R. *v.* B.W.P.; R. *v.* B.V.N., [2006] 1 S.C.R. 941, 2006 SCC 27

Her Majesty The Queen *Appellant*

v.

B.W.P. *Respondent*

and

Attorney General of Ontario, Attorney General of Alberta, Canadian Foundation for Children, Youth and the Law, Youth Criminal Defence Office and Aboriginal Legal Services of Toronto Inc. *Interveners*

- and -

B.V.N. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Alberta, Canadian Foundation for Children, Youth and the Law, and Youth Criminal Defence Office *Interveners*

Indexed as: R. *v.* B.W.P.; R. *v.* B.V.N.

Neutral citation: 2006 SCC 27.

File Nos.: 30514, 30512.

2005: November 10; 2006: June 22.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

on appeal from the court of appeal for manitoba

on appeal from the court of appeal for british columbia

Criminal law — Young persons — Sentencing — Considerations — Whether general deterrence factor to be considered in sentencing young persons under Youth Criminal Justice Act — Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 3, 38.

Criminal law — Young persons — Sentencing — Considerations — Young person pleading guilty to manslaughter and sentenced under s. 42(2)(o) of Youth Criminal Justice Act — Whether s. 42(2)(o) requires sentencing judge to impose at least two-thirds of sentence in custody and one-third under supervision — Youth Criminal Justice Act, S.C. 2002, c. 1, s. 42(2)(o).

B.W.P., a young person, killed a man during a fight and pled guilty to manslaughter. After reviewing the relevant provisions of the *Youth Criminal Justice Act* ("*YCJA*"), the sentencing judge held that general deterrence was no longer a principle of sentencing under the new *YCJA* regime. He also disagreed with the Crown's position that ss. 42(2)(*n*) and 42(2)(*o*) of the *YCJA* must be read in tandem so as to require the

court to impose two-thirds of the sentence in custody and one-third under supervision. Rather, he took the view that s. 42(2)(*o*) gave him the discretion to determine the appropriate length of the custody and supervision portions of the sentence. He sentenced B.W.P. to a 15-month custody and supervision order. He directed that B.W.P. serve one day in open custody and the remainder of the 15 months under conditional supervision in the community. The Manitoba Court of Appeal affirmed the sentencing judge's decision.

B.V.N., also a young person, pled guilty to the offence of aggravated assault causing bodily harm and was sentenced under s. 42(2)(*n*) of the *YCJA* to nine-month custody and supervision order, with the custodial part of the order to be spent in closed custody. Both the sentencing judge and the British Columbia Court of Appeal concluded that general deterrence is one factor, albeit a minor one, in determining the appropriate sentence under the *YCJA*. The Court of Appeal noted that this factor did not increase the sentence that would otherwise have been imposed.

Held: The appeals should be dismissed.

The *YCJA* introduced a new sentencing regime, and its wording can only support the conclusion that Parliament deliberately excluded general deterrence as a factor of youth sentencing. By virtue of s. 50(1) of the *YCJA*, the provisions of the *Criminal Code* on sentencing, save certain listed exceptions, do not apply to youth sentencing. Since s. 718(*b*) of the *Code*, which set out the adult deterrence sentencing principle, is not one of the exceptions mentioned in s. 50(1), this deliberate omission clearly indicates that Parliament chose not to incorporate that principle in the new youth sentencing regime. Furthermore, had Parliament intended to make deterrence part of the new regime, one would reasonably expect that it would be expressly included in the

detailed purpose and principles set out in the statute. Yet the words "deter" and "deterrence" are nowhere to be found in the *YCJA*: the words do not appear in the "Declaration of Principle" under s. 3, in the "Purpose and Principles" listed under s. 38 or in the list of particular sanctions found in s. 42. This omission is also of considerable significance. Nor can general deterrence, or some equivalent concept, be implied from the wording of ss. 3 and 38. Rather, the focus throughout remains on the young person before the court. Since no basis can be found in the *YCJA* for imposing a harsher sanction than would otherwise be called for to deter others from committing crime, general deterrence is not a principle of youth sentencing under the new regime. The *YCJA* also does not speak of specific deterrence. Parliament has sought preferably to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. Undoubtedly, the sentence may have the effect of deterring the young person and others from committing crimes, but Parliament has not included deterrence as a basis for imposing a sanction under the *YCJA*. [4] [22-30] [39-40]

It follows that the Manitoba courts in *B.W.P.* adopted the correct approach on the question of general deterrence. They were also correct in their interpretation of s. 42(2)(*o*) of the *YCJA*. Under that provision, a court is not required to impose on a young person guilty of manslaughter two-thirds of the sentence in custody and one-third under supervision. Unlike the wording of s. 42(2)(*n*), there is no restriction in s. 42(2)(*o*) on what part of the time that can be spent in a custodial setting. Accordingly, nothing in s. 42(2)(*o*) prevents a court from imposing a lesser proportion of time in actual custody if it sees fit. Since the Manitoba courts made no error in principle, the quantum of B.W.P.'s sentence need not be reviewed. There is also no need to review the quantum

of the sentence imposed on B.V.N. While the British Columbia courts erred in considering general deterrence as a principle of sentencing, this factor did not play a significant role in the determination of the sentence. Further, as B.V.N. has fully served his sentence, the quantum of his sentence has become moot. [5] [42-49]

Cases Cited

Distinguished: *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421; **referred to:** *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. O.* (1986), 27 C.C.C. (3d) 376; *R. v. C.D.*, [2005] 3 S.C.R. 668, 2005 SCC 78.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 718(*b*), 718.2(*e*).

