NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

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YOUTH CRIMINAL JUSTICE ACT PROSECUTIONS -NUNN COMMISSION RECOMMENDATIONS

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE **"WORDS & PHRASES"** SECTION OF THIS PART OF THE MANUAL.

YOUTH CRIMINAL JUSTICE ACT PROSECUTIONS -NUNN COMMISSION RECOMMENDATIONS

The Report of the Nunn Commission of Inquiry, released on December 5, 2006, included three recommendations directly relating to the prosecution policies and practices of the Public Prosecution Service. The PPS accepts those recommendations and this Directive is part of the response of the PPS to those recommendations.

1. A Consistent Approach to Pre-Trial Detention.

The Nunn Commission of Inquiry made this Recommendation:

> The Public Prosecution Service should direct its Crown prosecutors across the province to take a common general approach to pre-trial detention for young persons under the *Youth Criminal Justice Act* and *Criminal Code*, by ensuring that its Crown prosecutors are familiar with and up-to-date in training in the relevant statutory provisions and recent developments in the law. The directive should recognize the flexibility required and the discretion of individual Crown prosecutors, along with the desirability of a common approach. [Recommendation 15]

This Recommendation acknowledges the fact that directives should not remove the flexibility that prosecutors must have in order to respond appropriately to the infinite variety of circumstances that may arise in particular cases. The Recommendation does, however, urge prosecutors to take a "common general approach to pre-trial detention" and that this should be achieved by ensuring that prosecutors are familiar with recent developments in the law and have training in that regard.

The PPS will continue to include young offender prosecutions as an important part of its training programs. Materials relevant to the prosecution of young offenders will continue to be distributed to all prosecutors through CLERC, and otherwise, as they become available. Crown Attorneys who appear in Youth Court, or who may appear in Youth Court, are obliged to have current knowledge of these materials.

In recent months, a number of judgments have emerged from the Youth Courts in Nova Scotia which are of particular assistance to Crown Attorneys appearing at bail hearings in Youth Court. In the case of R. v. M.T.S., the Honourable Judge James H. Burrill issued a comprehensive outline of how the courts and counsel should approach what he described as the "complex web of legislative provisions" which constitute the bail regime relating to young offenders. While this judgment and the approach described therein are not binding upon other courts, the analysis presented by Judge Burrill exemplifies the approach being taken by the courts in Nova Scotia.. The judgment touches upon many of the issues frequently encountered at a bail hearing in Youth Court and all prosecutors should be

familiar with this judgment. Unless a contradictory decision arises in the future or legislative change occurs, Crown Attorneys appearing at judicial interim release hearings should be guided by this judgment. This is a difficult judgment to summarize because, as noted by Judge Burrill, the legislation is complex and the components are interrelated like parts of a web. For convenience, the essential portions of this judgment are annexed to this Practice Memorandum.

Additional judgments from Youth Courts in Nova Scotia are being posted on CLERC, along with an outline of the presentation made by Crown Attorney Terry Nickerson at the October, 2006 PPS educational conference dealing with Youth Court prosecutions, including judicial interim release hearings. It is essential that Crown Attorneys who appear in Youth Court continue to be aware of all legislative change and any new case law or materials that affect their work in Youth Court.

As stated earlier, the PPS is committed to continued training of prosecutors in regard to Youth Court matters. Training programs, however, cannot be expected to anticipate every issue that prosecutors will encounter as they deal with fresh legislation. For that reason, prosecutors are strongly encouraged to consult with experienced counsel when an item of legislation appears to be ambiguous or there appears to a gap in the legislation. If there is no immediate consensus on the approach that should be taken, the matter should be brought to the attention of the appropriate Chief Crown Attorneys for direction.

2. Request a section 36 finding of guilt at the time of plea.

The Nunn Commission of Inquiry made this recommendation:

> The Public Prosecution Service should continue its practice to request that a presiding judge make a "finding of guilt" as required under section 36 of the *Youth Criminal Justice Act* at the time a young person pleads guilty, not at the time of sentencing. [Recommendation 17]

This Recommendation is self-explanatory. Requesting a s.36 finding of guilt at the time that a plea is entered will assist in establishing, as early as possible, a pattern of findings of guilt. This can become significant in the case of a young offender who is offending repeatedly, as it directly impacts the court's authority to consider detention before sentencing for such an offender- see section 39 (1)(c) of the *Y.C.J.A.*

Although a court may not accede to the request of the prosecutor to have the s.36 made at the time of sentence, and may even signal its intention to deny the request in advance, protection of the public must always be the paramount consideration for the prosecutor in such circumstances. As noted by Commissioner Nunn (at page 222 of the Report), "the arguments for making the finding of guilt at the time the plea is entered are overwhelmingly persuasive".

