NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Smith,*** 2012 NSCA 37

Date: 20120411
Docket: CAC 337898
Registry: Halifax

Between:

Mykel Smith

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Hamilton and Beveridge, JJ.A.
Appeal Heard:	January 25, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal sentence granted. Appeal dismissed, per reasons for judgment of Hamilton, J.A., Saunders and Beveridge, JJ.A. concurring.
Counsel:	Roger A. Burrill, for the appellant Mark Scott, for the respondent

Reasons for judgment:

[1] The appellant, Mykel Smith, was found guilty by The Honourable Judge Jamie S. Campbell of attempting to murder Michael Patriquen, Jr., when he shot him in the chest at close range. The appellant was 17½ years old at the time of the offence and 19 at the time of sentencing. Mr. Patriquen suffers many health problems as a result of the shot, including thoracic level three-quarter paraplegia which confines him to a wheelchair. His life expectancy could be shortened by twenty to twenty-nine years.

[2] The appellant does not appeal his conviction or the judge's decision to impose an adult sentence. He seeks leave to appeal and, if successful, appeals his sentence of fourteen years, less one-for-one credit for his 469 days on remand – a go forward sentence of 12 years and 261 days. The judge's reasons for conviction are reported at 2010 NSPC 26 and for sentence at 2010 NSPC 53.

[3] This appeal raises the issues of the interaction of the principles of sentencing in the **Youth Criminal Justice Act**, S.C. 2002, c. 1 ("**YCJA**") and the **Criminal Code**, R.S.C., 1985, c. C-46 **("Code")** when an adult sentence is imposed on a young person; whether the judge correctly applied those principles; and whether the sentence he imposed was manifestly unfit. Despite Mr. Burrill's able argument, for the reasons that follow, I would grant leave to appeal, but dismiss the appeal.

Facts

[4] Sergio Bowers and Mr. Patriquen were friends. On the day before the attempted murder they were together. There was drinking, drunk driving, stealing liquor from a liquor store, and more drinking. They eventually ended up at Mr. Patriquen's house with a number of other people.

[5] During the course of the evening, Mr. Patriquen accidentally damaged Mr. Bowers' new Blackberry Pearl. Mr. Bowers became angry and left, returning some hours later, with a knife. He wanted Mr. Patriquen's gold chain as collateral until his Blackberry was repaired. Mr. Patriquen refused.

[6] Mr. Bowers became more agitated. Following a tense standoff, he made a telephone call and instructed the person to whom he was speaking to bring the

“heater” and “fuck this guy up”. Since Mr. Bowers had a knife, Mr. Patriquen did not confront him in an effort to make him leave. At approximately 3:30 a.m., Mr. Bowers used his phone to direct the driver of a truck into Mr. Patriquen's driveway. A shadowy figure ran up the side of the driveway. Mr. Patriquen unsuccessfully attempted to push Mr. Bowers out the door. Mr. Patriquen locked the door just as the shadowy figure reached it and was then either pushed or punched by Mr. Bowers. Mr. Patriquen landed in the closet next to the door.

[7] Mr. Bowers opened the door. A person was standing there. He had a black baseball cap pulled down to his eyes and a dark bandana covering his face. No words were exchanged. Mr. Patriquen did not know the assailant. He heard a shot and fell to the floor. The shooter unhooked and removed Mr. Patriquen’s gold bracelet from his wrist and he and Mr. Bowers fled.

[8] Mr. Patriquen called 911. The police responded. They spotted a truck similar to the one described by Mr. Patriquen at 3:45 a.m. The truck sped up in an effort to evade them, reaching speeds in excess of 100 kilometres an hour in a suburban area. Shortly thereafter the truck was found smashed into a house. Physical evidence from the truck linked the appellant to the attempted murder.

[9] The police investigation revealed that the appellant was bound by a Deferred Custody and Supervision Order requiring him to be inside his residence at the time of the shooting. Regardless, on the call from Mr. Bowers, he stole his grandfather’s truck and drove to Mr. Patriquen’s house.