Young Offenders Act, R.S.C. 1985, c. Y-1.

Youth Criminal Justice Act, S.C. 2002, c. 1, preamble, ss. 2, 3, 38, 39, 42(2), 50(1), 104, 105.

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Roberts, Julian V., and Nicholas Bala. "Understanding Sentencing Under the *Youth Criminal Justice Act*" (2003), 41 *Alta. L. Rev.* 395.

APPEAL from a judgment of the Manitoba Court of Appeal (Huband, Kroft and Hamilton JJ.A.) (2004), 187 Man. R. (2d) 80, 330 W.A.C. 80, 187 C.C.C. (3d) 20, 122 C.R.R. (2d) 214, [2004] M.J. No. 267 (QL), 2004 MBCA 110, affirming a sentence

imposed by Meyers Prov. Ct. J. (2003), 176 Man. R. (2d) 218, [2003] M.J. No. 331 (QL). Appeal dismissed.

APPEAL from a judgment of the British Columbia Court of Appeal (Lambert, Mackenzie and Oppal JJ.A.) (2004), 196 B.C.A.C. 100, 322 W.A.C. 100, 186 C.C.C. (3d) 21, [2004] B.C.J. No. 974 (QL), 2004 BCCA 266, affirming in part a sentence imposed by Auxier Prov. Ct. J., [2004] B.C.J. No. 153 (QL), 2004 BCPC 22. Appeal dismissed.

Jo-Ann Natuik, *Ami Kotler* and *Dale Tesarowski*, for the appellant Her Majesty the Queen.

Brock Martland and *Reginald P. Harris*, for the appellant B.V.N.

Jason Miller, for the respondent B.W.P.

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Martha Mackinnon, for the intervener the Canadian Foundation for Children, Youth and the Law.

Cathy Lane Goodfellow and *Patricia G. Yuzwenko*, for the intervener the Youth Criminal Defence Office.

Jonathan Rudin and *Kimberly R. Murray*, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

CHARRON J. —

1. Overview

1 These two appeals raise the same question of statutory interpretation: whether general deterrence is a factor to be considered in sentencing a young person under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"). The decisions under appeal reveal a divergence of opinion on this issue. The Manitoba courts in *B.W.P.* held that general deterrence was no longer a principle of sentencing under the new *YCJA* regime. The Crown appeals this decision, arguing that general deterrence should be factored in the determination of an appropriate sentence. (The Crown raises a second issue in *B.W.P.* relating to the respective duration of the custody and supervision portions of an order made under s. 42(2)(*o*) of the *YCJA*.) The British Columbia courts in *B.V.N.* held that general deterrence, while a minor factor, remained applicable under the new sentencing regime. B.V.N. appeals his sentence, arguing that general deterrence is no longer applicable in the sentencing of young persons. The appellant in each case takes the position that, if the courts below had taken a correct approach, the sentence would have been different.

2 Deterrence, as a principle of sentencing, refers to the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct. When deterrence is aimed at the offender before the court, it is called "specific deterrence", when directed at others, "general deterrence". The focus of these appeals is on the latter. General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity.

3 While general deterrence as a goal of sentencing is generally well understood, there is much controversy on whether it works or not. Those who advocate its abolition as a sentencing principle, particularly in respect of youth, emphatically state that there is no evidence that it actually works in preventing crime. Those who advocate its retention are equally firm in their position and, in support, point to society's reliance on some form of general deterrence to guide young people in making responsible choices on various matters, for example, about smoking, using alcohol and drugs and driving a motor vehicle. The question whether general deterrence works or not is not the issue before this Court. Whether the principles for youth sentencing should include deterrence was a matter of considerable debate in the passing of this new legislation. Ultimately, the repeal or retention of deterrence as a principle of sentencing for young persons is a policy choice for Parliament to make. This Court's role on these appeals is to interpret the relevant provisions of the *YCJA* so as to determine what choice Parliament in fact made.

4 The *YCJA* introduced a new sentencing regime. As I will explain, it sets out a detailed and complete code for sentencing young persons under which terms it is not open to the youth sentencing judge to impose a punishment for the purpose of warning, not the young person, but others against engaging in criminal conduct. Hence, general deterrence is not a principle of youth sentencing under the present regime. The *YCJA* also does not speak of specific deterrence. Rather, Parliament has sought to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. Undoubtedly, the sentence may have the effect of deterring the young person and others from committing crimes. But, by policy choice, I conclude that Parliament has not included deterrence as a basis for imposing a sanction under the *YCJA*.

