] The Crown will be seeking a custodial sentence. The defence would like to seek a deferred custody and supervision order (DCSO) pursuant to s. 42(2)(p) of the *YCJA*. However, s. 42(5)(a) of the *YCJA* makes this sentence unavailable for an offence in which serious bodily harm was attempted or caused and s. 42(2)(p) limits the duration of such an order to six months.

[6] In contrast, an adult found guilty of dangerous driving causing death would have a conditional sentence available as a sentencing option. These provisions give rise to a scenario in which a youth court justice sentencing a young person for an offence involving actual or attempted serious bodily harm has no sentencing option between custody and probation. T.M. argues that this is a scenario in which a young person is liable to a greater sentence than a similarly situated adult.

2024 ONCJ 257 (CanLII)

Issues

[7] The issues I am to determine are:

1. Does section 42(2)(p) and 42(5)(a) of the *YCJA* violate section 15 of the *Canadian Charter of Rights and Freedoms*?

2. Does section 42(2)(p) and 42(5)(a) of the *YCJA* violate section 7 of the *Canadian Charter of Rights and Freedoms*?

Youth Criminal Justice Act

[8] The *YCJA* creates a separate and unique criminal justice regime for young persons in Canada. As our Supreme Court has repeatedly explained, there is good reason for this:

> …[N]amely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a presumption of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment[2].

[1] The facts acknowledged during the plea were that T.M.'s vehicle slid 340 meters down the highway before it came to a stop. The applicant's factum notes T.M.'s vehicle slid 270 meters. I have used the distance that was acknowledged during the guilty plea.
[2] *R* v. *D.B.*, 2008 SCC 25 at para 41.

[9] The presumption of diminished moral blameworthiness is constitutionally recognized as a principle of fundamental justice[3].

[10] As the Court observed in *D.B.*, the *YCJA* is rife with sentencing provisions designed to protect young persons from custody, noting in particular that Section 38 and 29 of the YCJA also restrict when custody is available. Before sentencing a young person to custody, the court must:

- Believe that no reasonable alternative or combination of alternatives exists (s. 39(2))
- Know that the previous use of a non-custodial sentence does not preclude another non-custodial sentence (s. 39(4))
- Recognize that custody must not be a substitute for appropriate child protection, mental health or other social measures (s. 39(5))
- Consider a pre-sentence report and any sentencing proposal made by the young person or the counsel present (s. 39(6))
- State reasons why a non-custodial sentence is inadequate (s. 39(9))
- Require that the principles set out in section 3 of the *YCJA* govern sentencing (s. 38(2))
- Ensure that the sentence is not greater than might be afforded an adult under the same circumstances (s. 38(2)(a))
- Consider all available sanctions other than custody first (s. 38(2)(d); and
- Ensure that the sentence is the least restrictive one capable of holding the young person accountable, subject to proportionality concerns (s. 38(2)(e))[4].

[11] In the words of Bastarache J. in *R* v. *C.D.*: “the object and scheme of the *YCJA*, as well as Parliament’s intention in enacting it, all indicate that the *YCJA* was designed, in part, to reduce over-reliance on custodial sentences for young offenders”[5].

[12] In addition to the various statutory sentencing principles set out in s. 38 of the *YCJA*, s. 42 provides a wide range of sentencing options. The severity of options range from reprimand at the lowest end of the scale to custody at the highest. In order to impose a custodial sentence, at least one of the four enumerated preconditions must be met:

(a) The young person has committed a violent offence;

[3] *R* v. *D.B*. para 69
[4] *R* v. *D.B*. para 43.
[5] *R* v. *C.D.*, 2005 SCC 78 at para 40

2024 ONCJ 257 (CanLII)

> (b) The young person has previously been found guilty of an offence under section 137 of the *YCJA* in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the *Criminal Code* or section 137 of the *YCJA*, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;
>
> (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[6].

[13] Section 42(2)(p) permits a court to impose a deferred custody and supervision order (DCSO):

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

Section 42(5) only allows for such an order if:

> (a) The young person is found guilty of an offence other than one in the commission of which a young person causes or attempts to cause serious bodily harm; and
>
> (b) It is consistent with the purpose and principles set out in section 38 and the restrictions on custody set out in section 39.

A DCSO is a custodial sentence and a court can only impose it if the offender is eligible for custody.