3. Request that evidence be heard re a "responsible person".

The Nunn Commission of Inquiry made this recommendation:

> The Public Prosecution Service should direct its Crown prosecutors across the province that, during a judicial interim release hearing for a young person for which a responsible person is proposed in lieu of pre-trial detention, they request that the judge hear evidence about whether the proposed person is willing and able to take care of and exercise control over the young person, in keeping with the requirements of section 31(1) of the *Youth Criminal Justice Act*.
>
> [Recommendation 16]

Section 31(1) of the *Y.C.J.A.* permits a young person to be placed into the care of a "responsible person" if, but for this section, the young person would be detained. If a prosecutor or court is contemplating the release of a young person into the care of a responsible person, the prosecutor should ensure that it is clear on the record that the criteria for detention have been met, but for this section.

Before embarking on proceedings under section 31, the prosecutor should make inquiries to satisfy himself/herself that any proposed responsible person is (a) fully aware of the obligations that pertain to a responsible person and is willing to assume those responsibilities, and (b) that the proposed responsible person is able to take care of the young person and exercise control over the young person. Ideally, this information should be obtained through a direct interview with the proposed responsible person. If that is not feasible, sufficient reliable and detailed information must be obtained through the police, defence counsel, or other sources.

Having been satisfied that there is indeed a suitable responsible person available, the prosecutor should then ensure that sufficient evidence is before the court, on the record, to enable the judge to make a finding that the proposed responsible person is willing and is able to meet the obligations outlined in the section. Again, this evidence would ideally emerge through examination and/or cross-examination of the proposed responsible person, on the witness stand.

In the context of judicial interim release hearings, "evidence" has the meaning assigned in section 518 (1) (e) of the *Criminal Code*: "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case". In view of this provision, it is not open to the prosecutor to insist that the proposed responsible person be called as a witness in every case, particularly when it would be inconvenient to the court to do so. Nevertheless, the prosecutor should do whatever is necessary to ensure that the court has sufficient credible or trustworthy evidence before it to permit a determination to be made as to whether or not the proposed responsible person meets the requirements of the section.

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Between:

Her Majesty the Queen

and

M.T.S.[1](a young person)

Restriction on publication: S.110(1) YCJA - 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.

Judge: **The Honourable Judge James H. Burrill**

Heard: **February 16, 2006 in Halifax, Nova Scotia**

Charges: **S. 334(b) CC x 8; 355(b) CC x 7; 145(5.1) CC x 2**

Counsel: **Gary Holt, Q.C., for the Crown; Kimberley McOnie, for the Defence**

BURRILL, J.P.C, (Orally):

[1] M.T.S. is a 13 year old young person before this Court, charged with 23 separate offences that are alleged to have taken place between June 6th of 2005 and February 9th of this year.

1. This uncertified report of the Judgment is intended for use within the PPS. An official transcript or published report of the Judgment should be obtained if other use is to occur.

The charges involve the theft of eight separate vehicles and the attempted theft of another vehicle. He's charged also with possession of stolen property, with stealing from vehicles, and he's charged with breach of undertaking given to a judge and a peace officer.

He had been released on bail on all charges before the Court except for two charges of breach of an undertaking given to a judge that are alleged to have occurred between February 8th and 9th of this year, and also two charges of vehicle theft and possession that were alleged to have occurred between the 24th day of January and the 26th day of January, 2006, but were first presented to this Court after his arrest. In respect of all other matters, he had been released on February 6th on the terms of an undertaking given to a judge.

On the new charges before the Court of theft and possession, the Crown has indicated that it is proceeding by way of indictment.

THE FACTS

[2] The facts alleged against M.T.S. are contained in eight separate Informations and can be summarized as follows.

[3] On June 6th, 2005, it is alleged that he stole a vehicle, that he stole from another vehicle, and that he was in possession of a stolen vehicle and property stolen from another. On that occasion, the police attempted to stop the motor vehicle that had been stolen. Other individuals fled from the vehicle after it stopped. The accused was found in the back seat of that vehicle, allegedly, and allegedly a statement was given that he had been the driver of the vehicle at some point.

[4] On that series of charges he was released on an undertaking that he gave to a peace officer with conditions only that he remain in the Province of Nova Scotia.

[5] On August 3rd, 2005, he was charged with theft and possession of a red Dodge truck. Authorities were ultimately summoned to the vicinity of that truck. The accused and others ran. The accused was caught, and a police dog tracked his scent back to the area of that vehicle.

[6] On that charge, the authorities released him on no conditions other than a summons that he appear before the Court.

[7] Those first two series of charges, were referred to the Restorative Justice program and only brought back before this Court recently.