5 It follows that the Manitoba courts in *B.W.P.* adopted the correct approach on the question of general deterrence. I also conclude that they were correct in their interpretation of s. 42(2)(*o*) of the *YCJA* on the respective duration of the custody and supervision portions of the sentence. Consequently, since the courts in *B.W.P.* made no error in principle, I see no reason to review the quantum of B.W.P.'s sentence. Generally, as a matter of established practice and policy, this Court hears appeals involving the legal principles that should govern the pronouncement of sentence, but does not consider an appeal relating solely to the quantum of a particular sentence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 33; *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 404. I am also of the view that there is no need to review the quantum of the sentence imposed on B.V.N. While the British Columbia courts erred in considering general deterrence as a principle of sentencing, this factor was considered as "a minor one" and it is apparent from the reasons of the sentencing judge that it did not play a significant

role in the determination of the sentence. Further, as B.V.N. has fully served his sentence, the quantum of his sentence has essentially become moot.

6 I would therefore dismiss both appeals.

2. The Facts and Proceedings Below

2.1 *R. v. B.W.P.*

7 B.W.P., an aboriginal young person, pled guilty to manslaughter and to an unrelated offence of theft. The theft charge related to stolen speakers and is not relevant to this appeal. The charge of manslaughter arose out of a fight between B.W.P. and Saleh, a 22-year-old refugee from Iraq. The fight started when B.W.P., who was intoxicated at the time, asked Saleh why he was staring at the two women who were with B.W.P. Saleh thereupon exited his vehicle and challenged B.W.P. to fight. During the course of the fight, B.W.P. swung a stocking-covered pool ball hitting Saleh's head two or three times. Saleh was able to drive away, but died from his head injuries a short time later. With no family members residing in Canada, Saleh's body was returned to Iraq for burial. Attempts to contact members of the family were unsuccessful and no victim impact statement was available at the sentence hearing. Considerable evidence was called concerning B.W.P.'s background and character including a transfer report, a pre-sentence report, psychological assessment reports and youth bail management reports.

8 Although charged under the *Young Offenders Act*, R.S.C. 1985, c. Y-1 ("*YOA*"), B.W.P. was sentenced under the *YCJA*. Meyers Prov. Ct. J., for the Winnipeg Youth Justice Court, first held that the offence of manslaughter is a "serious violent offence" within the meaning of s. 2 of the *YCJA* and then turned to a consideration of the

appropriate sentence: (2003), 176 Man. R. (2d) 218. After reviewing the guiding principles and purposes of sentencing found in ss. 3(1), 38 and 39, the provisions of s. 50(1) of the *YCJA* on the limited applicability of Part XXIII of the *Criminal Code*, R.S.C. 1985, c. C-46, and the relevant jurisprudence, the sentencing judge concluded that general deterrence is not consistent with the new sentencing philosophy under the *YCJA*.

9 The sentencing judge reviewed the evidence concerning the offender, noting in particular B.W.P.'s supportive and stable family, aboriginal identity, minimal legal record, positive school attendance and performance, pro-social extracurricular activities and the positive comments from family members, school officials and hockey coaches. The sentencing judge also relied on the psychological assessment by Dr. Somers who found the risk of re-offending to be low and unlikely to be reduced by a period of custody, recommending rather that B.W.P. be maintained in the community. The sentencing judge held as follows:

> The purpose of sentencing under the *Youth Criminal Justice Act* is to provide just sanctions that have meaningful consequences for the offender and promote his rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. That rehabilitation and reintegration has been well underway since BWP's release from custody in December 2001. Except for one misstep for which he paid dearly by serving a period of time in custody while awaiting disposition, his march towards becoming a law-abiding member of the community has been most positive.
>
> . . .
>
> Separating BWP from society as urged by the Crown will in my opinion not address the long-term protection of the public as envisioned by the *Youth Criminal Justice Act*. However, allowing him to build on the progress he has made since his release from custody would meet that goal. [paras. 78 and 86]

10 Meyers Prov. Ct. J. disagreed with the Crown's position that ss. 42(2)(*n*) and 42(2)(*o*) must be read in tandem so as to require the court to impose two-thirds of the

sentence in custody and one-third under supervision. Rather, he took the view that s. 42(2)(*o*) gave him the discretion to determine the appropriate length of the custody and supervision portions of the sentence. He therefore sentenced B.W.P. to a 15-month custody and supervision order, in addition to the 108 days spent in pre-trial custody. He directed that B.W.P. serve one day in open custody and the remainder of the 15 months under conditional supervision in the community subject to 18 listed conditions, to be followed by a one-year supervised probation order subject to less restrictive conditions.

11 The Crown appealed to the Manitoba Court of Appeal, arguing that the youth court judge erred in finding that general deterrence was not consistent with the philosophy of the *YCJA*. The Crown argued further that the sentencing judge erred by refusing to read s. 42(2)(*o*) in tandem with s. 42(2)(*n*) which requires that the supervision portion of the order be "one half as long" as the custody portion. Hamilton J.A., writing for the Manitoba Court of Appeal, affirmed the sentencing judge's decision and dismissed the appeal: (2004), 187 Man. R. (2d) 80, 2004 MBCA 110.