[10] The single gunshot to the chest missed Mr. Patriquen’s descending aorta by 20 millimetres. Had it struck or lacerated the aorta, Mr. Patriquen would likely have died. Shrapnel from the bullet damaged his spinal cord and caused thoracic level three-quarter paraplegia. Mr. Patriquen will be confined to a wheelchair for the rest of his life. He also suffers from sexual dysfunction, lack of control over his bowels and bladder, muscle spasticity, respiratory problems and risk of skin breakdown. He is at increased risk for early heart disease and Type 2 diabetes. His life expectancy could be shortened by twenty to twenty-nine years.

[11] Following a thirteen-day trial, the appellant was found guilty of attempted murder, dangerous operation of a motor vehicle, failure to stop at the scene of an accident, robbery, theft and possession of stolen property. Section 34 **YCJA**

reports were ordered. The judge noted the “intensive and extensive examination and assessment” the appellant was subjected to in the course of the preparation of these reports. Four presentence reports, completed when the appellant was 14, 15, 17 and 19, were also before the judge.

[12] The sentencing hearing took place over three days. A go forward sentence of 12 years and 261 days was imposed on the appellant for attempted murder. Remaining counts involved various periods of incarceration to be served concurrently.

Decision

[13] When addressing the issue of whether an adult sentence should be imposed on the appellant, the judge considered in detail his circumstances. He considered his age, maturity, family relationships, schooling, psychiatric assessment, prior criminal record, behaviour in custody, addictions/mental health, character and prospect for rehabilitation and reintegration. He concluded:

> [76] A disturbing picture emerges. It can perhaps be visualized in the Facebook photographs of Mykel Smith, also known as “Soulja”. There he is seen striking poses, wearing a black baseball cap pulled down to his eyes and with a camouflage bandana covering his face. Those were the same articles worn when Michael Patriquen was shot. It is the picture of someone who wants to portray an arrogantly sinister gangster image.
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> [77] Yet, Mykel Smith sees himself, to use his word, as a “gentleman”. He isn’t capable of getting the disconnect. He doesn’t see the irony. He believes his own spin. He seems to believe that according to the antisocial code that he has adopted, that he is indeed a “gentleman”.
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> [79] He is shallow and insincere. He is able to turn on his unctuous “charm” in an effort to manipulate people. But his ability to do so is not so finely tuned that his charm does not usually come across as transparent or superficial. He is so arrogant that he actually thinks he has people fooled.
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> [80] He is not rash or impulsive. He is not driven by emotion. He is not mentally ill. He is purpose driven. Mykel Smith often acts in a calculated way to get what he wants. His intellectual ability is such that his “calculations” are often

> wrong. He says that he isn't “stupid”. He is cunning. He just isn’t quite cunning enough.
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> [81] Mykel Smith’s sense of specialness or self indulgence draws him to a life where “success” is measured in terms that are more amenable to his abilities. He plays to his “strengths”. He is drawn to a world where a kind of greasy charm, a perverse and twisted code of respect, a gun and a willingness to act without regard for other people, are things that bring status.

[14] The judge also considered the nature of the offence:

> [85] Obviously the offence that Mykel Smith committed is serious. Whenever a person tries to kill another the circumstances will, in their own unique way, be horrifying. There is much about this offence however that makes it especially disturbing. The victim, Michael Patriquen, was a stranger to Mykel Smith. He simply went to his house and shot him in the chest. He had nothing against him. There was no grudge. There was no argument. There were no words exchanged. He just shot him.
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> [86] This is not a case where a young person was caught up in a moment, or was driven by rage, anger, jealousy or revenge.
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> [87] This is not a case where a robbery went “bad”, or where a fight escalated into something no one intended. This was not a case where one bad decision led to tragic consequences.
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> [88] This was callous, cold and calculated.
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> [89] The Crown has noted, that Mykel Smith should receive no benefit for his luck in failing to kill Michael Patriquen. He intended death and acted with all of the moral blameworthiness of a first degree murderer. *R. v. Logan*, [1990] 2 S.C.R. 731 at para. 20. Attempted murder is a very serious offence. It is not murder. But for millimeters this would have been murder. It was not however, murder.
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> [90] The fact that a gun was used is not insignificant. While the issues of denunciation and deterrence are not applicable here, the use of a gun is relevant to the issue of retribution. Michael Patriquen was put in a wheelchair by the use of a lethal weapon that is designed and manufactured to kill and maim people. ...

[15] The judge noted the severe consequences of the offence to Mr. Patriquen, and, after considering the law, concluded that an adult sentence should be imposed.

