.NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. M.M.*, 2022 NSCA 46

Date: 20220610
Docket: CAC 510095
Registry: Halifax

Between:

M.M.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Sections 110(1) and 111(1) of the *Youth Criminal Justice Act*; and Section 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Anne Derrick
Appeal Heard:	May 17, 2022, in Halifax, Nova Scotia
Subject:	Sentencing under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 as amended; ss. 3, 38, 39 and 42; least restrictive sentence; requirement for reasons; use of *R. v. Friesen*, 2020 SCC 9 in youth sentencing; regional parity.
Summary:	Following a trial that resulted in a conviction for sexual assault, the Youth Justice Court judge sentenced M.M. to a 135 day Custody and Supervision Order (90 days in custody and 45 days supervision in the community) followed by 19 months of probation. He emphasized the seriousness of the offence—sexual intercourse with a same-aged peer who was asleep and therefore incapable of consenting—but did not address the substantive content of the purpose and principles applicable to sentencing found in sections 3, 38, and 39 of the *Youth Criminal Justice Act* (*YCJA*). M.M. had no prior convictions, expressed remorse to the victim soon after the

incident, had made progress in his rehabilitation, and had suffered significant collateral consequences.

Issue: Did the trial judge's sentencing of M.M. disclose errors in principle?

Result: The judge erred in law. The appeal was allowed and the Custody and Supervision and Probation Orders set aside. A 12 month Probation Order was substituted. The mere recital of relevant provisions of the *YCJA* does not satisfy the legislation's imperative that all alternatives to custody be considered before a custodial sentence is imposed. The judge did not substantively comply with the statutory requirement for reasons under s. 39(9) of the *Act*. He did not address highly applicable circumstances—mitigating factors and collateral consequences—that were relevant to crafting an appropriate sentence for this young person. The judge's failure to comply with the requirements of the *YCJA* displaced the deference to which a sentencing decision is typically entitled.

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Judges:	Beveridge, Van den Eynden, Derrick, JJ.A.
Appeal Heard:	May 17, 2022 in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Derrick, J.A.; Beveridge and Van den Eynden, JJ.A., concurring.
Counsel:	David J. Mahoney, for the appellant Mark Heerema, for the respondent

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110 (1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT*, S.C. 2002, c. 1 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) – Identity of victim or witness not to be published – Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Reasons for judgment:

Introduction

[1] On May 25, 2021, M.M. 15 years old and a young person within the meaning of the *Youth Criminal Justice Act*, S.C. 2002, c.1 as amended, was found guilty of the sexual assault of J.D., contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. J.D. was also 15 and a close friend. Judge Alain Bégin, presiding as a judge of the Youth Justice Court, found that M.M. had vaginally penetrated J.D. while she was asleep. On October 18, 2021, Judge Bégin sentenced M.M. to a Custody and Supervision Order (CSO) followed by probation.

[2] M.M. did not appeal his conviction. He was granted leave to appeal his sentence by Justice Cindy Bourgeois of this Court and released pending appeal on conditions set out in a Release Order dated November 18, 2021.

[3] M.M. appeals his sentence on the grounds the trial judge erred in principle in determining custody to be the only alternative in the circumstances of his case. As these reasons explain, I would allow the appeal and substitute a sentence of probation.

The Trial Decision

[4] In his trial decision (*R. v. M.M.*, 2021 NSPC 27), the judge made factual findings about the sexual assault of J.D on March 4, 2019.

[5] M.M. had asked J.D.'s mother if he could spend the night with her family as he was having issues at home. J.D.'s mother agreed. J.D. testified that she and M.M. were really close friends.

[6] L. was also visiting at the J.D. home. Contrary to the expectations of J.D.'s mother, the three friends settled in for the night in a downstairs rec room. The two girls were sharing a queen-sized mattress. M.M. was on the sofa next to them. L. fell into a sound sleep. J.D. fell asleep facing L. with her back to M.M. The judge accepted her evidence that she woke up to M.M. having sex with her "from behind" with his penis in her vagina. Sexual intercourse lasted a couple of minutes.

[7] The judge found J.D. to be "a credible and reliable witness".[1] He accepted that she had been asleep when M.M. penetrated her, and therefore incapable of consenting.

[8] The judge viewed M.M.'s narrative of events as lacking credibility. He rejected his evidence that J.D. consented to the sexual intercourse. He concluded M.M. had taken no reasonable steps to confirm consent by J.D. and "relied on silence and passivity or ambiguous conduct by J.D., and as a result there is no air of reality, or proper legal foundation, to his claim of an honest but mistaken belief".

[9] In his discussion of the evidence, the trial judge noted that approximately one month after the assault, M.M. sent J.D. a series of texts:

> I just want to say I'm sorry for everything…I didn't know you were sleeping and I didn't do it just bc I wanted to have sex. It was because I love you.
>
> I thought u felt the same way so my head got the best of me. I wanted to be with you so bad it made me the way I was that night. And I would never try to rape you.
>
> I just want to say I'm very sorry.
>
> I just really hope you know I didn't mean to hurt you in any way. I just had the wrong idea.[2]

The Positions of Crown and Defence at Sentencing

[10] The Crown asked the judge to impose a Custody and Supervision Order of 6 months: 4 months to be served in custody and 2 months to be served under supervision in the community, followed by 18 months of probation. Crown counsel indicated his position on sentence was based on the offence being a "high end" sexual assault. He told the judge: "I mean there's full penetration with a sleeping victim".