12 On the first issue, Hamilton J.A. gave careful consideration to the Crown's argument that this Court's decision in *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, continues to apply and considered the conflicting jurisprudence on this point. She concluded that deterrence is not a principle for sentencing young persons under the *YCJA*:

> Under the *YOA*, the protection of society and the public was an important principle. While the long-term protection of the public and respect for societal values remains important under the *YCJA*, Parliament has directed that this is achieved through rehabilitation, reintegration and accountability wherever possible. As Gorman, P.J., noted in *C.M.P.*, the sentence of a young person is "individualistic" with a primary emphasis on rehabilitation. When I consider the wording of s. 50(1) in the context of the overall principles of the *YCJA*, I agree with those judges, like Werier, P.J., in *A.E.B.*, and the sentencing judge here, who have ruled that deterrence is not to be considered when sentencing a young person. A judge cannot sentence one young person with the aim of sending a message to other

> youth. This would be at variance with the required focus on the young person being sentenced. I am also of the view that specific deterrence is not a principle of sentencing in light of the exclusion of this principle under s. 50(1) of the *YCJA*. Having said that, the sentence, and the judicial process itself, may very well have a deterrent effect on the young person and others. [para. 64]

13 On the second issue, Hamilton J.A. held that the sentencing judge had properly concluded that s. 42(2)(*o*) gives a wider discretion than does s. 42(2)(*n*):

> The sentencing judge was correct to distinguish between subs. 42(2)(n) and 42(2)(o). I agree with counsel for B.W.P. that the ordinary meaning of s. 42(2)(o) is clear from its words and its context. A custody and supervision order under s. 42(2)(o) is but one of 18 sanctions that a sentencing judge may consider. It is different from subs. (n) and gives the judge broader discretion with respect to how long (or short) the custody period and community supervision period will be. Because s. 42(2)(o) only applies to presumptive offences, this broader discretion allows for the sentencing judge to increase the time in custody for these serious offences. However, this discretion does not preclude the judge from favouring the supervision period of the order, as the sentencing judge obviously did in this case. This discretion is consistent with the primary purpose of the *YCJA* to promote rehabilitation, reintegration and accountability through, wherever possible, non-custodial sentences. [para. 73]

14 The Crown appeals to this Court on the same two grounds.

2.2 *R. v. B.V.N.*

15 B.V.N. pled guilty to the offence of aggravated assault causing bodily harm. The charge arose out of B.V.N.'s activities as a drug dealer. A few days before the assault in question, B.V.N. and an associate accosted the complainant — a drug addict — over a drug debt, held a gun to his head, clicking the trigger several times, forced him into a car and took him to a relative's house to get money. That incident ended when the relative phoned the police, forcing B.V.N. and his associate to flee. A few days later,

B.V.N. and his associate again accosted the complainant, threatened, punched, kicked and stabbed him. The complainant spent several days in the hospital.

16 The evidence about the offender revealed a very unfortunate family background, no prior convictions for violent offences, but a history of suspension and expulsion from school for assault and drug trafficking, numerous problems in group homes, including threatening staff members, and possessions of weapons. A psychiatric report put him at high risk of engaging in serious and violent criminal activity.

17 On the question of general deterrence, the sentencing judge compared the provisions of the *YCJA* with the former *YOA* and concluded that general deterrence is one factor, albeit a minor one, in determining the appropriate sentence under the new regime. Considering the circumstances of the offence and the offender, the sentencing judge imposed a nine-month custody and supervision order under s. 42(2)(*n*) (in addition to 81 days of pre-trial custody), with the custodial part of the order to be spent in closed custody: [2004] B.C.J. No. 153 (QL), 2004 BCPC 22.

18 B.V.N. appealed to the British Columbia Court of Appeal, arguing, among other grounds, that the sentencing judge erred in relying on the principle of general deterrence. Mackenzie J.A., Lambert J.A. concurring, disagreed, finding that this Court's decision in *M. (J.J.)* decided under the *YOA* remained good law: (2004), 196 B.C.A.C. 100, 2004 BCCA 266. Although the *YCJA* provides more detailed guidance for sentencing and is intended to reduce reliance on incarceration, it did not expressly exclude deterrence as a factor. Mackenzie J.A. noted however that, as he read the reasons of the sentencing judge, "the element of general deterrence did not increase the sentence that would otherwise have been imposed" (para. 15). The appeal was allowed in part, deleting certain conditions that have no relevance here. Oppal J.A., in concurring

reasons, agreed that the principle of general deterrence is still applicable, *albeit* on a somewhat more limited basis. B.V.N. appeals to this Court, arguing that the courts below fell into error in considering general deterrence as a relevant factor and submitting that a different result would have been reached had this error not been made.

3. Deterrence and the *YCJA*

3.1 *The YCJA: A New Sentencing Regime*

19 The *YCJA* came into force on April 1, 2003. Notably, Parliament did not simply amend its predecessor, the *YOA*, it repealed it. The *YCJA* is a complex piece of legislation that has substantially changed the Canadian youth justice system at various stages of the process including: at the front end, by encouraging greater use of the diversionary programs; at bail hearings, by substantially limiting pre-trial detention; and in the adult sentencing process, by the presumptive application of adult sentences for some of the most serious offences. Most of all, the *YCJA* brought about substantial changes in the general youth sentencing process. The statute provides more specific guidance to judges. Detailed sentencing principles are expressly set out. Sentencing options are more regulated. Factors to be taken into account are spelled out. Mandatory restrictions are placed on the use of custodial sentences. The new sentencing provisions have been characterized as "the most systematic attempt in Canadian history to structure judicial discretion regarding the sentencing of juveniles": J. V. Roberts and N. Bala, "Understanding Sentencing Under the *Youth Criminal Justice Act*" (2003), 41 *Alta. L. Rev.* 395, at p. 396.