[16] He then addressed the question of how the sentencing principles under the **YCJA** and the **Code** interact when an adult sentence is imposed on a young person:

> [118] There may be some issue as to exactly what happens when a young person actually does receive an adult sentence. Is the young person then sentenced according to the principles in the *Criminal Code* that are applicable to adults, without regard to the provisions of the *YCJA*? Or, is the person sentenced under youth criminal justice principles only, receiving a sentence that is "adult" only with respect to its length? If only youth criminal justice principles apply there is a distinct emphasis on rehabilitation and no consideration at all of deterrence or denunciation.

[17] Courts have voiced a variety of perspectives in answering that question. Judge Campbell reviewed the authorities in detail. He considered his colleague Judge Burrill's decision on this question, **R. v. A.A.B.**, 2006 NSPC 4, and the different positions taken by the courts in **R. v. Pratt**, 2007 BCCA 206, and **R. v. Flaten**, 2009 SKCA 136:

> [119] My colleague Judge Burrill answered those questions in *R. v. A.A.B.* [2006] N.S.J. No. 80, 2006 NSPC 4. He took the view that when an adult sentence is imposed, the principles of the *YCJA* still apply in addition to the principles governing adult sentencing:
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> > In my view, when one decides that an adult sentence is appropriate, it does not mean and I am not directed by the Youth Criminal Justice Act to abandon the principles and purpose of sentencing set out in the Youth Criminal Justice Act. In my view, while I must acknowledge in imposing an adult sentence that 718 through 718.2 should be referred to, I am of the view that predominantly, the principles and purposes of sentencing set out in the Youth Criminal Justice Act should be applicable .... para. 72
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> [120] That position was referenced, and in fact specifically adopted, by the British Columbia Court of Appeal in *R. v. Pratt*, [2007] B.C.J. No. 670. That court held that even when an adult sentence is imposed it is imposed under the *YCJA*, and it remains a sentence under the *YCJA*. That brings into consideration the adult sentencing principles of s. 718, such as deterrence, but does not exclude the application of principles applicable to youth sentencing, particularly those found in s. 3 of the *Act*.

> [121] A somewhat different position was adopted recently by the Saskatchewan Court of Appeal in *R. v. Flaten*, [2009] S.J. No. 709. That court addressed the position taken by Judge Burrill and the British Columbia Court of Appeal. They held that there are "key inconsistencies set out in s. 3 of the *YCJA* and the sentencing principles set out in s. 718 of the *Criminal Code*." para. 29. General and specific deterrence are not factors to be considered under the *YCJA*, while deterrence is a factor that must be considered under the *Criminal Code*. Rehabilitation is a primary objective of the *YCJA* while it is only one of several factors to be considered and may in some circumstances be given greater, little or no weight. The court held that an attempt to combine the two regimes would result in a third hybrid regime, which "depending on the circumstances could require a judge to give less weight to the factor of deterrence than the circumstances would warrant and more weight to the factor of rehabilitation than the circumstances would warrant when sentencing pursuant to the provisions of the Code." para. 31 The court determined that when the sentencing of a young person under the Act involved the imposition of an adult sentence, the principles of the *Criminal Code* and not those of *Act* apply.
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> [122] The court noted that the age of the offender and his or her personal circumstances are still relevant to the ultimate sentencing decision. Age is still an important mitigating factor. The younger the person the more "heightened become the factors of youth and the potential for rehabilitation."

[18] The varying approaches prompted Judge Campbell to observe that while certain distinctions might invite academic interest, it did not change, in any practical sense, the application of sentencing principles he believed were especially important in this case. He found the sentencing principles in both the **YCJA** and the **Code** must be considered, with the weight to be given to any particular principle to be determined by the circumstances of the offender and the offence:

> [123] The theoretical distinction is academically interesting. The focus for the trial court judge however has to be on the specific case before him or her. It is rather difficult to grasp the practical implications for this case, of opting for what either the Saskatchewan Court of Appeal or the British Columbia Court of Appeal have decided. From the perspective of a trial court, the circumstances of the case have to be considered. If an adult sentence is determined to be the only appropriate one, the principles of adult sentencing, including denunciation and deterrence apply. It is also clear that if an adult sentence is imposed, the age and circumstances of the young person upon whom that sentence is being imposed have to be considered. Deterrence and denunciation should be given the weight that the circumstances call for. The same holds true for the principle of rehabilitation.