[8] On December 14th, 2005, the accused was allegedly involved in stealing another motor vehicle and possession of that same vehicle. The allegations set forth by the Crown state that he, along with five others, popped the ignition from a 1993 Dodge Caravan, that at some point during the theft and possession of that vehicle it's alleged that the accused drove. Military police ultimately came upon that vehicle and attempted to stop it. Another individual was driving at the time who was ultimately charged with dangerous driving. This happened Shannon Park area. The accused, it is alleged, ultimately ran from that vehicle and was apprehended.

[9] It's noteworthy that, once again, the authorities responded to this particular circumstance by not releasing the accused on any conditions but simply releasing him on an appearance notice to appear in court at a later time.

[10] Less than a month later, on January 10th, 2006, it is alleged that he attempted to steal another motor vehicle. It is alleged that he was watched by a citizen who ultimately summoned the police to the scene and that this citizen saw the accused, with another individual, attempting to do something with a screwdriver and the ignition of that motor vehicle.

[11] The accused was apprehended and, despite the fact that the accused had been released on an undertaking given to a peace officer in June, the authorities responded once again by releasing that individual on a notice that required him only to appear in court. No conditions were imposed upon him at that time, at least according to the process contained in the files presented to this Court.

[12] Next in time is an information that charges that, between the 24th and 26th day of January, 2006, he stole two separate vehicles and possessed those same two vehicles, and on those charges bail is yet to have been determined. Those charges were first presented to this Court on Monday when I heard evidence at the bail hearing.

[13] Between February 1st and February 3rd, 2006, it is alleged that he stole two other vehicles and was in possession of two other vehicles. It is noteworthy that the allegations indicate that he was in the company of other individuals who, at a time, drove the motor vehicle and collided with a tow truck. It's not alleged that this accused was driving at that time. He was apprehended.

[14] It's also alleged that on February 5th he stole another vehicle; that he was pulled over as a passenger in that vehicle; that he had operated that vehicle on that particular day; that it was a Plymouth Acclaim; that the vehicle had been stopped and that the

police noticed right away that the ignition had been damaged. He was charged with breaching, as well, an undertaking given to a peace officer by operating the motor vehicle, and association with certain individuals.

[15] In respect of the allegations contained in that charge, the Crown provided information to this Court that he had been earlier released at sometime on an undertaking given to a peace officer that required him not to operate a motor vehicle and required him not to associate with certain individuals. A review of the documentation in the files does not indicate that that undertaking has been filed with the Court so I have no knowledge as to when that undertaking was issued if, in fact, it exists.

[16] On all those charges, he was released, as I said, on an undertaking given to a justice that had certain conditions contained in it: that he keep the peace and be of good behaviour; reside at a particular residence; not associate with K. M. and A. K. except as incidental contact in an education or treatment program or while at work. It required him as well to abide by a 7 p.m. to 7 a.m. curfew seven days a week except when in the company of a parent or guardian or an adult approved by a parent or guardian or dealing with a medical emergency.

[17] The allegations are that, after being released on that undertaking, he was, after school on February 8th and February 9th, seen on separate occasions in the company of K.M. and A. K., and it is alleged that that association was not contact that was incidental to his attendance at school but occurred after school on the roadway areas surrounding the school property.

THE ISSUE

[18] Those are the factual allegations. The Crown asks this Court to deny bail on the new charges and applies to revoke bail previously granted on the remainder of the charges. The defence asks this Court to consider the evidence that it called and release the accused on a recognizance with certain conditions, or in the alternative, to release the accused to the care of his stepfather on a responsible person undertaking.

[19] In that regard, the stepfather of the accused testified that he has been involved in the accused's life and lived with he and his mother for the last four years. He indicated that he is currently under a disability pension and is able to provide supervision of this individual 24 hours a day, seven days a week, and indicated that he or the accused's mother or the accused's grandmother or an older sister could be available to escort this 13 year old youth to and from school as required. He indicated that, if the accused were released to his

custody, there would be little doubt in his mind that the accused would listen to him. In fact, as he put it, "He's going to listen. I know he's going to listen, and if I'm responsible, he will listen."

[20] He was cross-examined about the fact that some of these charges were alleged to have occurred during the very early morning hours, and the Crown, through its questioning, probed as to how that could occur, and that if that was occurring, how could this individual possibly exercise the necessary control over the accused, and in response to that, the accused's stepfather's answer was that he had been permitted to stay at other individuals' homes, and that, of course, at those times he was not able to directly supervise what the accused was doing or where he was going.

[21] Those are the facts that this Court must consider in deciding whether bail should be granted in this particular case.

ANALYSIS

[22] Consideration of bail for a youth brings into play what can only be described as a complex web of legislative provisions that must be considered before deciding the ultimate issue of whether the accused will be detained in custody pending his trials or whether he will be released.