20 Counsel for both appellants and respondents spent much time on these appeals comparing the *YOA* and the *YCJA* in an attempt to persuade the Court that its

decision in *M. (J.J.)*, decided under the *YOA*, was either still good law or no longer applicable. In *M. (J.J.)*, this Court settled the existing controversy between provincial appellate courts over the applicability of general deterrence in youth sentencing under the *YOA*. The Court endorsed the opinion of Brooke J.A. of the Ontario Court of Appeal in *R. v. O.* (1986), 27 C.C.C. (3d) 376, and held that "although the principle of general deterrence must be considered, it had diminished importance in determining the appropriate disposition in the case of a youthful offender" (p. 434). Cory J., in writing for the Court, then commented on some of the existing literature on the potential deterrent effect of *YOA* dispositions and added the following caveat:

> Having said that, I would underline that general deterrence should not, through undue emphasis, have the same importance in fashioning the disposition for a youthful offender as it would in the case of an adult. One youthful offender should not be obliged to accept the responsibility for all the young offenders of his or her generation. [p. 434]

21 In my view, little can be gained by attempting a detailed comparison of the two statutes. The *YCJA* created such a different sentencing regime that the former provisions of the *YOA* and the precedents decided under it, including *M. (J.J.)*, are of limited value. In order to determine the question before the Court, the focus must be rather on the relevant provisions of the new statute. Except where otherwise indicated, all references to statutory provisions in the analysis that follows are to the *YCJA*.

3.2 *Principles of Adult Sentencing Do Not Apply*

22 Parliament has expressly adopted a firm policy that the criminal justice system for young persons be separate from that of adults: s. 3(1)(*b*). In keeping with this policy, the provisions of the *Criminal Code* on sentencing, save certain listed exceptions, do not apply to youth sentencing. Section 50(1) reads as follows:

> **50.** (1) Subject to section 74 (application of *Criminal Code* to adult sentences), Part XXIII (sentencing) of the *Criminal Code* does not apply in respect of proceedings under this Act except for paragraph 718.2(*e*) (sentencing principle for aboriginal offenders), sections 722 (victim impact statements), 722.1 (copy of statement) and 722.2 (inquiry by court), subsection 730(2) (court process continues in force) and sections 748 (pardons and remissions), 748.1 (remission by the Governor in Council) and 749 (royal prerogative) of that Act, which provisions apply with any modifications that the circumstances require.

23 It is particularly noteworthy that s. 718(*b*) of the *Criminal Code* is *not* one of the listed exceptions incorporated in the *YCJA* — s. 718(*b*) provides that one of the objectives in sentencing adults is "to deter the offender and other persons from committing offences". Since Parliament has expressly included other provisions, in particular one of the adult sentencing principles — s. 718.2(*e*) with respect to aboriginal offenders — one can only conclude that the omission is deliberate. Parliament chose not to incorporate the adult sentencing principle of deterrence in the new youth sentencing regime. The question then becomes whether deterrence, or some equivalent concept, can be found in the words of the *YCJA* itself.

3.3 *"Deterrence", "Deter" or Equivalent Concepts Not Found in the YCJA*

24 As indicated earlier, deterrence, as a general principle of sentencing, is well known. Had Parliament intended to make deterrence part of the youth sentencing regime, one would reasonably expect that it would be expressly included in the detailed purpose and principles set out in the statute. Yet the words "deter" and "deterrence" are nowhere to be found in the *YCJA*: the words do not appear in the "Declaration of Principle" under s. 3, nor in the "Purpose and Principles" listed under s. 38 and not even in the list of particular sanctions found in s. 42. This omission is of considerable significance.

25 The Crown recognizes that the *YCJA* does not explicitly refer to deterrence as a sentencing principle. However, it is argued, nor does the statute expressly exclude it from consideration in sentencing. This argument was accepted by the British Columbia courts in *B.V.N.* and formed the essential basis for their decision that general deterrence was still a factor to be considered in youth sentencing. In support of its argument, the Crown submits that the continued application of general deterrence can be inferred from several provisions in the new statute. First, it is submitted that Parliament, while emphasizing rehabilitation, has also recognized the need for "long-term protection of the public" as a purpose of youth sentencing: ss. 3 and 38(1). Second, ss. 3 and 38(1) both speak of "meaningful consequences" without defining the term. The Crown does not quarrel with the proposition that in most cases, the consequences should be meaningful to the youth before the court, but argues that a rational system of sentencing must recognize interests apart from those of the offender. Third, the statute speaks of "accountability" which, it is submitted, is a sufficiently broad concept to encompass considerations of general deterrence, provided that it does not lead to a disproportionate or exemplary sentence which the Crown concedes would be contrary to s. 3(1)(*c*). Fourth, it is submitted that general deterrence has a role to play in fashioning a sentence that reinforces "respect for societal values", a principle set out in s. 3(1)(*c*)(i).