[14] Both parties before me agree on all the purposes and principles that underpin the *YCJA*. Where the parties disagree is whether ss. 42(2)(p) and 42(5) discriminate against young persons. The applicant asserts that the impugned provisions perpetuate the very disadvantage that the Act and the rest of the sentencing scheme seeks to ameliorate.

[15] The respondent contends that when the DCSO provisions are viewed within the context of the *YCJA,* the applicant's argument fails.

Section 15 of the *Charter of Rights and Freedoms*

[6] *YCJA*, s 39(1)

2024 ONCJ 257 (CanLII)

[16] Section 15 of the *Charter* guarantees the right to equality. It provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[17] A law will violate the equality right, where it:

a) Creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and

b) Imposes a burden or denies a benefit in a matter that has the effect of reinforcing, perpetuating, or exacerbating disadvantage *R* v *C.P.,* 2021 SCC 19 at paras 56 and 141; *Fraser* v. *Canada (Attorney General)*, 2020 SCC 28, at para 27; *Kahkewistahaw First Nation* v. *Taypotat*, 2025 SCC 30, [2015] 2 S.C.R. 548, at paras 19-20[7].

[18] The parties both concede that the first branch is satisfied. Sections 42(2)(p) and 42(5)(a) of the *YCJA* treat young persons differently than the *Criminal Code* treats adults, and the distinction is based on age.

[19] Section 742.1 of the *Criminal Code* provides a conditional sentence as a sentencing option for adult offenders. A conditional sentence is the functional adult equivalent of a DCSO. Like a DCSO, it is a custodial sentence served in the community.

[20] While s. 742.1 contains its own internal limitations, they are less restrictive than those in the *YCJA* that limit the availability of a DCSO. In particular, there is no prohibition on the imposition of a conditional sentence where bodily harm (whether serious or otherwise) was attempted or caused. Moreover, a conditional sentence can be up to two-years less a day in length.

[21] The disparity between the DCSO provisions of the *YCJA* and s. 742.1 of the *Code* means that adult offenders convicted of offences involving real or attempted bodily harm, such as dangerous driving causing death, are eligible to receive a conditional sentence, while young persons are not.

[22] Are the *YCJA*'s deferred custody and supervision provisions discriminatory? Does this distinction deny young persons a benefit in a manner that reinforces, perpetuates or exacerbates their disadvantage[8]?

[23] In making this assessment the Supreme Court of Canada cautions against artificially cherry-picking individual features from a multifaceted legislative scheme in order to reveal inequities between fundamentally different systems[9]. The British Columbia Court of Appeal made similar comments warning against "artificially isolating a single provision from a comprehensive criminal justice regime intended to benefit youth

[7] *R* v. *Sharma*, 2022 SCC 39 at para 28.
[8] *R* v. *C.P*. at para 142.
[9] *R* v. *C.(T.L.)*, [1994] 2 S.C.R. 1012 and *R* v. *C.P*.at para 144

2024 ONCJ 257 (CanLII)

and thereby finding a constitutional violation. It is necessary to broadly compare the two sentencing regimes to determine whether, under the *YCJA* there is correspondence with the needs and circumstances of youth"[10].

[24] The analysis instead requires a "…contextual understanding of a claimant's place within a legislative scheme and society at large; the court must ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme"[11]. A contextual approach is particularly significant when analyzing the constitutionality of sentencing regimes[12].

Other Courts Consideration of the Constitutionality of the DCSO Provisions

[25] The British Columbia Court of Appeal ruled in *R* v. *J.S.M*. that section 42(2)(p) and 42(5)(a) were not discriminatory and did not violate section 15 of the *Charter*[13]. This decision is not binding on this court "unless it is persuaded that it should do so on its merits or for other independent reasons"[14]. Based on the analysis below, I find that *J.S.M*. is not persuasive.

[26] Firstly, the case was decided in 2005 and the court relied on the *Law* test[15], at the time the governing authority on the application of section 15[16]. Following *Law*, the Court in *J.S.M*. noted:

> …the most significant *Law* contextual factor in this case is the correspondence between the distinction and the claimant's characteristics or circumstances; if the Act responds to the vulnerability and needs of youth, there cannot be a finding of discrimination[17].

[27] The *Law* test has since been overtaken and reformulated to remove reference to the four contextual factors[18].