[23] Any system of bail in a free and democratic society involves the balancing of the right of an individual to be presumed innocent until proven guilty with the right of society to be protected from any undue risk presented by the individual pending their trial. Since trials cannot be held instantaneously, there will always be a period of time between arrest and trial, and the rights of society and the accused need to be balanced. That is what a system of bail attempts to provide.

[24] The starting point for any consideration of bail must be the Canadian **Charter of Rights and Freedoms**, which sets out the presumption of innocence, and also the right of any person charged with an offence to not be denied reasonable bail without just cause. The Court must keep in mind that the facts that I have reviewed are but allegations at this stage and that the accused is entitled to the presumption of innocence and that the accused is entitled to reasonable bail unless just cause is shown.

[25] Next, one proceeds to the **Youth Criminal Justice Act**, and section 28 of that Act says:

> "**28.Application of Part XVI of *Criminal Code*--**Except to the extent that they are inconsistent with or excluded by this Act, the provisions of Part XVI

> (compelling appearance of an accused and interim release) of the ***Criminal Code*** apply to the detention and release of young persons under this Act."

[26] Section 29(1) of the Act indicates that detention as a social measure is prohibited and reads this way:

> "29.(1) **Detention as social measure prohibited--**A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures."

[27] In particular, section 29(2) of the **Youth Criminal Justice Act** indicates that, in certain circumstances, detention is presumed to be unnecessary in order to protect society. The section reads this way:

> "29(2) **Detention presumed unnecessary--**In considering whether the detention of a young person is necessary for the protection or safety of the public under paragraph 515(10)(b) (substantial likelihood--commit an offence or interfere with the administration of justice) of the ***Criminal Code***, a youth justice court or a justice shall presume that detention is not necessary under that paragraph if the young person could not, on being found guilty, be committed to custody on the grounds set out in paragraphs 39(1)(a) to (c) (restrictions on committal to custody).

[28] So one moves the analysis on to section 39(1)(a) to (c), and that section indicates:

> "39.(1) **Committal to custody--**A youth justice court shall not commit a young person to custody under section 42(youth sentences) unless (a) the young person has committed a violent offence; (b) the young person has failed to comply with non-custodial sentences; (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the ***Young Offenders Act*****,** chapter Y-1 of the Revised Statutes of Canada, 1985;...."

[29] Section 39(2) of the **Youth Criminal Justice Act** also indicates that:

> "39(2) **Alternatives to custody**--If any of the paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42

> (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances and determined that there is not a reasonable alternative or combination of alternatives that is in accordance with the purpose and principles set out in section 38."

[30] Clearly, the message that Parliament is sending through the imposition of the **Youth Criminal Justice Act** is this: we will not hold a young person in custody unless all alternatives to custody are considered, and is essentially saying a young person will be committed to custody only as a last resort.

[31] One then needs to move to a consideration of the provisions in the **Criminal Code**. The grounds for detention in custody set out in the **Criminal Code** are spelled out in section 515(10). That section says this:

> "515(10) **Justification for detention in custody--**For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds: (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law; (b) where the detention is necessary for the protection or safety of the public, including any victim or witness to the offence, having regard to all the circumstances, including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and (c) on any other just cause being shown, and without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment."

[32] As one can see, section 515(10) sets out three grounds. They're often called the primary, secondary and tertiary grounds. The tertiary ground that I mentioned, or the third ground that I read, has been modified by the Supreme Court of Canada in the case of R. v. Hall, [2002] 3 S.C.R. 309. The Supreme Court of Canada effectively excised from that section the words "on any other just cause being shown and without limiting the generality of the foregoing" and left the section to read,

> **"where the detention is necessary in order to maintain confidence in the administration of justice having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment."**

[33] That's not the end of what I've described as the complex web of provisions that the Court must consider.

[34] In this particular case, the accused is charged with breaching an undertaking given to a judge and is also charged with an indictable offence after he had been released on other offences by way undertakings given to peace officers and appearance notices. That fact calls into play section 515(6) of the Criminal Code, and also section 524(8) of the Criminal Code, and those sections read as follows:

> 515(6) "Notwithstanding any provision of this section, where an individual is charged: ... (c) with an offence under any of subsections 145(2) to (5)..."

And that includes the charges with which this young person has been charged.

> "...that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this part.... the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused be released, he shall include in the record a statement of his reasons for making the order." should be done with prior release documents that allowed the accused to be at large in the community. That provision as well requires that the judge or justice dealing with the matter detain the person in custody unless the person shows cause why his or her detention is not justified.

[36] The provisions that I've reviewed to date are most of the provisions that the Court must consider at this bail hearing, but a review of those provisions leads one back to a consideration of the facts in this case, and a consideration of whether or not any of the provisions of the **Criminal Code** that I reviewed are inconsistent with or excluded by the **Youth Criminal Justice Act**.