[11] Counsel for M.M. sought a Probation Order of 24 months.

M.M.'s Pre-sentence Report

[12] The pre-sentence report (PSR) was prepared in July 2021. M.M. was interviewed for it over the telephone because of COVID protocols. The PSR

[1] Trial Judge's Decision, at para. 97.
[2] Trial Judge's Decision, at paras. 74-77.

indicated M.M. was two years old when his parents separated. He was raised by his mother. There was physical and emotional abuse in his background. His maternal grandparents hit him and his paternal grandparents told him he was "useless and no good". M.M. reported that his father had anger issues. This had led to them spending less time together than had been the case when he was younger.

[13] At the time the PSR was prepared, M.M. was planning to complete, in the fall, two Grade 11 classes he had failed. He had changed schools after being bullied and beaten up, a direct result of the sexual assault charge. He reported having good relationships with his Guidance Counsellor and an individual with the Schools Plus program.

[14] The PSR disclosed that M.M. had been struggling with mental health issues, specifically depression, anxiety and suicide attempts. Between January and June 2021, M.M. was seen at the local hospital on a number of occasions. In February 2021, he had been prescribed an anti-depressant. He told the author of the PSR he had found talk therapy unhelpful.

[15] M.M.'s mother was interviewed for the PSR. She described M.M. as very helpful with chores in the home. He had been working on his grandparents' farm and was also volunteering at a local church. At the sentencing hearing, M.M.'s counsel described his volunteer work as cleaning up on Sundays after church, and setting up activities such as crafts for the children.

[16] M.M. was described in the PSR as not accepting responsibility for the offence, saying it did not happen. The report noted that M.M.'s mother in her interview had expressed the view the case had been a learning experience for M.M. as to "how nasty and promiscuous girls can be".[3]

[17] J.D.'s mother, N., and J.D. were interviewed for the PSR. N. said since the sexual assault she had seen her daughter experience unprecedented bouts of anxiety. J.D. confirmed this, reporting that after the offence she began having panic attacks and more prevalent episodes of anxiety. She had been on daily medication for her anxiety but now only took it as needed. She and M.M. had been good friends until the assault. J.D. had since blocked him on all social media.

[3] This statement appears in quotes in the pre-sentence report.

[18] The PSR concluded by stating that M.M. appeared to be "a suitable candidate for community supervision, if he is referred to appropriate services and follows through with same".

J.D.'s Victim Impact Statement

[19] J.D.'s Victim Impact Statement addressed the emotional and physical impacts of the sexual assault, in sparse but direct terms: "self-blame, changes in trusting others, flashbacks, and sadness" and "hair loss".

The Sentencing Hearing

[20] The sentencing hearing proceeded on September 20, 2021. Crown counsel's oral submissions were brief. He described the PSR as "remarkable for a number of reasons" noting three aspects of it only: M.M.'s denial of "liability", his mother's "disturbing" statements, and M.M.'s indication that therapy for his mental health issues had not been helpful. He went on to say the Crown was unable "to assess what risk profile [M.M.] presents because of those factors set out in the Pre-Sentence Report". He otherwise relied on written submissions filed with the court and *R. v. C.Z.*[4], a decision of the British Columbia Provincial Court. He acknowledged probation was an available sentence but argued in favour of custody as the appropriate disposition.

[21] M.M.'s counsel made more extensive submissions that included: the special statutory regime for young persons in conflict with the law, the purpose and principles of the *YCJA*, specifically reflected in sections 3, 38 and 39, the imperatives directed at sentencing judges by the legislation, the diminished responsibility of young persons, the "last resort" use of custody for young persons, and the statutory emphasis on accountability through meaningful consequences, restraint and rehabilitation. She referred to a number of cases and spoke about M.M.'s specific circumstances.

[22] As described by his counsel, M.M. had suffered significant collateral consequences as a result of being charged with sexual assault:

> Severe bullying that has made him change schools. Complete loss of friends, bullying by all his sports teams that he was kicked off of, somebody engraving "pedophile" in his car[5], then [*sic*] he then had to get fixed, severely demoralizing

[4] 2021 BCPC 25

[5] M.M.'s counsel indicated later in her submissions that "rapist" had also been etched into M.M.'s car.

> him and damaging his mental health. He has no friends from those same groups anymore.

[23] M.M. had been on a number of teams at his high school: football, rugby, track and field and he had had lots of friends. He was yelled at "everywhere he went", threatened until he cried, and beaten up.