[28] Secondly, the court did not examine the effect of the impugned provisions in their analysis. Rather, the ultimate conclusion was that the differential treatment of young persons under ss. 42(2)(p) and 42(5)(a) of the *YCJA* and adults under s. 742.1 of the *Code* was not discriminatory was focused on the court's finding that the Act as a whole was responsive to the vulnerabilities of young persons. At paragraph 39 the court held:

> … based on a comparative analysis of the sentencing schemes of the Act and the Code as a whole, young persons have numerous advantages under the Act not available to adults under the Code. The scheme of the Act,

[10] *R* v. *J.S.M.*, 2005 BCCA 417 at 31.
[11] *R* v. *C.P*. para 145.
[12] *R* v. *Sharma*, 2022 SCJ No 39 at para 60.
[13] *R* v. *J.S.M*., 2005 BCCA 417.
[14] *R* v. *Wolf*, [1975] 2 S.C.R. 107; *R* v. *Sullivan*, 2022 SCC 19 at para 144; *Re Hansard Spruce Mills Ltd*,. [1954] 4 D.L.R. 590 at page 286.
[15] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
[16] *R* v. *J.S.M*. para 22.
[17] *R* v. *J.S.M*. para 28
[18] *R* v. *Kapp*., [2008] 2 S.C.R. 483 para 27-42.

2024 ONCJ 257 (CanLII)

> directed to the obvious needs of young persons in recognition of their greater dependency and reduced maturity, emphasizes their rehabilitation and reintegration into society. The sentencing provisions of the Act are different from the sentencing provisions for adults under the Code for good reason.

The Court concluded at para 42:

> It is abundantly clear that a reasonable young person in the position of the appellant would conclude the impugned provisions, when considered in the context of the Act as a whole, correspond to the actual needs and circumstances of young persons, the sentencing provisions of the Act are numerous and varied and permit sentencing judges to fashion sentences sensitive to the needs of the young persons appearing before them. While it is true that the sentencing options are not identical to those available to adults, as McLachlin C.J. for the majority noted in *Canadian Foundation*, supra, at para 51, equal treatment does not mean identical treatment.

[29] While it is entirely appropriate and necessary to consider the impugned provisions in the context of the legislative scheme of the *YCJA* rather than to simply stand them against their *Criminal Code* counterpart in a vacuum, individual provisions do not become constitutionally valid because the overall scheme in which they are situated is itself non-discriminatory. An individual provision in a well-intentioned piece of legislation can nonetheless create a discriminatory distinction.

[30] I agree with the applicant's submission that the court's analysis in *J.S.M*. focused on the many beneficial aspects of the *YCJA* and its sentencing regime without any real analysis of whether the impugned provisions themselves worked in tandem with the rest of the Act or counter to it. In so doing, the court failed to recognize their discriminatory effect.

[31] There are several cases from Ontario that have addressed the constitutionality of the DCSO provisions. These cases were all decided before the s. 42(9) serious violent offence designation was repealed by the *Safe Streets and Communities Act*[19]. At the same time that the serious violent offence designation was repealed, s. 42(5) was amended by replacing "serious violent offence" with "an offence… in the commission of which a young person causes or attempts to cause serious bodily harm". The discretionary serious violent offence designation was a pivotal factor in the decisions that found the DCSO provisions to be constitutional.

[32] In *R* v. *T.R*.[20], Justice Hawke found the DCSO provisions unconstitutional. In *T.R*., the accused pled guilty to assault cause bodily harm and acknowledged pushing the victim to the ground. While the victim was on the ground, the accused kicked her in the head and face and hit her with a rock on the forehead. The victim suffered a broken jaw and required two staples on her forehead. At the time of the plea, the court deemed the offence a serious violent offence making a DCSO unavailable. Justice Hawke agreed

[19] (S.C. 2012, c.1, s 174 in force October 23, 2012)
[20] [2005] O.J. No. 6179

2024 ONCJ 257 (CanLII)

with the defence argument that the DCSO provisions violated section 15 of the *Charter*. Her reasons make clear that the discretion to find a serious violent offence designation was not determinative on the availability of a DCSO sentence. Even if the SVO designation was not made, but the offence involved attempted or real bodily harm, a DCSO was unavailable as a sentencing option. Because there was no serious violent offence ineligibility that attached to the sentencing of an adult, like it did to a youth, the DCSO provisions were held to violate section 15 of the *Charter*.