> [124] The principles of sentencing in each regime are, in these kinds of circumstances, informed by the other. Both are considered. Neither is tossed out. Neither one should automatically, always and in every case trump the other. Once the decision has been made to sentence a young person to an adult sentence, the social policy considerations underlying the system of youth criminal justice do not disappear. They may well have to be addressed in a way that reflects the circumstances. In some cases, denunciation and deterrence will have to be emphasized. In some cases, they will be considerably more important than rehabilitation. In others, even though the circumstances call for the imposition of an adult sentence, those policy considerations set out in the *YCJA* are more important.
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> [125] As is often the case, the answer, I think, is, "It depends." Any time when young people are involved that seems to be a fairly reasonable answer.
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> [126] How adult sentencing principles and youth sentencing principles interact should depend on the circumstances of each case. In some cases, despite the imposition of an adult sentence, youth justice sentencing principles may have application. In others, the balance may tip more toward the application of adult principles.

[19] Finding he had to weigh the applicable youth and adult sentencing principles in response to the circumstances when imposing an adult sentence on the appellant, the judge stated the following when applying these principles to the circumstances before him:

> [136] Those purposes and principles of adult sentencing have to be applied to Mykel Smith and his crimes. But they are to be applied having regard to the circumstances of the offender including his young age, as well as his criminal sophistication. While the presumption of diminished moral culpability has been rebutted, that does not erase the fact of his age.
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> [137] Mykel Smith's age must also be taken into account when considering the principle of parity. His sentence must reflect the sentences of others who have committed similar offences in similar circumstances. His age is not the only circumstance. Mykel Smith is not defined only by his age. It is however a very important consideration. The cases as noted have established that sentences for attempted murder, even by people who are young, are significant.
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> [138] Mykel Smith's age at the time of the offence must be considered when considering the principle of rehabilitation. Given his age, rehabilitation should be

a very important consideration. There are significant challenges that will be faced in the rehabilitation of this young man. There are things about his personality that will make him resistant to change. He is not an “average” 19 year old. Yet, despite some of those entrenched criminal values, as a young man of under 20 years old, his circumstances are different, for example, from a person hardened by a criminal lifestyle that has persisted for over 30 years. Rehabilitation will be difficult but it is not, by any means, a lost cause.

...

[140] Denunciation of unlawful conduct is an aspect of adult sentencing. Society, through the criminal law process, must be able to denounce certain kinds of behaviour. We tend to shy away from the use of the word evil. It seems to have been co-opted by the writers of movie scripts and political speeches. People seem to prefer more gentle euphemisms. But sometimes we have to call it what it is. A young man was shot in cold blood and left for dead. He will spend the rest of his life in a wheelchair. That is evil. Pure and simple. A sentence has to be a measured way to say that.

[141] Mykel Smith did not want to “beat himself up” over stabbing the cab driver. It is high time that Mykel Smith started to beat himself up over something.

[142] Deterrence is not a principle applicable to the sentencing of young people. A youth sentence is never about sending a “message” to the community or to other young people. Here adult principles apply. In applying the principle of deterrence a court cannot lose sight of the circumstances of the offender. Is this the appropriate person through whom that message should be sent? When the person is 17 1/2 when the offence was committed and is being sentenced to an adult sentence, deterrence is an aspect, but somewhat less so than for an adult being sentenced in similar circumstances. In these particular circumstances however deterrence must be given a real voice. If Mykel Smith were older, that voice may well have been louder.

[143] Thugs with guns need to hear a very simple message. It is this. If you shoot someone the punishment will be more than a cost of doing business. This is Nova Scotia. It’s not the mean streets of inner city America. It’s not a movie. Real lives are damaged. Real communities are damaged. A serious sentence is not an emotional reaction. It is a practical response.