[24] M.M. had no previous convictions. He did not drink alcohol or use non-prescription drugs. He had been on release conditions since being charged with no breaches. His counsel indicated that he lived with his mother and sister and had been raised in a home where consequences were meted out for his actions. (In the PSR these were described as being grounded, given time-outs, having his mouth washed out with soap and being spanked.) As noted in the PSR, M.M. was a volunteer at his church. He had told his counsel he attended church every week and wanted "to be a good leader there" with the younger children.

[25] M.M.'s counsel confirmed the information from the PSR that M.M. had stopped therapy due to finding it was unhelpful. She clarified the problem: M.M. had not found therapy sessions delivered by telephone[6] met his needs. She explained what had happened since the PSR was prepared:

> …he's gone back to therapy, and actively has been attending in person appointments…now that he is going to in person appointments, it's a more meaningful experience and he has found it more helpful to engage in therapy where you're talking in person with an individual. He talks about his anxiety and his stressors and how he's coping with them.

[26] The judge was told M.M. had plans to improve his grades in order to get accepted at university. He was interested in studying for a kinesiology degree and eventually having a home and family, aspiring to be a "good father one day and a good husband".

[27] M.M.'s counsel said she had asked M.M. if he had learned anything from his conviction. She informed the judge of his response:

> He said it did change how he interacted with women, as regardless of his perception of the event he obviously had – did have to change how he interacted with women, and he had to be better verbally when asking what they wanted or [were] okay with instead of interpreting and possibly misinterpreting. He says he now had a girlfriend for a little over seven months and he says he's always very

[6] Due to COVID-related restrictions.

> careful in asking for consent, and states now he knows he cares more about having relationships and less about casual encounters.

[28] M.M.'s counsel, while sharing in Crown counsel's negative characterization of the comments of her client's mother in the PSR, properly noted that they could not be attributed to him.

[29] As M.M.'s counsel concluded her submissions, the judge raised the Manitoba Court of Appeal case *R. v. B.S.*[7] He noted the court had found the trial judge erred in finding there was no "serious bodily harm" and imposing a Deferred Custody and Supervision Order (DCSO).[8] In *B.S.* both counsel had agreed the victim suffered "serious bodily harm" in the form of serious psychological harm due to the young person engaging in sexual intercourse while she was sleeping.[9] A five month custody and supervision order was substituted for the DCSO.

[30] The judge asked M.M.'s counsel to respond, stating:

> But the Manitoba Court of Appeal tells me someone having sex with someone who's sleeping should be looking at jail because it's a major sexual assault.

[31] M.M.'s counsel indicated she was unfamiliar with the facts in *B.S.*, noting it was difficult for her "to distinguish or assess the case without knowing more".

[32] The judge moved directly to asking M.M. if he had anything to say, which he did not, and selecting a date for his decision.

The Judge's Sentencing Decision

[33] In his sentencing decision (*R. v. M.M.*, 2021 NSPC 41) the judge described M.M.'s offence as "at the highest end of the spectrum, sexual intercourse. Or rape, in the old terminology. This was a very violent offence". He summarized his trial findings as: "…M.M. vaginally penetrated J.D. with his penis while she was asleep".[10]

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[7] 2017 MBCA 102.
[8] s. 42(5) of the *YCJA* precludes the imposition of a *DCSO* where "serious bodily harm" has been caused or attempted.
[9] *B.S.*, at para. 4
[10] Trial Judge's Decision, at para. 3.

[34] He noted the positions of the Crown and defence and explained what he described as the "rationale" for the 24 months' probation being sought by M.M.'s counsel: "…MM is attending therapy and he has suffered collateral consequences because of his criminal actions, in that he had to leave his school because of bullying".[11]

[35] The judge went on to recite sections 38 and 39 of the *YCJA*. He observed the wide range of sentences available under the statute and described himself as having been "a strong advocate of keeping youth out of custody, if possible".[12]

[36] Referencing sentencing cases involving adults, and language from the *Criminal Code*, the judge observed that "proportionality is a fundamental principle of sentencing".[13] He described "imprisonment as a sentence of last resort" under both the *Criminal Code* and the *YCJA*, stating:

> An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.[14]

[37] Employing terminology from the *YCJA*, the judge stated that the "respective importance of "rehabilitation", "meaningful consequences" and "accountability"—principles articulated in s. 38—will vary according to the nature of the crime and the circumstances of the offender".[15] In this context he identified the broad discretion enjoyed by sentencing judges. Relying on a decision of this Court in *R. v. E.M.W.*, he held that "rehabilitation is a much greater consideration for a sentencing judge when the offender has accepted responsibility".[16]

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[11] Trial Judge's Decision, at paras. 5 and 6.

[12] Trial Judge's Decision, at para. 9. Although of no significance to this appeal, the judge, referring to caselaw that predated amendments to the *YCJA* in 2010, erroneously observed that specific deterrence and denunciation are not sentencing principles under the legislation. Section 38(2)(f) of the *YCJA* states that, subject to the principle of proportionality in s. 38(2)(c), a youth sentence may have the objectives of denouncing unlawful conduct and deterring the young person from committing offences.

[13] Trial Judge's Decision, at para. 12.

[14] Trial Judge's Decision, at para. 13.

[15] Trial Judge's Decision, at para. 15.