[33] In R v. Z(M)[21], Justice McLeod held that the DCSO provisions were constitutionally valid. Justice McLeod's analysis preferred the reasoning in *R* v. *J.C.B*. and held:

> Probation is available to youths who have committed serious violent offences. Thus the choice for a judge sentencing a youth for a serious violent offence is only restricted to this extent – a judge cannot impose a DCSO – but can impose probation with equally as restrictive conditions.[22]

With the greatest of respect to Justice McLeod, I disagree with this analysis. Where a judge is faced with a situation in which alternatives to custody, including probation, have been rejected and the offence involved attempted or actual bodily harm, section 42(5)(a) leaves the youth court judge with no ability to give effect to section 39(2). A youth court judge has no alternative but to impose a custodial sentence whereas a similarly situated adult would have a conditional sentence as an available sentencing option.

[34] In *R* v. *J.C*.[23], the court held that the DCSO provisions violated section 15 of the *Charter*. The Crown filed an appeal challenging the constitutional ruling. Durno J. held that he lacked jurisdiction to hear the appeal because the Crown did not appeal the sentence imposed[24].

[35] In *R* v. *E.F*.[25], the court found the DCSO provisions constitutional. Justice MacLean's analysis focused on whether the court had discretion to make a section 42(9) serious violent offence designation even if the statutory definition was met. If the serious violent offence designation was not made, a DCSO was available as a sentencing option. The constitutional validity of the DCSO provisions hinged on the discretion of the court to make the serious violent offence designation.

[36] Since the serious violent offence designation provision was removed from the *YCJA*, I am unaware of any other Ontario court that has ruled on the constitutional validity of the DCSO provisions.

Sections 42(5)(a) and 42(2)(p) of the *Youth Criminal Justice Act*

[21] 2005 CarswellOnt 8447
[22] Z.(M.) para 49
[23] Unreported decision of Clement J.
[24] [2006] O.J. No. 81.
[25] [2007] O.J. No. 1000

2024 ONCJ 257 (CanLII)

[37] The issue before me is whether it is discriminatory that a young person cannot receive a DCSO when found guilty of an offence causing serious bodily harm while an adult can receive a CSO for the same offence.

[38] Starting with the provision of the *YCJA* that limits the availability of the DCSO, I find that the answer to this question is yes, section 42(5)(a) is discriminatory. Amongst the benefits of the *YCJA* are the statutory restrictions on custody in s. 39 and the dictate in s. 38(2) that a young person cannot receive a greater punishment than an adult convicted of the same offence committed in similar circumstances. An additional benefit of the *YCJA* is that there are a wide array of non-custodial options available under the Act, including a sentence of probation for a serious violent offence. These benefits illustrate how the impugned provisions perpetuate the very disadvantage that the Act and the rest of the sentencing scheme seeks to ameliorate. The impugned provision render these benefits unavailable.

[39] Both the *YCJA* and the *Criminal Code* provide for a wide array of sentencing options. However, even without statutory limitations on their use, not all sentencing options are practically available in all circumstances. In sentencing both adults and young persons, courts are required to impose a fit sentence that achieves the governing statutory and common law goals. To this end the *YCJA* enshrines a number of principles, including parity and proportionality. Like a conditional sentence under section 742.1 of the *Code*, a DCSO is a custodial sentence served in the community. When imposing a DCSO, the youth justice court may make an order for a youth to be placed in custody, then defer the custody portion and set conditions on which the youth is to be supervised in the community. A DCSO can only be imposed if the preconditions to the imposition of a custodial sentence under s. 39(1) of the *YCJA* are met[26].

[40] While it is true that meeting the criteria for a custodial sentence does not mean a custodial sentence must be imposed, there will be situations where a youth court justice concludes that a custodial sentence is required. In these circumstances, s. 39(2) requires the youth court justice to consider and reject all alternatives to custody that are reasonable in the circumstances before imposing real jail.

[41] However, where such a conclusion is made in the face of an offence involving attempted or actual serious bodily harm, s. 42(5)(a) leaves the Youth Court Justice with no ability to give meaning to s. 39(2) and leads to a scenario where the young person could receive a harsher punishment than a similarly situated adult offender notwithstanding the statutory prohibition against such a consequence in s. 38(2)(a).