[144] The sentence imposed must acknowledge, but cannot begin to reflect, the life sentence that has been imposed on the victim of this crime. It must say that this was evil. It has to take into account the remarkable callousness with which Mykel Smith acted. It has to take into account that when he shot Michael

> Patriquen, he was not acting out of character. It must consider his criminal sophistication and his record of offences. It must consider his apparently entrenched sense of entitlement and his attitudes which are consistent with a criminal lifestyle and which will be hard to change. There is much about this arrogant, shallow, self-centered and remorselessly cruel young man that calls out for a very long time in jail.
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> [146] The law requires that Mykel Smith's age be considered. He was still a young person when he shot Michael Patriquen, even though an adult sentence is being imposed. His sentence must reflect that. At 17 1/2 no one could suggest that Mykel Smith had grown up.
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> [148] There will be serious challenges that will be faced in his rehabilitation. He is still young enough that the interests of society and it's long term protection, are best served by working to change Mykel Smith. Those changes will not happen quickly.

[20] The judge's references in ¶ 141, to it being time for the appellant to "beat himself up over something", and in ¶ 143, to the punishment for shooting someone being "more than a cost of doing business", were references to two of Mr. Smith's fourteen prior criminal offences that the judge summarized earlier in his reasons:

> [57] In 2006 after a taxi driver braked to avoid hitting a small dog, Mykel Smith approached the cab, took out a knife and stabbed the driver twice, once in the arm and once in the chest. He did it simply to prove that he could and would. When speaking about the cab driver he said, "I empathize with his situation but I'm not going to beat myself up over it."
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> [59] In 2008 when being picked up on a warrant he was found with 15 tin foil balls of cocaine and $606 in his pocket. He said, "Fuck, I got caught with stones on me!" and later said, "That's the price you pay for doing business". That resulted in a drug trafficking conviction. At the time he was already bound by a probation order.

Issues

[21] The appellant does not take issue with the judge's finding that the sentencing principles of both the **YCJA** and the **Code** must be considered when imposing an adult sentence on a young person, with the circumstances of the offender and the offence determining the weight to be given to these principles. He argues that the judge erred by (1) overemphasizing the adult sentencing principles of deterrence and denunciation to the exclusion of the youth sentencing principles, (2) "objectifying" the appellant as the personification of evil and (3) imposing a manifestly unfit sentence.

Standard of Review

[22] Justice Fichaud of this Court, recently re-stated the applicable standard of review in a sentence appeal in **R. v. E.M.W. (No 2)**, 2011 NSCA 87:

> [6] In *R. v. Shropshire*, [1995] 4 S.C.R. 227, paras. 46-50, Justice Iacobucci for the Court stated or adopted the views that:
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> (a) An appellate court should vary a sentence only when "the court of appeal is convinced it is not fit" or "clearly unreasonable", or the sentencing judge "applied wrong principles or [if] the sentence is clearly or manifestly excessive".
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> (b) "If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts".
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> (c) "[S]entencing is not an exact science", but rather "is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender".
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> (d) "The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range".
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> (e) "Unreasonableness in the sentencing process involves the sentencing order falling outside the 'acceptable range' of orders".
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> [7] In *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, paras. 89-92, Chief Justice Lamer for the Court reaffirmed *Shropshire's* principles and added (para. 92):

> Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. [citations omitted]. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. [citations omitted]. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.

[8] In *R. v. L.M.*, [2008] 2 S.C.R. 163, Justice LeBel for the majority discussed the effect of sentencing asymmetry on appellate review:

> 36. Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity *where warranted by the circumstances*, because of the principle of proportionality. [citation omitted] As this Court noted in *M.(C.A.)*, at para. 92, "there is no such thing as a uniform sentence for a particular crime". From this perspective, an appellate court is justified in intervening only if the sentence imposed by the trial judge "is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*M (C.A.)*, at para. 92). [Justice LeBel's italics]

See also, paras. 14-15, 22.

Analysis

[23] Before dealing with the appellant's arguments I will consider the judge's finding that the sentencing principles of both the **YCJA** and the **Code** apply when imposing an adult sentence on a young person, with the circumstances of the offender and the offence determining the weight to be given to these principles.