[16] 2011 NSCA 87. Following a trial, E.M.W. was sentenced for sexually assaulting his young daughter by repeated incidents of digital penetration of her vagina. In upholding his two-year prison sentence, this Court noted the conclusion of the forensic psychologist who prepared the Comprehensive Forensic Sexual Behaviour Pre-Sentence Assessment that "…rehabilitation does not appear to be a meaningful pursuit with Mr. [W.] at this time. In contrast, consequences are likely to have a positive impact on future behaviour based on Mr. [W]'s personality makeup. (at para. 35).

[38] The judge confirmed his review of the cases provided by Crown and defence, saying they were "all worthy of consideration". He indicated it was "almost impossible to find cases that are similar to the case before the Court that can act as a strong precedent".[17] He continued with the following comments:

> That being said, I also pointed out to counsel the case of *R. v. B.S.* [2017] M.J. No. 290, 2017 MBCA 102 (Man. C.A.) where the Manitoba Court of Appeal found that the trial judge had erred in finding there was no 'serious bodily harm' in the absence of expert evidence and in imposing a deferred custody and supervision order. The offence was a major sexual assault, forced sexual intercourse, while the victim was sleeping. The sentence appeal was allowed and the sentence was varied to a five-month custody and supervision order.
>
> Further, the recent *Friesen* case from our Supreme Court has emphasized the serious, long-lasting and pervasive damage inflicted on young people who are sexually assaulted. All courts have been directed by the Supreme Court of Canada to deal with these types of cases very seriously".[18]
>
> **This was a sexual assault that was at the high end of the sexual assault spectrum. And it was a sexual assault against a young person.[19]**

[39] In concluding his reasons, the judge referred to the contents of J.D.'s Victim Impact Statement and her comments to the author of the PSR, which I described earlier. He reviewed the PSR, and made the following comments about it:

> The Pre-Sentence Report…shows a reluctance by M.M. to engage in treatment as he sees no benefit in treatment. There is also a lack of acceptance of responsibility, and a change in how he refers to the victim of the sexual assault between the trial and now as he now claims that J.D. was a friend instead of his girlfriend, despite strongly testifying otherwise at trial.
>
> It is clear from the Report that M.M. is in need of mental health services even though he does not think that it would be of benefit to him.[20]

[40] Under a heading "Submissions by Defence Counsel", the judge briefly noted that MM had no prior record, was back in school, was volunteering at church and was on anti-depressants.

[41] He then sentenced M.M.:

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[17] Trial Judge's Decision, at para. 21.
[18] Trial Judge's Decision, at paras. 22 and 23.
[19] Trial Judge's Decision, at para. 24. Bolding in the original.
[20] Trial Judge's Decision, at paras. 27 and 28.

> M.M., please stand. Your sentence, which is intended to provide "meaningful consequences" for what was a very violent sexual offense against a young person, along with "accountability" and "rehabilitation" is as follows:
>
> What you did to J.D. was a "major sexual assault." You violated the trust of someone who was a good friend and trusted you. Instead of honouring that trust you sexually assaulted her for your own selfish sexual urges. Your actions will no doubt have long term consequences for J.D. She will continue to suffer long after you have completed serving whatever sentence I impose.
>
> To ensure 'meaningful consequences' for your violent offense of sexual assault which caused 'serious bodily harm' to J.D., I am sentencing you to 3 months Custody followed by 1 1/2 months Open Custody /Supervision Order. For your 'accountability' and 'rehabilitation,' your period of custody will be followed by a period of probation for a maximum sentence of no longer than 24 months so that you can get the necessary counselling that you require.
>
> The specific terms of your Probation for 19 months are as follows: [The terms (a) through (j) are set out in the judge's decision.][21]

[42] M.M.'s Custody and Supervision Order states 90 days custody and 45 days supervision in the community.

The Issue in this Appeal

[43] The appellant stated the issues in its factum as:

1. Did the honourable trial judge err in law or principle by:

    a. Failing to consider all reasonable alternatives to custody, contrary to s. 38(2)(d), 39(2) and 39(3)(a) of the *Youth Criminal Justice Act*;

    b. Failing to provide reasons indicating why a non-custodial and less restrictive sentence was not adequate or capable of achieving the purposes of sentencing set out in subsection 38(1), contrary to s. 38(2)(e)(i) and 39(9) of the *Youth Criminal Justice Act*;

    c. Applying the adult sentencing principles set out in the *Criminal Code* (as applied in *R. v. Friesen*, 2020 SCC 9 and *R. v. EMW*, 2011 NSCA

[21] Trial Judge's Decision, at paras. 31-34.

87) to the sentencing of a young person under the *Youth Criminal Justice Act*;

d. Failing to apply the principle of regional parity in sentencing mandated by s. 38(2)(b) of the *Youth Criminal Justice Act*.

[44] These issues can be addressed under a single ground: does the trial judge's sentencing of M.M. disclose errors in principle?