[42] The Crown submits that a Youth Court Justice sentencing similarly situated young persons would be eminently capable of meeting the *YCJA* ameliorative sentencing objectives by crafting a restrictive probation order even after determining that the criteria for a custodial sentence has been met.

[43] With respect, I do not accept this submission for two reasons. The first is that probation is an alternative sentencing option for both adults and youths found guilty of an offence that caused serious bodily harm. But regardless of whether the individual being

[26] See *R* v. *H.A.M*., [2003] M.J. No. 147; *R* v. *C.D.J.,* [2005] A.J. No. 1190 (C.A.)

2024 ONCJ 257 (CanLII)

sentenced is a youth or adult, the sentencing judge must first consider the circumstances of the offence and the circumstances of the offender in arriving at a fit and appropriate penalty. And if the fit sentence, having considered all the sentencing provisions in the *YCJA* is a custodial sentence, the court is deprived of one important sentencing option – the DCSO – that would ensure all sentencing options other than a custodial sentence are considered.

[44] The calculus a sentencing judge is required to consider when assessing if a CSO is appropriate is highlighted by the Ontario Court of Appeal in *R* v. *Faroughi*[27]. The court delineated the two-step process a sentencing judge must engage when determining whether a conditional sentence is appropriate for an adult offender.

> First, the court must make a preliminary determination that neither probation nor a penitentiary term is appropriate: *Proulx*, at para 58; *R* v. *Scholz*, 2021 ONCA 506, 156 O.R. (3d) 561, at paras 26-27. Second, assuming the offender satisfies the other statutory prerequisites enumerated under s. 742.1 of the Code, the court must determine whether a conditional sentence is consistent with the fundamental purpose and principles of sentence: *Proulx*, at para. 60.

The process of sentencing a youth involves starting with the least restrictive sentencing option and considers whether that sanction would achieve the purpose of sentencing set out in section 38(1). If that sanction would not achieve the purpose of the sentence, the youth justice court moves up the scale of sentencing options. If and when the youth court justice considers probation and determines that probation would not achieve the purpose of sentencing, and a custodial sentence is available, the youth justice court cannot then impose a probation order as an alternative to custody. In other words, the impugned provisions prevent a youth court justice to give meaning to the other provisions of the *YCJA* and force the youth court justice to impose a sentence that runs contrary to the *YCJA*. Either the youth court justice will impose probation, having already determined that such a sentence would not achieve the purpose of sentencing as defined in s. 38(1), or the youth court justice will impose a custodial sentence in a circumstance where the *YCJA* was designed in part to reduce over-reliance on custodial sentences for young persons[28] and an adult in a similar circumstance can receive a conditional sentence[29].

[45] The 6-month limitation on a DCSO in s. 42(2)(p) similarly hamstrings a youth court justice who would otherwise impose such a sentence but concludes that a longer period of sentence is required to achieve the purpose of sentencing as defined in s. 38(1).

[46] I find that the distinction based on age created by ss. 42(5)(a) and 42(2)(p) of the *YCJA* does deny young persons a benefit in a manner that reinforces, perpetuates or exacerbates their disadvantage. Rather than working in tandem with the rest of the

---

[27] 2024 ONCA 178

[28] *R* v. *C.D*. 2005 SCC 78 at para 50.

[29] Examples of decisions of adults receiving CSO for dangerous driving causing death: *R* v. *Regier* [1998] O.J. No. 3133; *R* v. *Areco* [1999] O.J. No 4351; *R* v. *De Jesus*, [2000] O.J. No. 3055; *R* v. *Buchanan* [2002] O.J. No. 3115; *R* v. *Rodrigues*, [2007] O.J. No. 4157; *R* v. *Whone* [2007] O.J. 5416; *R* v. *Ryazanov* [2008] 92 O.R. (3d) 81; *R* v. *Manahan* [2010] O.J. no. 3614; *R* v. *Machado* [2011] O.J. No. 6452; *R* v. *Hutchinson* [2022] O.J. No. 2756; *R* v. *Linton* [2022] O.J. No. 2013.