26 In my view, none of these provisions, when considered in context, supports the Crown's position that a harsher sanction can be imposed upon on a young person for the purpose of sending a message, not to the youth, but to others who may engage in criminal conduct. For ease of reference, I will set out the relevant provisions and underline the words upon which the Crown relies.

27 The general purpose of youth sentencing is set out in s. 38(1) and reads as follows:

> **38.** (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

28 The governing sentencing principles are set out in ss. 3 and 38(2):

> **3.** (1) The following principles apply in this Act:
>
> (*a*) the youth criminal justice system is intended to
>
> (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
>
> (ii) rehabilitate young persons who commit offences and reintegrate them into society, and
>
> (iii) ensure that a young person is subject to meaningful consequences for his or her offence
>
> in order to promote the long-term protection of the public;
>
> (*b*) the criminal justice system for young persons must be separate from that of adults and emphasize the following:
>
> (i) rehabilitation and reintegration,
>
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
>
> (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
>
> (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(*c*) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(*d*) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

38. . . .

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

(*a*) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;

(*b*) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(*c*) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

(*d*) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and

(*e*) subject to paragraph (*c*), the sentence must

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgment of the harm done to victims and the community.

29 Section 38(3) lists the factors to be considered in determining a youth sentence:

38. . . .

(3) In determining a youth sentence, the youth justice court shall take into account

(*a*) the degree of participation by the young person in the commission of the offence;

(*b*) the harm done to victims and whether it was intentional or reasonably foreseeable;

(*c*) any reparation made by the young person to the victim or the community;

(*d*) the time spent in detention by the young person as a result of the offence;

(*e*) the previous findings of guilt of the young person; and

(*f*) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

30 I am unable to find in these provisions a basis for imposing a harsher sanction than would otherwise be called for to deter *others* from committing crime. Rather, as I will explain, the focus throughout remains on the young person before the court.

31 I will deal firstly with Parliament's express concern about the protection of the public. The Crown is correct in saying that "protection of the public" as a purpose of sentencing is not incompatible with general deterrence. Indeed, it is essentially on the basis of these words in the statute that this Court in *M.(J.J.)* held that general deterrence could be considered under the *YOA*. However, the *YCJA*'s references to "protection of the public" must be examined in context. For convenience, I repeat the words of s. 38(1):

> **38.** (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

It is apparent from a plain reading of s. 38(1) that "protection of the public" is expressed, not as an immediate objective of sentencing, but rather as the long-term effect of a successful youth sentence. Likewise, s. 3(1) sets out the three specific means by which sentencing is intended to "promote the long-term protection of the public". These specific means do not include general deterrence. Again, for convenience, I repeat the relevant wording of that provision here:

> **3.** (1) . . .
>
> (*a*) the youth criminal justice system is intended to

> (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
>
> (ii) rehabilitate young persons who commit offences and reintegrate them into society, and
>
> (iii) ensure that a young person is subject to meaningful consequences for his or her offence
>
> in order to promote the long-term protection of the public;

In my view, none of these express means would allow for the imposition of a harsher sanction for the purpose of deterring others from committing crimes. Rather, the means of promoting the long-term protection of the public describe an individualized process by focussing on underlying causes, rehabilitation, reintegration and meaningful consequences *for the offender*.

32 Likewise, when the *YCJA* speaks about reinforcing "respect for societal values" in s. 3(1)(*c*)(i), it is important to look at the context to determine *whose* respect is targeted: the young person's or society's as a whole? The more obvious target, or course, is the young person before the court "against" whom "measures" are "taken" under that provision. However, if there is any ambiguity on the interpretation of this provision, it is dispelled by the French version which makes it clear that the statute is speaking about reinforcing the young person's respect for societal values, not society's at large:

> **3.** (1) . . .
>
> (*c*) les mesures prises à l'égard des adolescents . . . doivent viser à :
>
> (i) renforcer <u>leur respect</u> pour les valeurs de la société,
>
> . . .

33 In the same way, when the statute speaks of "accountability" or requires that "meaningful consequences" be imposed, the language expressly targets the young offender before the court: "ensure that a young person is subject to meaningful consequences" (s. 3(1)(*a*)(iii)); "accountability that is consistent with the greater dependency of young persons and their reduced level of maturity" (s. 3(1)(*b*)(ii)); "be meaningful for the individual young person given his or her needs and level of development" (s. 3(1)(*c*)(iii)). Parliament has made it equally clear in the French version that these principles are offender-centric and not aimed at the general public: e.g., s. 3(1)(*a*) speaks of "*le système de justice pénale pour adolescents vise à prévenir le crime par la suppression des causes sous-jacentes à la criminalité chez les adolescents . . . et à assurer la prise de mesures leur offrant des perspectives positives*".

34 In my view, the words of the statute can only support the conclusion that Parliament deliberately excluded general deterrence as a factor of youth sentencing.