[37] My review of the law suggests that, indeed, there is an inconsistency between the **Youth Criminal Justice Act** and the reverse onus provisions of the **Criminal Code** when we deal with a case that presumes the detention of the young person to be unnecessary. It makes no sense, in my view, to, on the one hand, say that a judge shall presume that an individual should be released, and, on the other hand, say that he shall be detained in custody unless he shows cause why he should be released. In my view, those two sections are inconsistent with one another.

[38] I believe support for that proposition can be found in the case of R. v. W.S.C., [2003] S.J. No. 810 (Sask. Prov. Ct.), a judgement of Judge Whelan, where at paragraph 20 she says:

> "I'm inclined to the view that section 29(2) does affect the burden upon the Crown in a bail application. For instance, it likely impacts upon the reverse onus situation. Section 28 makes it clear that the **Criminal Code** bail provisions apply only where they are not inconsistent with the provisions of the **YCJA** and it would be seem that there would be little point in maintaining a reverse onus if the presumption in 29(2) applied. More than that, however, I believe that the presumption in 29(2) serves to reinforce the important new focus of the **YCJA**, which is to reserve custody for the most serious offenders, to limit the use of custody, and to search for alternatives to its use. With that in mind, this presumption drives home the importance of the presumption of innocence and the unfairness of remanding a person who, in the event of a guilty finding, cannot receive a custodial sentence."

[39] In that regard, having found the inconsistency, it's clear that this is not a situation where the accused must show cause why his detention is not required. Saying it another way around, the onus is not on the accused to show why he should be released from custody. I say that because it's clear that the presumptions against custody contained in section 39 apply in this particular case. 39(1)(a) reads that there is a presumption against custody unless the young person has committed a violent offence. It's clear on the basis of the law as it stands in Canada that this accused has not been charged with committing a violent offence. That's not to say that there is not an inherent danger in 13 year olds stealing and driving cars, but the Supreme Court of Canada recently gave a ruling in R. v. C.D.K. ,[2005] S.C.J. No. 79, which indicates that the crimes with which this individual is charged do not constitute a violent offence within the meaning of the law.

[40] Subsection (b) clearly does not apply as well because the allegations set forth do not show that this is a young person that has failed to comply with noncustodial sentences. In fact, the information that this Court is provided is that this young person has never been found guilty of any criminal offence, nor has he ever received any type of sentence, let alone a non-custodial sentence.

[41] Moving on to the consideration of the third factor, that the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the **Young Offenders Act**. In this particular case, only two indictable offences have been charged, and those are the offences for which the Crown made an election. They relate to the charges from January 24th to 26th of this year that were first presented to this Court on February 13th. They are, as the Crown concedes, offences for which the adult maximum is two years, so it doesn't fall into the circumstance of the available sentence being a sentence of more than two years. It is just two years. It's clear as well that this subsection does not apply because this individual does not have

a history or does not have a pattern of findings of guilt under this Act. There have been no findings of guilt to date.

[42] So under those three subsections, custody would not be an available option if the accused stood before this Court today, pled guilty to all of the charges and said, "Sentence me." Since we are not at that stage, I must go back, on the consideration of bail, to section 29(2), that says, in considering whether the detention of the accused is necessary for the protection or safety of the public, I shall presume that detention is not necessary because he could not be sentenced to custody on being found guilty under paragraphs 39(1)(a) to (c). So it's clear that the presumption against custody applies to all 23 charges that are before this Court today.

[43] While nothing turns on it, I will say this. This does not mean that, should the accused be ultimately found guilty that he would not receive a custodial sentence. The reason that is so is because there is an additional provision that would allow a Court, at sentencing only, to consider a period of custody under 39(1)(d), which says that:

> "39(1)(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."

[44] So, to the extent that two of the charges before the Court are indictable, if the sentencing judge considered it to be an exceptional case where aggravating circumstances were such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles of sentencing set out in section 38, custody could be imposed upon a first-time offender. So one starts to get a sense of the complex web of provisions that must be applied at a youth bail hearing.

[45] What we are left with in this particular case is the primary ground. Is the detention of this individual necessary to ensure their attendance in court? On the facts of this case, clearly, that is not the situation, nor has the Crown argued that before me. That leaves the secondary and tertiary grounds which must be considered in order.

[46] So on the secondary ground of whether or not the detention of the accused is necessary for the protection or safety of the public, including any victim or witness of an offence, having regard to all the circumstances, including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice, on that ground, I must presume that the detention is not necessary because he could not be sentenced to custody under paragraphs 39(1)(a) to (c) of the **Youth Criminal Justice Act**.