[24] Whatever differences or refinements might emerge from such cases as **A.A.B.**, **Pratt**, and **Flaten**, I believe Judge Campbell articulated the correct approach to be taken in such matters when he said (and I repeat here):

> [124] The principles of sentencing in each regime are, in these kinds of circumstances, informed by the other. Both are considered. Neither is tossed out. Neither one should automatically, always and in every case trump the other. Once the decision has been made to sentence a young person to an adult sentence, the social policy considerations underlying the system of youth criminal justice do not disappear. They may well have to be addressed in a way that reflects the circumstances. In some cases, denunciation and deterrence will have to be emphasized. In some cases, they will be considerably more important than rehabilitation. In others, even though the circumstances call for the imposition of an adult sentence, those policy considerations set out in the *YCJA* are more important.
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> ...
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> [126] How adult sentencing principles and youth sentencing principles interact should depend on the circumstances of each case. In some cases, despite the imposition of an adult sentence, youth justice sentencing principles may have application. In others, the balance may tip more toward the application of adult principles.

[25] I cannot improve on the language he used and would adopt that as a proper statement of the law.

[26] The appellant argues that the judge erred by overemphasizing the adult sentencing principles of denunciation and deterrence to the exclusion of the youth sentencing principles. In support of this argument, he points to what he says is the judge's failure, commencing at ¶ 136, to refer to the youth sentencing principles when he applied the law to the circumstances before him.

[27] Earlier in his reasons, when the judge determined that an adult sentence should be imposed, he considered in detail the circumstances of the appellant and the offence, including its severe effect on Mr. Patriquen. He made findings. He also extensively reviewed the law concerning the interaction of the youth and adult sentencing principles and clearly concluded he had to consider both sets of sentencing principles, weighed in light of the circumstances before him, in determining the appellant's sentence. His earlier findings and reasoning informs the whole of his reasons. It is unconvincing to suggest he disregarded the youth sentencing principles when he determined the appellant's sentence, having earlier directed himself to consider them.

[28] In fact, a review of the judge's reasons indicates that he specifically referred to some of the youth sentencing principles, along with the adult sentencing principles of denunciation and deterrence, after ¶ 136 of his reasons.

[29] He found deterrence would not be relevant if he were imposing a youth sentence, but was relevant here because he was imposing an adult sentence. He then expressly tempered the weight he placed on deterrence to take account of the appellant's youth:

> [142] ...When the person is 17 ½ when the offence was committed and is being sentenced to an adult sentence, deterrence is an aspect, but somewhat less so than for an adult being sentenced in similar circumstances. In these particular circumstances however deterrence must be given a real voice. If Mykel Smith were older, that voice may well have been louder.

[30] He found the principle of denunciation was deserving of significant weight given that the appellant acted as a "hit man", shooting a stranger in the chest at close range, in his home, and leaving him for dead, on the basis of nothing more than a phone call asking him to bring the "heater" and "fuck this guy up", resulting in Mr. Patriquen being forced to spend the rest of his life in a wheelchair with permanent life altering health problems and the chance of a significantly shorter life expectancy.

[31] The judge noted the importance of the appellant's youth many times, including in ¶ 137, where he found his age was a very important consideration. He referred to the appellant's reduced level of maturity and greater dependance, youth sentencing principles, in ¶ 146 by stating that no one could suggest the appellant was grown up.

[32] He referred to the importance of rehabilitation in ¶ 138. He found this too was a very important principle to be weighed, given the appellant's youth. However, when he considered rehabilitation in the context of the appellant's circumstances, he found there would be significant challenges to his rehabilitation; that his personality would make him resistant to change. He found the appellant had entrenched criminal values and was not your "average" young person. Despite this, in ¶ 148, the judge found the appellant was young enough that the interests of society and its long term protection, principles underlying the **YCJA**, were best served by working to change him.

[33] I am not satisfied the judge overemphasized deterrence or denunciation to the exclusion of the youth sentencing principles when he set the appellant's sentence. The nature of the offence called for strong denunciation and deterrence. Even the most casual observer would be alarmed by the seeming prevalence of illegal handguns on our city streets. A clear message must be sent to those who would use guns, that there will be serious consequences for such actions. The message needs to get out that the **YCJA** does not immunize persons under the age of 18 from fair and proportionate accountability for such actions. The judge's reasons make it clear he took the youth sentencing principles into account and tempered the appellant's sentence because of these principles. As a young person approaches the age of 18, the cut-off age under the **YCJA**, youth sentencing principles continue to be relevant but do not warrant as much weight on sentencing as they do for younger persons; **Pratt**, ¶ 57; **R. v. Kenworthy**, 2009 BCCA 197, ¶ 13.

[34] I would dismiss this ground of appeal.