Standard of Review

[45] The standard of review of a sentence of the Youth Justice Court is the same as it is for the review of an adult sentence.[22] It is highly deferential, leading to intervention only where the sentence is demonstrably unfit or the judge made an error in principle that impacted the sentence imposed. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor".[23]

[46] In this case, the judge erred in principle, thereby displacing the usual deference a sentencing decision is to be afforded. Our review is focused on the judge's sentencing analysis and the material errors it reveals.

Analysis

The Youth Criminal Justice Act

[47] The *Youth Criminal Justice Act* "sets out a detailed and complete code" for sentencing young persons. Young persons who commit crimes are "decidedly but differently accountable" than adults. Parliament has mandated a youth criminal justice system that "must be separate from that of adults" and "based on the principle of diminished moral blameworthiness or culpability".[24] This diminished moral blameworthiness reflects - as a consequence of their age - the heightened vulnerability, immaturity, and reduced capacity for moral judgment of young persons.[25]

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[22] *R. v. J.R.L.*, 2007 NSCA 62, at para. 24.
[23] *R. v. Friesen*, 2020 SCC 9, at paras. 25-26; *R. v. Lacasse*, 2015 SCC 64, at paras. 39-44; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34.
[24] s. 3(1)(b), *YCJA*
[25] *R. v. D.B.*, 2008 SCC 25, at para. 41.

[48] The *YCJA*'s Declaration of Principle indicates the "...youth criminal justice system is intended to protect the public by holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person and through "promoting the rehabilitation and reintegration of young persons who have committed offences."[26] In *R. v. B.W.P.*, the Supreme Court of Canada recognized Parliament's objective:

> …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.[27]

[49] Accountability for young persons under the *YCJA* must be "fair and proportionate" and "consistent with the greater dependency of young persons and their reduced level of maturity."[28] Rehabilitation and reintegration must be emphasized and there must be "timely intervention that reinforces the link" between the crime and its consequences.[29]

[50] The *YCJA* requires that the sentence imposed:

> Reinforce respect for societal values;
>
> Encourage the repair of harm done to victims and the community; and
>
> Be meaningful for the young person given their needs and level of development and, involve parents and extended family, where appropriate, and the community and social or other agencies in his rehabilitation and reintegration.[30]

[51] Section 38 of the *YCJA* which contains the purpose and sentencing principles of the legislation also references the critical factor of accountability:

> The purpose of sentencing ... 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.[31]

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[26] s. 3(1)(a)(i)(ii).
[27] 2006 SCC 27, at para. 4.
[28] s. 3(1)(b)(ii).
[29] s. 3(1)(b)(i) and (iv).
[30] s. 3(1)(c).
[31] s. 38(1).

[52] In *B.W.P.*, the Supreme Court of Canada concluded a "plain reading of s. 38(1)" makes it apparent 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.[32]

[53] The *YCJA* mandates judges to sentence young persons "in accordance with the principles set out in section 3" and the principles in section 38(2) that include, for the purposes of this appeal: parity—a young person's 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; proportionality—the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence; and, subject to the proportionality principle, the sentence be the least restrictive sentence that is capable of achieving the overall purpose of sentencing; it be the one most likely to rehabilitate the young person and reintegrate him or her into society; and it promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.[33]

[54] The *YCJA* is explicit about the factors a judge must take into account in crafting the appropriate sentence for a young person:

> (a) The degree of participation by the young person in the commission of the offence;
>
> (b) The harm done to the 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 or mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in section 38.[34]

[55] Also relevant to M.M.'s sentencing was s. 39(1) of the *YCJA* and the requirement that a custodial sentence shall not be imposed unless certain circumstances apply, including that the young person has committed a violent offence. There was no dispute M.M. had committed a "violent offence" as defined

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[32] at para. 31.
[33] s. 38(2)(b);(c);(d);(e)(i)(ii) and (iii).
[34] s. 38(3).

by the statute,[35] opening the door to the possibility of a Custody and Supervision Order pursuant to s. 42(2)(n).

[56] Where, as here, a custodial sentence is in play, the *YCJA* directs that no such sentence can be imposed unless:

> …the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out on section 38.[36]

[57] The Supreme Court of Canada has recognized that restricting the use of custody for young persons in conflict with the law is the aim of the *YCJA*.[37]

[58] A judge's determination of whether a reasonable alternative to custody exists is governed by s. 39(3) of the *YCJA* which mandates consideration of submissions relating to:

> (a) the alternatives to custody that are available;
>
> (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
>
> (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

[59] Section 39(9) of the YCJA emphasizes the importance of the judge's reasons for determining a custodial sentence is the only alternative that satisfies the purposes of sentencing under the *Act*:

> If a youth justice court imposes a youth sentence that includes a custodial portion, the court shall state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purposes set out in subsection 38(1)…

[60] Judicial discretion in sentencing young persons is highly structured under the *YCJA*. As indicated by the Supreme Court of Canada:

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[35] s.2(1)(a) of the *YCJA* defines a "violent offence" as one that "includes an element of causing bodily harm. The Supreme Court of Canada held in *R. v. McCraw* that "bodily harm" includes psychological harm ([1991] 3 S.C.R. 72, at para. 23).
[36] s. 39(2).
[37] *R. v. C.D.*, 2005 SCC 78, at para. 38.