[47] So there's a presumption against custody. What does a presumption against custody mean? The Crown argues that, like any presumption, it's a presumption that can be rebutted. In speaking to that issue, Gorman J. in the case of R. v. H.E. ,[2003] N.J. No. 299 (Nfld. Prov. Ct.), said this

at paragraph 15:

> "Section 29(2) of the Act is indeed drafted in a curious fashion. Its intent is far from obvious or clear. It states that, in applying section 515(10)(b) of the **Code** that, if the young person is charged with an offence for which he or she could not be placed in custody, then the Court is to presume that detention is not necessary pursuant to that section. The word 'presume' is defined by the Oxford English Dictionary as being taken for granted, assume, suppose, dare; the word 'presumption' as meaning the assuming or taking of something for granted, also that which is presumed or assumed to be or to be true on probable evidence, a belief deduced from facts or experience, assumption, assumed probability, supposition, expectation."

At paragraph 16 he says this:

> "Presumptions are, of course, rebuttable. Therefore, is section 29(2) simply a means of switching the onus to the Crown in cases where custody is not an option under sections 39(1)(a) to (c) of the Act? Or is it something more significant, such as an absolute prohibition on the denial of bail pursuant to section 515(10)(b) of the **Code** unless the offence involved could result in a period of custody being imposed under section 39(1)(a) to (c)? This latter interpretation does have certain attractions. It seems consistent with the intent, purpose and principles of the Act. In addition, it seems quite unfair to keep a person in custody pending trial for an offence for which, if they are convicted after trial, a period of custody could not be imposed. It could be considered a means to impose a period of custody in cases where the Act indicates that a period of custody shall not be imposed. In J.R.M. it was held that the effect of section 29(2) of the Act is that a young person cannot be detained unless he could be committed to custody in relation to the offence for which the judicial interim release hearing is being held. If so, why not say this plainly and clearly in the section itself, and what if the offence falls within 39(1)(d) of the Act?....."

[48] That is the subsection that I reviewed a few moments ago.

[49] Judge Whelan in the W.S.C. case at paragraph 23 concluded, like Judge Gorman, that, indeed, the section contains a rebuttable presumption, and she says this:

> "I find that section 29(2) is a rebuttable presumption but that the circumstances when it may be rebutted outside of the criteria in section 39(1)(a) to (c) will likely depend upon the existence of one, and usually several, of the following circumstances: a serious threat to the public in general or specifically a victim or witness, a persistent course of criminal misbehaviour which is escalating in nature, and a demonstrated unwillingness on the part of the young person to comply with any reasonable conditions to secure good conduct in the community. Interference with or threats toward victims or witnesses will attract serious consideration, and this action alone has the potential to rebut the presumption. A failure to cooperate with the sentencing process alone may not be sufficient to detain a young person but may contribute to a finding that detention is required. This list of circumstances is not exhaustive but is intended to be illustrative and demonstrative of the rather serious situation that must exist in order to rebut the presumption against detention absent the criteria in section 39(1)(a) to (c)."

[50] Like Judge Whelan, I'm of the view that there is a rebuttable presumption contained within that subsection. Like Judge Gorman, I believe that, if Parliament had intended that there be an absolute prohibition on the detention of individuals who could not be sentenced under those subsections in 39 to a period of custody, that Parliament would have said so. I'll deal in a moment with whether or not in this circumstance I find that the presumption has been rebutted.

[51] Because I raised it with counsel at the hearing on Monday, I feel it necessary to make some comment about the possible applicability of the tertiary ground, that is the ground set out in section 515(10)(c), in this particular case. I queried whether such a subsection could apply to the circumstances in this case, while being mindful that I had to deal with the primary and secondary grounds first.

[52] I considered whether or not, in a case where a first-time offender repeatedly violated court orders and the Court had concluded that the presumption was not rebutted, whether or not one could resort to 515(10)(c) in order to justify detention in order to maintain the public's confidence in the administration of justice. In that regard, I felt it necessary to review the Supreme Court of Canada's case in R. v. Hall (2002), S.C.J. No. 65, where at paragraph 40 the court said this:

> "Section 515(10)(c) sets out specific factors which delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice. As discussed earlier, situations may arise where, despite the fact that an accused is not likely to abscond or commit further crimes while awaiting trial, his presence in the community will call into question the public's confidence in the administration of justice. Whether such a situation has arisen is judged by all the circumstances, but, in particular, the four factors that Parliament has set out in section 515(10)(c): the apparent strength of

> the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission, and the potential for lengthy imprisonment. Where, as here, the crime is horrific..."

And in the case of Hall it was described as a horrific murder.