2024 ONCJ 257 (CanLII)

sentencing scheme of the *YCJA* to address the disadvantage of young persons arising from their diminished moral blameworthiness, the impugned provisions work against it. They prevent youth court justices from giving meaning to the important ameliorative provisions and may result in sentences that actually violate them. This is not a situation where a side-by-side comparison of the DCSO provisions of the *YCJA* and the CSO provisions of the *Criminal Code* demonstrates a simple distinction, it is a situation where the distinction that arises between the two has the effect of denying young persons the benefit of a fit and appropriate sentence and thereby perpetuates the disadvantage occasioned by their age.

[47] I find that ss. 42(5)(a) and 42(2)(p) violates section 15 of the *Charter*.

Section 7 of the *Charter of Rights and Freedoms*

[48] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[49] The Applicant submits that the impugned provisions violate section 7 of the *Charter*. They argue that the impugned provisions deprive young persons of their liberty in a manner that does not accord with the fundamental principle of diminished moral blameworthiness recognized in *R* v. *D.B*.[30]

[50] The Respondent submits that the DCSO provisions do not violate the presumption of diminished moral blameworthiness because the provisions need to be considered within the context of the *YCJA* as a whole.

[51] The section 7 analysis begins by asking whether the impugned provisions fail to meet the requirement of the principle of fundamental justice that ensures the fair operation of the legal system[31]. There is no dispute between the parties that the provisions engage the liberty interest. The constitutionality of the impugned provisions hinges on whether this deprivation is in accordance with the principle of diminished moral blameworthiness. The principle of diminished moral blameworthiness provides that:

> …. Because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a presumption of diminished moral blameworthiness or culpability.[32]

These principles apply to young persons "throughout any proceedings against them, including during sentencing"[33].

[30] *R* v. *D.B*., 2008 SCC 25.
[31] *R* v. *Brown*, 2022 SCC 18 para 72.
[32] *R* v. *Brown* para 41.
[33] *R* v. *Brown* para 69

2024 ONCJ 257 (CanLII)

[52] By removing a DCSO as a sentencing option for a young person found guilty of an offence involving real or attempted serious bodily harm, section 42(5)(a) of the *YCJA* prevents a youth court justice from giving meaning to the principle of diminished moral blameworthiness. It does so by making the nature of the offence, rather than the age of the offender, the determining factor in how they should be sentenced.

[53] The Supreme Court of Canada explained in *R* v. *D.B*. how provisions which deny young persons a benefit based on their age infringe the principle of fundamental justice:

> No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences. But the onus provision in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that determines how he or she should be sentenced. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and despite their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitled them, including a youth sentence, the onus provisions infringe a principle of fundamental justice[34].

[54] As already discussed, in a scenario where a youth court justice determines an offence involving real or attempted serious bodily harm requires a custodial sentence, section 42(5)(a) leaves them with no option other than real jail despite the presumption of diminished moral blameworthiness. A young person is deprived of the benefit of a community based DCSO because of the age of the person not the offence committed.

[55] Additionally, as discussed under the analysis of section 15 of the *Charter*, ss. 42(5)(a) and 42(2)(p) negate a number of other statutory provisions of the *YCJA* that are aimed at giving meaning to the principle of diminished moral blameworthiness. By removing the option for, and restricting the length of a DCSO, a youth court justice is unable to give effect to the principals of restraint and ensure that young persons are not punished more severely than similarly situated adults.

[56] I find that ss. 42(5)(a) and 42(2)(p) does offend section 7 of the *Charter*.

Does section 1 of the *Charter* save the Legislation?

[57] Section 1 of the *Charter* requires the court to determine whether the constitutional infringement is “reasonably and demonstrably justified in a free and democratic society”. The onus is on the Crown, the party seeking to uphold the legislation. In this case the Crown has conceded that there is no section 1 argument for me to consider as they were given ample opportunity to argue this issue and declined to do so. That concession is well-founded.

[34] *R* v. *D.B*. para 76.

2024 ONCJ 257 (CanLII)

Remedy

[58] Having found that sections 42(5)(a) and 42(2)(p) violate both section 15 and section 7 of the *Charter of Rights and Freedoms*, and are not saved by section 1, I find those sections invalid[35].

Released: May 29, 2024

Signed: Justice Amanda J. Camara

2024 ONCJ 257 (CanLII)

[35] *R* v. *Lloyd*, 2016 SCC 13 at para 15-16.