> …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…[38]

[61] The trial judge was to have sentenced M.M. in accordance with the comprehensive suite of principles laid out in the *YCJA*.

Failing to Consider All Reasonable Alternatives to Custody

[62] At the start of his decision, the judge recited sections 38(1), (2) and (3) and 39(1), (2), and (3) of the *YCJA*. I have not found an indication in his reasons that he applied the principles embedded in these provisions. He never mentioned section 3, the *YCJA*'s Declaration of Principle, at all.

[63] The mere recital of relevant provisions of the *YCJA* does not satisfy the legislation's imperative that all alternatives to custody be considered before a custodial sentence is imposed. The judge's failure to comply with the requirements of the *YCJA* displaces the deference to which a sentencing decision is typically entitled.

[64] To comply with s. 38(1) of the *YCJA*, the sentence imposed by the judge had to hold M.M. accountable through just sanctions that had meaningful consequences for him and that promoted his rehabilitation and reintegration into society. The sentence had to be determined in accordance with the principles in the *YCJA*'s Declaration of Principles and the principles in s. 38(2). Those principles required the imposition of a proportionate sentence determined after an assessment of all available and reasonable sanctions short of custody. The judge was statutorily obligated to "consider any sentencing proposal made by the young person or his or her counsel" before imposing a custodial sentence.[39] Including probation as part of the overall sentence is not an indication the judge considered it as an alternative to custody. There is nothing to show the judge gave attention to alternatives to custody as required by the *YCJA*.

[65] The trial judge made no mention in his reasons of the principle of diminished responsibility that underpins the sentencing of young persons. The Supreme Court of Canada has described sections 38 and 39 of the *YCJA* as a

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[38] *B.W.P.*, at para. 19.
[39] s. 38(6), *YCJA*.

"statutory preoccupation with ensuring that sentencing reflects the reduced maturity and moral sophistication of young persons…[40] The trial judge failed to advert to his obligation to factor M.M.'s reduced capacity for moral reasoning and judgment into his sentencing calculus.

[66] I am not persuaded by the respondent Crown's submission that reading the reasons as a whole leads to the conclusion the relevant factors were considered and addressed. His reasons and the imposition of a period of probation to follow the CSO do not show, as the respondent has suggested, that the trial judge "kept rehabilitation as a focus and a stated goal".[41] The judge did not address a number of highly applicable circumstances he was mandated to consider in crafting an appropriate sentence for M.M. He did not show he had reflected on the information provided about M.M. that:

- His rehabilitation was underway. M.M.'s counsel told the judge what M.M. had said he had learned from being charged with sexual assault. He clearly had gained a critical appreciation of what is required for consent to sexual activity.

- He had shown remorse in the texts he sent J.D. well before the trial and his sentencing. At a time when there was no apparent benefit to be obtained by doing so, M.M. apologized to J.D. The judge had referred to these texts in his trial decision. M.M. got no credit for them at sentencing. They should have been taken into account as mitigating.

- Despite the judge recognizing M.M. was in need of mental health services, in his sentencing decision he overlooked the fact that M.M. was attending counselling. At the sentencing hearing, M.M.'s counsel explained the history of M.M.'s mental health issues and interventions. Significantly, since the preparation of the PSR, M.M. had been attending in-person sessions with a therapist and finding it beneficial.

- M.M. experienced significant collateral consequences in the wake of being charged with sexual assault. A proportionate sentence takes into account "all the relevant circumstances related to the offence and the offender", including

[40] *D.B.*, *supra*, at paras. 43 and 44.
[41] Respondent's Factum, at para. 77.

> any collateral consequences.[42] There is very little difference between the application of collateral consequences to the sentencing calculus and what are often treated as mitigating factors.[43] In M.M.'s case, the judge determined that custody was a proportionate sentence without taking into account, as he should have, the violent retribution to which M.M. had been subjected. The judge settled on custody for M.M. as the only sentencing alternative without regard for the full range of his personal circumstances.

[67] The trial judge was correct to have identified M.M.'s sexual assault of J.D. as a serious, violent offence. He recognized the psychological harm inflicted upon J.D. as evidenced by her Victim Impact Statement and what she had said to the author of the pre-sentence report. This recognition reflects the progress that has been made in understanding "the profound impact sexual violence can have on a victim's physical and mental health".[44] There can be no suggestion this impact is any less traumatic where the non-consensual sexual intercourse was perpetrated by a same-age teen peer. The violation by a trusted friend will have deep repercussions: as J.D. described in her Victim Impact Statement this has meant, "changes in trusting others".

[68] The seriousness of the offence and M.M.'s high degree of moral culpability were factors the trial judge had to take into account in his proportionality assessment. But fashioning a sentence in compliance with the *YCJA* required a more comprehensive analysis. The trial judge focused exclusively on the seriousness of the offence. As I have discussed, he brought no other considerations to bear in his determination that custody was the only option for holding M.M. accountable. He failed to examine why 24 months of probation, the longest period of probation that can be imposed under the *YCJA*, could not constitute a proportionate sentence and meaningful consequence for M.M.