> "....Where, as here, the crime is horrific, inexplicable and strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence upon which the bail system and the justice system as a whole repose. This, then, is Parliament's purpose: to maintain public confidence in the bail system and the justice system as a whole. The question is whether the means it has chosen go further than necessary to achieve that purpose. In my view, they do not. Parliament has hedged this provision for bail with important safeguards. The judge must be satisfied that detention is not only advisable but necessary. The judge must, moreover, be satisfied that detention is necessary, not just to any goal but to maintain confidence in the administration of justice. Most importantly, the judge makes this appraisal objectively through the lens of the four factors Parliament has specified. The judge cannot conjure up his own reasons for denying bail. While the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of the day, the judge can only deny bail if satisfied that, in view of those factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice."

[53] The four factors specified by Parliament in 515(10)(c) would require the Court to focus on the apparent strength of the prosecution's case, and in the case at bar it's clear that the Crown has a strong case in relation to a number of offences, but more importantly, the Court must focus on the gravity of the nature of the offences, the circumstances surrounding its commission, and the potential for lengthy imprisonment. One would be hard pressed, even considering 39(1)(d), to conclude that in a case such as the case at bar there is a potential for a lengthy period of imprisonment. But could it, in another case, apply? Certainly Parliament has left open the possibility that 515(10)(c) can be applied in its normal fashion to youth as it would adults, but it's clear that to use it in order to justify a detention that would otherwise not result from a combination of the presumption against custody in 29(2) and 39(1)(a) to (c) would be to use it for an improper purpose. It would be to use it to cure what one might perceive to be, in a particular circumstance, a deficiency in the drafting of the **Youth Criminal Justice Act**.

[54] Having said all that, in my view, the tertiary ground is not applicable to this particular case. The Crown has simply not shown cause why the detention of this accused would be necessary

under that ground to maintain confidence in the administration of justice.

[55] One must go back, of course, to consider whether or not the Crown has rebutted the presumption against custody in this particular case. In that regard, I am mindful that the accused is alleged to have seriously escalated his criminal behaviour in the last number of months and, in fact, in the last number of weeks. He has now been involved in the attempted theft or theft and/or driving of nine vehicles. And while I've cautioned myself that these are but allegations at this stage and that the accused is entitled to the presumption of innocence, the allegations, if true, are indeed serious.

[56] I am disturbed that this individual has been arrested so many times and released on so few conditions until February 6th. It's inconceivable to this Court that a person could be involved in the third and fourth theft of a motor vehicle and released only on an appearance notice. One can only speculate as to why this might occur. Perhaps the authorities dealing with the individual were not aware of the prior incidents, although in this technological age it's hard to imagine how such a circumstance could exist.

[57] In this case, I am mindful that the only incidents that are alleged to have taken place after M.S. had been released on an undertaking with many restrictive conditions, including a 7:00 p.m. to 7:00 a.m. curfew, a residence requirement and a non-association clause, are allegations that the accused breached that very document. I have, however, considered the nature of the breach. The nature of the breaches are alleged to have been association with individuals he was not entitled to associate with unless such association was incidental to education or treatment programming or while at work. And I'm mindful that the alleged breaches of that condition occurred outside of school, perhaps just off the school grounds, after school hours. The allegations are criminal in nature but in and of themselves those breaches cannot be considered to pose a substantial danger to the public. However, I must consider all of the factors that are before me, including the escalation of this accused's behaviour.

[58] In considering all of the factors, I am satisfied that the totality of the circumstances cause me to conclude that the Crown has rebutted the presumption against custody in this circumstance. I am satisfied that the Crown has proven that the detention of this individual would be necessary under the secondary ground to ensure the safety of the public because this individual has, especially for the past three months, exhibited out-of-control behaviour, and to release him simply on an undertaking with conditions or a recognizance suggested by the Defence would not diminish in any significant way what I consider to be a substantial likelihood that the accused would commit a further criminal offence, a criminal offence that would endanger the protection or safety of the public. While vehicle theft is not a violent offence, the theft of vehicles by young persons and the operation of those vehicles by young, untrained drivers is a dangerous situation for the public.

[59] I talked at the beginning of my remarks about the complex web of provisions. The determination that I've made to this point does not end the matter. I must now go on to consider section 31 of the **Youth Criminal Justice Act**. Section 31(1) of the **Youth Criminal Justice Act** says this:

> 31(1)"**Placement of young person in care of responsible person--**A young person who has been arrested may be placed in the care of a responsible person instead of being detained in custody if a youth justice court or a justice is satisfied that: (a) the young person would, but for this subsection, be detained in custody under 515 (judicial interim release) of the **Criminal Code**..."

[60] Well, that's what I just decided. I decided certainly that, but for that provision, he would have been detained in custody.

> "...(b) that the person is willing and able to take care of and exercise control over the young person; and (c) the young person is willing to be placed in the care of that person."