[35] I am also satisfied the judge did not err by "objectifying" the appellant as the personification of evil. In this case he obviously felt that clarity of expression required plain language and blunt prose. I agree. His use of the word "evil" in ¶ 140 and 144 of his reasons refer to the offence the appellant committed, not to the appellant himself. There is nothing wrong with the judge describing the appellant's offence as "evil". It is. Chief Justice McLaughlin used the same word to describe sexual assault in the recent case of **R. v. D.A.I.**, 2012 SCC 5, ¶ 1. I would dismiss this ground of appeal.

[36] The appellant's final argument is that his sentence is manifestly unfit.

[37] As set out previously in ¶ 22, if the sentencing judge applied the correct principles and considered all relevant facts, courts of appeal must exercise deference before intervening in the specialized discretion Parliament explicitly vested in sentencing judges. "Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise in academic abstraction."; **R. v. M.(C.A.)**. Disparity in sentences may be warranted by the circumstances.

[38] The judge summarized many cases in his reasons concerning sentence. The respondent referred us to many more. Not unexpectedly, none are on all fours with this case. They disclose a great variety of circumstances relating to the offenders and the offences. The sentences range from 5 ½ years to life.

[39] With respect to the circumstances of the offenders, they range in age from 14 to 45, with the majority being in their late teens and early 20's. Their prior criminal records range from no prior record to varied and serious ones such as the appellant's. Their prospects for rehabilitation were found to differ significantly, from excellent prospects as in **R. v. Ferreira**, [1997] O.J. No. 4103 (C.A.), **R. v. J.B.,** [2010] O.J. No. 3931, **Flaten** and **R. v. Thiara**, 2008 BCSC 1414, to very poor prospects such as the judge found to be the case for the appellant. Several offenders expressed remorse for their offence, unlike the appellant. Some pled guilty, unlike the appellant, saving the victim from the stress of testifying and saving judicial resources. In some cases, the offence was found to be out of character for the offender, in contrast to the judge's finding here that the appellant's attempted murder of Mr. Patriquen was in character.

[40] The circumstances of the offences disclosed in these cases also differ significantly. They include attempted murder, first and second degree murder, manslaughter, robbery and aggravated assault. In most cases the offender acted as a result of animus towards the victim, unlike here. The seriousness of the consequences to the victim varied significantly. In **R. v. Cuthbert**, 2007 BCCA 585, and **R. v. Chevers**, 2011 ONCA 569, for example, the victims suffered no injury, in contrast to this case where Mr. Patriquen suffers from many permanent life altering injuries, including paraplegia, and his life expectancy could be shortened by twenty to twenty-nine years. No other case where the victim survived, indicated the victim's life expectancy could be shortened as a result of the injury, much less by such a significant length. The severe nature of the injuries suffered by the victim and their lasting impact can add to the length of a sentence; **R. v. Smith**, 2010 ONCA 229, ¶ 32, and **R. v. Tan**, 2008 ONCA 574, ¶ 39.

[41] The appellant refers us to two cases that he argues suggest an appropriate sentence for him of seven to ten years, **Flaten** and **R. v. Quintana**, [2009] B.C.J. No. 513 (C.A.).

[42] In **Flaten**, the remorseful accused was sixteen years old when he shot his former girlfriend in the face after a breakup. He had no criminal record, pled guilty to attempted murder and was found by the sentencing judge to have good prospects of being rehabilitated. The victim suffered serious injuries including the loss of an eye, facial disfigurement and cognitive impairment. On appeal, his sentence was lowered to seven years from nine.

[43] In **Quintana**, a remorseless, seventeen year old took part in the swarming of another young person at a dance. He struck the victim with a hatchet, rendering him a quadriplegic. He was found guilty of aggravated assault following a trial. He had a minor criminal record and was sentenced to ten years less remand.

[44] The appellant also refers us to three cases where sentences of fourteen, sixteen and eighteen years were imposed; **R. v. Bagga**, [1991] B.C.J. No. 2387 (C.A.), **R. v. Siu**, [1998] B.C.J. No. 2627 (C.A.), and **R. v. LeBlanc**, 2011 NSCA 60. He argues that the sentences in these cases provide no guidance with respect to his sentence because the circumstances are distinguishable.