> *Failing to Provide Reasons Indicating Why a Non-Custodial Sentence Was Not Capable of Achieving the Purposes of Sentencing in s. 38(1)*

[69] The judge cannot be said to have substantively complied with the requirement for reasons mandated by s. 39(9) of the *YCJA*. That statutory requirement underscores Parliament's emphasis on the importance of articulating why a non-custodial sentence is not adequate to achieve the purposes set out in s.

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[42] *R. v. Suter*, 2018 SCC 34, at para. 46.
[43] *R. v. Potter*, 2020 NSCA 9, at para. 934.
[44] *R. v. Goldfinch*, 2019 SCC 38, at para. 37.

38(1) of the *YCJA*. A simple recital of the seriousness of the offence, with the assertion that custody is required, does not comply with the mandates of the *Act*. The judge dismissed the alternative of a lengthy period of probation without explaining his reasons for why this sanction could not operate to hold this young person accountable.

[70] In the submission by counsel for the respondent Crown, the seriousness of an offence is often a sufficient explanation for why custody is required. Mr. Heerema referred to *R. v. K.G.B.* from the New Brunswick Court of Appeal[45] and the Manitoba Court of Appeal decision in *R. v. B.S.*, as examples of courts expressing the need for custody "in similar cases". *K.G.B.* is not a similar case as evidenced by the description of the offence and the offenders:

> The inherent seriousness of an offence is necessarily a consideration when determining whether a non-custodial sentence would be inconsistent with the purpose and principles set out in s. 38 of the *YCJA*. However, of itself, it is not conclusive. Regard must be given to the circumstances in which the offence was committed. In the present case, the offence consisted of the premeditated rape of a 15-year-old girl who, to the knowledge of the perpetrators, was rendered defenceless by alcohol and who was restrained against her will. After himself violating L.L.'s personal privacy and bodily integrity, K.G.B. urged another to do the same and forced L.L. to search for her clothing that he had removed, and in the aftermath both K.G.B. and S.R.B. "embarked on a campaign to savage [L.L.'s] reputation ..."[46] (*emphasis added*)

[71] The facts in *R. v. B.S.* bear a greater resemblance to M.M.'s offending. *B.S.* was 17 years old when he had sexual intercourse with a young woman he knew from work who was asleep at the home of a mutual friend.[47] However, as I explain later in these reasons, *B.S.* should not have been relied on by the trial judge in determining M.M.'s sentence.

[72] It is important to recognize that Provincial Court judges in this province work under considerable time constraints and pressures.[48] Their decisions are not to be examined against a standard of perfection. Appellate review is expected to have regard for "the time constraints and general press of business in the criminal

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[45] 2005 NBCA 96
[46] *K.G.B.*, at para. 54.
[47] 2017 MBPC 23, at para. 1.
[48] *R. v. K.P.L.F.*, 2010 NSCA 45, at para. 42; *R. v. Aucoin*, 2011 NSCA 64, at para. 46; *R. v. Francis*, 2018 NSCA 7, at para. 29.

courts".[49] However, Parliament has mandated that when youth justice court judges impose custodial sentences, a sanction intended to be sparingly used, their reasons must state why a non-custodial sentence cannot satisfy the requirement of accountability through meaningful consequences.[50]

[73] No such explanation was given by the trial judge when he sentenced M.M. to Custody and Supervision under s. 42(2)(n). This failure constituted an error in principle.[51]

The Application of Adult Sentencing Principles

[74] Parliament has "expressly adopted a firm policy" of a criminal justice system that was separate and distinct from that governing adult offenders.[52] Sections 3 and 38(1) of the *YCJA* "show the clear and meaningful difference in the objectives to be considered and the principles to be applied" in the sentencing of young persons.[53] The *Act* is explicit in s. 50 that the sentencing provisions of the *Criminal Code* do not apply to its proceedings, other than select provisions not relevant to this appeal.

[75] The trial judge seems to have had at least one foot planted in adult sentencing considerations. In a reference to "imprisonment as a sentence of last resort" he mentioned both the *Criminal Code* and the YCJA.[54] More significantly, he added a notation to his recital of s. 38(2)(a), which directs that a young person's sentence must not result in a punishment greater than appropriate for a similarly-situated adult: "Note: an adult would be looking at a maximum sentence of 10 years, and quite likely looking at a sentence in the 3-to-4-year range".[55]

[76] This observation had no relevance to M.M.'s sentencing. Given the restrictions placed by the *YCJA* on custodial sentences, s. 38(2)(a) was not applicable to this case. A custodial sentence under s. 42(2)(n) of the *YCJA* is

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[49] *R. v. Sheppard*, 2002 SCC 26, at para. 55.
[50] s. 39(9) and s. 38(1) of the *YCJA*.
[51] *R. v. S.L.*, 2003 BCCA 563, at paras. 53, 59; *R. v. K.S.*, 2009 NLCA 46, at para. 16.
[52] *B.W.P.*, at para. 22.
[53] *R. v. C.N.T.*, 2016 NSCA 35, at para. 28.
[54] Trial Judge's Decision, at para. 13.
[55] Trial Judge's Decision, at para. 7. S. 38(2)(a) states: the sentence [of a young person] 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".

subject to strict limitations: a Custody and Supervision Order imposed in relation to a young person's conviction for sexual assault cannot exceed two years.[56]

[77] There are additional illustrations that suggest the trial judge did not firmly locate his thinking within the special regime for sentencing young persons.