3.4 *Exclusion of General Deterrence Accords With Parliament's Intention*

35 The general object and scheme of the *YCJA*, and Parliament's intention in passing it, has already been the subject of much discussion, by courts and commentators alike, most recently by this Court in *R. v. C.D.*, [2005] 3 S.C.R. 668, 2005 SCC 78. I will not repeat this Court's analysis in *C.D.* here. It is quite clear in considering the preamble and the statute as a whole that Parliament's goal in enacting the new youth sentencing regime was to reserve the most serious interventions for the most serious crimes and thereby *reduce the over-reliance on incarceration for non-violent young persons*. This goal is expressly set out in the preamble to the *YCJA*. It reads as follows:

> WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;
>
> WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;
>
> WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;
>
> WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;
>
> AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;
>
> NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows . . . .

36 Unlike some other factors in sentencing, general deterrence has a unilateral effect on the sentence. When it is applied as a factor in sentencing, it will always serve to increase the penalty or make it harsher; its effect is never mitigating. The application of general deterrence as a sentencing principle, of course, does not always result in a custodial sentence; however, it can only contribute to the increased use of incarceration, not its reduction. Hence, the exclusion of general deterrence from the new regime is consistent with Parliament's express intention to reduce the over-reliance of incarceration for non-violent young persons. I am not persuaded by the Crown's argument that the words of the preamble referring to the public availability of information indicate that Parliament somehow intended by those words to include general deterrence as part of the new regime. The reference in the preamble to the desirability that certain information

be available to the public, in and of itself and in context, cannot reasonably support such an interpretation.

37 The Crown's reliance on some of the exchanges before the Parliamentary Standing Committee on Justice and Human Rights — the committee responsible for reviewing the draft provisions of the *YCJA* — is equally unconvincing. At best, the record of Parliamentary Committee proceedings shows that the exclusion of general deterrence from the *YCJA* was a very live issue. This fact can only lend further support to the conclusion that the drafters' ultimate omission of deterrence as a youth sentencing factor was deliberate. Administrative materials published by the Department of Justice Canada on its Web site further confirm this. None of the statements speaks of deterrence as a principle of sentencing. Indeed, in the sentencing modules that directly address the sentencing guidelines under the *YCJA*, the Department of Justice Canada takes the position that deterrence plays no role in youth sentencing. The statement reads:

> The *YCJA* sets out distinct sentencing provisions for young persons which are different in important respects from the sentencing provisions for adults in the *Criminal Code*. Denunciation, specific deterrence, general deterrence, and incapacitation, which are sentencing objectives for adults under the *Criminal Code*, are not sentencing objectives under the *YCJA*. Section 50 of the *YCJA* states clearly that the purpose and principles of sentencing of adults under the *Criminal Code* which are contained in sections 718, 718.1 and 718.2 of the *Code* do not apply in proceedings under the *YCJA*, except for paragraph 718.2(*e*) which deals with Aboriginal offenders. [Emphasis added.]
>
> (*YCJA Explained* (2002), www.justice.gc.ca/en/ps/yj/repository/downlds/3040301.pdf, at p. 3)

38 Of course, this does not mean that sentencing under the *YCJA* cannot have a deterrent effect. The detection, arrest, conviction and consequences to the young person may well have a deterrent effect on others inclined to commit crime. It also does not mean that the court must ignore the impact that the crime may have had on the

community, as was suggested in argument. A consideration of all relevant factors about the offence and the offender forms part of the sentencing process. What the *YCJA* does not permit, however, is the use of general deterrence to justify a harsher sanction than that necessary to rehabilitate, reintegrate and hold accountable the *specific young person before the court*.

3.5 *Specific Deterrence*

39 The focus on these appeals has been on general deterrence, not specific deterrence. As stated earlier, specific deterrence is directed at the offender before the court. As a principle of sentence, it refers to the goal of preventing the offender from committing another criminal offence. When considered broadly, there can be considerable overlap between specific deterrence and other goals of sentencing. Indeed, rehabilitation and reintegration of the offender in society may be the best way to ensure that the young person does not re-offend. However, the new sentencing regime does not speak of specific deterrence as a distinct factor in sentencing. Rather, Parliament has specifically and expressly directed how preventing the young offender from re-offending should be achieved, namely by addressing the circumstances underlying a young person's offending behaviour through rehabilitation and reintegration and by reserving custodial sanctions solely for the most serious crimes. In my view, nothing further would be gained in trying to fit specific deterrence, as a distinct factor, by implying it in some way under the new regime.

40 In its narrower sense, specific deterrence calls for the incapacitation of the offender in order to prevent the further commission of crime, usually by separating the offender from society through incarceration. It is plain from the preceding analysis on general deterrence that, in this sense, specific deterrence, as a distinct factor in youth

sentencing, is also excluded under s. 50(1) and cannot be implied from any of the provisions of the *YCJA*. As reviewed in detail by this Court in *C.D.*, Parliament has imposed specific restrictions on the imposition of custodial sentences. It is those provisions that must govern.

41 For these reasons, I conclude that deterrence, general or specific, is not a principle of sentencing under the *YCJA*.