[61] The stepfather of the accused came before this Court and provided evidence that he was willing to and able to provide care for and exercise control over the young person 24/7. He testified that he has had no difficulty with this youth when he was within his care within the home and that he was able to exercise control over this individual, and took the position before the Court that "If he's in my care, he will listen."

[62] I listened carefully to the cross-examination of this individual by the Crown attorney and suggestions that the care that he was able to take or the control that he was able to exercise might be deficient because of the circumstances surrounding the commission of some of these offences, but I found that the position taken by the stepfather was understandable in that I inferred from what he said that a number of these offences had occurred while the accused was staying at a home other than his. One might question the judgement of a parent or step-parent in allowing a person to stay over at friends' houses if they've known that they have in the past been involved in the commission of offences late at night while staying over in such a location, but at the end of the day I got the distinct impression from and confidence in Mr. P., the stepfather, that he was a person that was willing and able to take care of and exercise control over this young person, who is but 13 years of age. Although I would have otherwise detained Mr. S. in custody, I will release him on a responsible person undertaking to Mr. P. if I'm satisfied of the third criteria, and that is this: is the young person willing to be placed in the care of that person?

[63] THE COURT: Mr. S., would you stand up, please, sir. Mr. S., you've heard what I've said at length. Are you prepared to be placed in the care of Mr. P., follow the conditions that I'm about

to outline?

MR. SAULNIER: Yes.

THE COURT: Okay. You can sit down for a moment while I outline those conditions. You will keep the peace and be of good behaviour. You'll attend court as and when directed. Mr. P., what is your address, sir? (Address provided)

THE COURT: You will reside at (specified address), and remain in that residence at all times unless you are in the company of Mr. P.. Mr. P., you indicated a number of other individuals when you were testifying. The mother of the accused was one.

MR. P.: My wife.

THE COURT: Can you give me their names so it can be drafted in a document?

MR. P.: Okay. A. S., J. S..

THE COURT: That's his sister?

MR. P.: That's the brother of hers, which is my brother-in-law.

THE COURT: Okay.

MR. P.: And the mother, which is A., his grandmother.

THE COURT: His grandmother, A. S.?

MR. P.: Yeah.

THE COURT: Those four individuals?

MR. P.: Just them, yeah.

THE COURT: Okay. You'll remain in the residence at all times unless you're in the company of one of those individuals, except you will be permitted to attend school. However, travel to and from school will be in the accompaniment of one of those four named individuals. You're not to go back and forth to school by yourself. You'll stay on school property when they deliver you there and you'll not leave there until they pick you up. At all other times, you'll be in the residence unless you're in the company of one of those persons. And you will not associate with or be in the company of K. M. or A. K. except as may be incidental to your attendance at school.

Now, I want to explain to you what that means. That means you don't hang out with them at recess. You don't hang out with them outside the school. That means that if you're in the same class and the teacher assigns you to do a project together, well, you can have contact for the purpose of doing a project together or something or doing your lessons in school, in the classroom, together, but it doesn't mean that you go to the cafeteria and eat lunch with them or have any other type of friendly contact with them. It means simply that, if it's incidental to your participation in school, you can have contact with them.

You will prove compliance with what essentially is a house arrest condition by presenting yourself at the entrance of your residence should a peace officer attend there to check compliance. As well, you are not to be alone in -- you are not to be in your residence unless you are in the immediate -- or unless you are in the company of one of those four people. That means that when you're home one of them is home as well. You'll be under 24/7 supervision.

Now I want to tell you what will happen if you don't follow the conditions. If you don't follow the conditions, you can be delivered to this courtroom at any time by the responsible person. If you don't follow the rules, Mr. P. can bring you to court and say that "I'm no longer willing to act as a responsible person," and the Court will consider the matter at that time. You've spent the last week essentially in Waterville. You know what can happen if you come back.

That’s the ruling of this Court. Are there any issues that the Court failed to address with

regard to conditions and such? I know we'll deal with the issue of date, next date.

MR. HOLT: Just for clarification, the last little bit that you were talking about is, in essence, he's not to be in the residence alone?

THE COURT: He's not to be in the residence unless one of the other four individuals that I named are in the residence also.

MR. HOLT: Are there as well. Yeah. So if everybody – everybody's going to be out, then he's got to be out with one of those people?

THE COURT: That's correct. Okay. Do you understand the conditions, first of all, M.T.S. that I've imposed?

M.T.S. Yes.

THE COURT: Are you willing to and can you comply with those conditions, sir?

M.T.S.: Yes.

THE COURT: Then you can gain your release once the document is prepared, you've signed it and Mr. P. has signed it. And the conditions are strict, sir, and they're strict because I feel that they are absolutely necessary to ensure the safety of the public. Thanks.

Burrill, J.P.C.