[45] In **Bagga**, a remorseless, seventeen year old pled guilty at the first opportunity to attempted murder, after shooting a victim multiple times at close range. He had no criminal record. The shooting was motivated by political and religious reasons. The victim suffered serious injuries, including the loss of the use of one arm and leg but had a 50/50 chance of regaining their use. He was sentenced to fourteen years.

[46] In **Siu**, the unremorseful, thirty-eight year old accused shot his victim at close range in retaliation over a drug deal. The accused had a criminal record. The victim did not suffer life threatening injuries. Following trial, he was sentenced to sixteen years.

[47] In **LeBlanc**, a twenty-eight year old at the time of sentencing, pled guilty to attempted murder. He had a violent and lengthy record and was on a recognizance at the time of the offence. He attempted to murder a rival in a public place. There is no indication the victim’s injuries were serious or permanent. A sixteen-year sentence was imposed after the judge gave credit, on a one for one basis, for the 574 days he spent on remand.

[48] The appellant did not refer to **R. v. Gordon**, 2009 ONCA 170 or **R. v. Marriott**, 2011 NSSC 414.

[49] In **Gordon** the remorseless offender, just short of eighteen years old at the time of the offence, was found guilty following a trial of attempted murder. He shot the victim in a public place sometime following a drug transaction. The offender had a non-violent criminal record and was on probation at the time of the shooting. The Court upheld a twelve and one-half year sentence, minus remand credit, noting a "generous allowance for his age".

[50] In **Marriott** the offender was 18 at the time of the offence, twenty at the time of sentencing, and had been in custody the whole of his adult life for prior criminal offences. Following a joint recommendation, he was sentenced to 15 years for a planned and deliberate attempted murder, with the judge noting this sentence was in accordance with the cases before him.

[51] There are features in this appeal that call for a higher sentence than those imposed in **Flaten** and **Quintana**. In **Flaten**, the offender was younger, remorseful, pled guilty, had no prior criminal record, had good prospects for being rehabilitated and the victim's injuries, though serious, were less so than Mr. Patriquen's which required him to spend his life in a wheelchair and could shorten his life. In **Quintana**, the offender was found guilty of aggravated assault, a less serious offence than attempted murder, had a minor criminal record and used a hatchet, rather than a gun, in his attack.

[52] While **Bagga** (1991) and **Siu** (1998) are dated, I am not aware of any principle that suggests sentences for attempted murder should be shorter today than they were 22 and 14 years ago respectively. The political and religious motivation in **Bagga** sharply distinguishes it from this appeal, but on the other hand, the offender pled guilty, had no prior criminal record and the victim had a 50/50 chance of recovering the use of his arm and leg. The offender's age in **Siu** distinguishes that case from this appeal. However, in **Siu** the victim suffered no injuries.

[53] In **LeBlanc** the offender was older than the appellant and had a more extensive prior criminal record than the appellant's, but he pled guilty and his

victim's injuries appear to have been significantly less severe than Mr. Patriquen's. Mr. LeBlanc's sentence was approximately four years longer than the appellant's.

[54] As appropriately acknowledged by the appellant in his factum (¶ 50), cases can always be distinguished.

[55] In **R. v. Tan**, the Court found that there is a wide variation in sentences for attempted murder by an adult, six to nine years for the least serious, eleven to thirteen for the mid range, and up to life for the most serious. There appears to be a wide variation for young persons as well.

[56] Considering the circumstances of this appeal, I am satisfied the sentence imposed by the judge was appropriate given:

- the "callous, cold and calculated" manner in which the appellant fired the shot at close range into Mr. Patriquen's chest, in Mr. Patriquen's home, simply because he had been told by Mr. Bowers to bring the "heater" and "fuck this guy up",

- the extremely serious consequences to the victim, including his paraplegia and the fact his life expectation could be shortened by twenty to twenty-nine years,

- the judge's finding that the appellant's personality would make him resistant to change, making his rehabilitation difficult and that it would take a long time,

- the use of a gun,

- the appellant's prior serious and varied criminal record,

- the impact on the community,

- the appellant was close to 18 years of age at the time of the offence, and

- the appellant was bound by a Deferred Custody and Supervision Order requiring him to be in his residence at the time of the shooting.

[57] I would grant leave to appeal sentence, but dismiss the appeal.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.