4. Custody and Supervision Orders Under Section 42(2)(*o*)

42 This leaves the additional issue in *B.W.P.* concerning the respective duration of the custody and supervision portions of an order made under s. 42(2)(*o*). As noted earlier, B.W.P. was sentenced to a 15-month custody and supervision order under s. 42(2)(*o*) for the offence of manslaughter. At the time of sentencing, he had spent 108 days in pre-trial custody. The Crown sought a custody and supervision order of 12 to 15 months, with an open custody period of not less than two-thirds of the 15 months. The Crown argued that the youth sentencing judge had no discretion but to impose at least two-thirds of the sentence in custody. In support of its position, the Crown argued that ss. 42(2)(*n*) and 42(2)(*o*) must be read together, thereby ensuring that offenders sentenced under the latter provision spend at least as significant a portion of the sentence in a custodial setting. This interpretation was rejected by the courts below and, in my view, correctly so.

43 Section 42(2)(*o*) only applies to offences of manslaughter, attempted murder and aggravated sexual assault. Under its terms, the custody and supervision order cannot exceed three years; however, there is no restriction on what part of the time can be spent

in a custodial setting. Indeed, nothing is said about the respective duration of the custody and supervision portions of the order. The provision reads as follows:

> **42.** . . .
>
> (2) . . .
>
> (*o*) in the case of an offence set out in subparagraph (*a*)(ii), (iii) or (iv) of the definition "presumptive offence" in subsection 2(1), make a custody and supervision order in respect of the young person for a specified period not exceeding three years from the date of committal that orders the young person to be committed into a continuous period of custody for the first portion of the sentence and, subject to subsection 104(1) (continuation of custody), to serve the remainder of the sentence under conditional supervision in the community in accordance with section 105;

44 By contrast, under s. 42(2)(*n*), a custody and supervision order cannot exceed two years (three years for those offences which are subject to a maximum sentence of life imprisonment for an adult), and the supervision portion of the order must be "one half as long" as the custody portion. In other words, an offender who is subject to a s. 42(2)(*n*) order must spend two-thirds of the sentence in custody and one-third under community supervision. The provision reads as follows:

> **42.** . . .
>
> (2) . . .
>
> (*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;

45 It is therefore clear from their wording that the two provisions are different. The Crown submits that Parliament's intention in not requiring that the supervision portion of the order by "one half as long" as the custody portion under s. 42(2)(*o*) was to acknowledge for the most serious offences — manslaughter, attempted murder and aggravated sexual assault — that a young offender may require to spend more time in custody than in less serious cases. I agree. However, there is nothing in s. 42(2)(*o*) to prevent the court from imposing a lesser proportion of time in actual custody if it sees fit. The Crown submits that this interpretation leads to an absurd result because it would allow a young offender to spend less time in custody when he or she commits a more serious offence. I do not find this argument persuasive. The same could be said in respect of the *Criminal Code* offence of manslaughter which, in theory, may attract a less severe sentence than other less serious offences in respect of which a minimum sentence must be imposed. What constitutes a fit sentence in any given case depends on all the circumstances. For example, in the case of the more serious offences, it may be, as was the case here, that a considerable amount of time will already have been spent in pre-trial custody. A s. 42(2)(*o*) custody and supervision order simply allows for more flexibility.

46 Alternatively, the Crown argues that a custodial period of one day is inconsistent with s. 104. Under s. 104(1), the Crown may seek an extension of the period of custody in respect of an offender sentenced under s. 42(2)(*o*), (*q*) or (*r*) (but not (*n*)) who is held in custody. The application must be brought "within a reasonable time before the expiry of the custodial portion of the youth sentence". The Crown submits that, by this wording, s. 104 contemplates that the custody period will be longer than the one day that was imposed by the sentencing judge in this case. I see no merit to this argument and would dispose of it summarily as did Hamilton J.A. in the Manitoba Court of Appeal:

> The Crown's right to make application for a continuation of custody is dependent on the young person being in custody. In other words, if a young person is not "held in custody" then s. 104(1) does not apply. One must look directly to s. 42(2) for any requirements for custody, not indirectly through s. 104(1). [para. 70]

47 Finally, the Crown argues that a one-day custodial sentence is inconsistent with s. 105 which requires that a young person who is held in custody under a s. 42(2)(*o*), (*q*) or (*r*) order be brought before the court at least one month prior to the expiry of the custodial portion to set out the conditions of their conditional supervision. Again here, I reach the same conclusion as Hamilton J.A. The purpose of s. 105 is to "ensure the conditions are appropriate for the young person at the time of release" (para. 71). As she stated, "a one-day custody period cannot be prohibited on the basis that [a] young person is entitled to one month's notice under s. 105. The effect of a one-day custody period simply makes the procedure under s. 105 unnecessary" (para. 71).

5. Conclusion

48 For these reasons, I conclude that the Manitoba courts were correct in finding that general deterrence is not a relevant factor in sentencing under the *YCJA*. They were also correct in their interpretation of s. 42(2)(*o*). I would therefore dismiss the Crown's appeal in *B.W.P.*

49 As stated at the outset, I see no reason to interfere with the sentence imposed in *B.V.N.* While the British Columbia courts erred in considering general deterrence as a principle of sentencing, this factor did not play a significant role in the determination of the sentence, which has now essentially become moot. I would also dismiss B.V.N.'s appeal.

Appeals dismissed.

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