[78] As noted in paragraph 37 of these reasons, the trial judge addressed rehabilitation by reference to *R. v. E.M.W.*, a sentence appeal involving an adult who had been convicted of sexually assaulting his daughter. In *E.M.W.*, this Court confirmed the priority of the sentencing principles that governed E.M.W.'s crime: deterrence and denunciation as reflected in s. 718.01 of the *Criminal Code*. The judge in *E.M.W.* was found to have made no error by failing to mention rehabilitation in his sentencing analysis: Fichaud J.A. observed that E.M.W. "has not accepted responsibility, normally a feature of rehabilitation".[57]

[79] The sentencing of M.M., a young person, required that rehabilitation be examined through the lens of his diminished moral culpability which recognizes the immaturity and reduced capacity for moral judgment that is characteristic of young persons. Invoking *E.M.W.* aligned the trial judge's thinking with the principles that govern adult sentencing. This led the judge into error. He failed to give rehabilitation the emphasis mandated by the *YCJA*. Furthermore, as I noted earlier, the trial judge had been told that by the time of his sentencing hearing, M.M.'s rehabilitation had begun to take shape through his engagement with his therapist and the insights into his conduct that he shared with his counsel.

[80] M.M. has also identified as problematic the trial judge's reference to *Friesen* and the Supreme Court of Canada's emphasis on the serious, long-lasting and pervasive harm occasioned by sexual assault perpetrated against young people.[58] M.M. submits it was "reasonable for the trial judge to refer to *Friesen* for the purposes of considering proportionality as the case underscored the degree of short term and long term harm caused to children who are sexually abused by adults".[59] M.M.'s concern lies with the trial judge's comment that courts have been directed by *Friesen* "to deal with these types of cases very seriously".[60] He says this

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[56] s. 42(2)(o) of the *YCJA* provides that in the case of a conviction for aggravated sexual assault contrary to s 273 of the Criminal Code, the maximum length for a Custody and Supervision Order is three years.
[57] *E.M.W.*, at para. 35
[58] Trial Judge's Decision, at para. 23.
[59] Appellant's Factum, at para. 86.
[60] Trial Judge's Decision, at para. 23.

suggests the trial judge viewed *Friesen* as authority for more punitive sentencing under the *YCJA.*

[81] *Friesen* is focused on the sentencing of adults convicted of sexual offences against children. The court recognized that "offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them".[61] It directed judges in explicit terms not to minimize or under-emphasize the harms caused by sexual crimes.

[82] A judge's acknowledgment in sentencing a young person convicted of sexual assault that sexual assault is inherently violent and harmful is entirely appropriate and consistent with the princip of proportionality. However, judges engaged in sentencing young persons for sexual assault must be very cautious in their use of *Friesen*. The emphasis in *Friesen* on more punitive sentences for adults convicted of the sexual exploitation of children does not resonate in the context of the *YCJA.* As I previously indicated, the sentencing principles under the *Criminal Code*, discussed in *Friesen*, have no application to the sentencing of young persons.

[83] In *R. v. E.M.*, an unreported sentencing decision dated September 25, 2020, of the Halifax/Dartmouth Youth Justice Court, Judge Barbara Beach stated the Crown, in submissions before her, had "spoken at length" of the decision in *Friesen*. She observed that the Supreme Court of Canada,

> …did not undertake an analysis of the extent to which their decision and its strong message should be considered in matters involving the sentencing of youth where different principles and objectives are at play.[62]

[84] Judge Beach held the comments in *Friesen* in relation to the profound harm caused by sexual offences against children and the importance of not minimizing the effects of that harm, "are alive in any sentencing hearing, be it adult or youth".[63] She exercised the caution I am counselling by indicating she was "giving some consideration on a limited basis" to *Friesen*, specifically restricting herself to "recognizing the significant harm done to children who are the victims of sexual offences.[64]

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[61] *Friesen*, at para. 65.
[62] *R. v. E.M.*, Transcript of sentencing decision, pages 10-11.
[63] *R.v.E.M.*, page 17.
[64] *ibid*, page 18.

[85] What must be emphasized is that the principles that govern sentencing under the *YCJA* are in no way attenuated or modified by *Friesen* nor are they to be interpreted through a *Friesen* lens. To the extent the trial judge was influenced by *Friesen* to impose a more punitive sentence on M.M. in the form of a Custody and Supervision Order, that constituted an error in principle.

Failing to Apply the Principle of Regional Parity

[86] The trial judge was obligated by s. 38(2)(b) of the *YCJA* to impose a sentence that was "similar to sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances" (emphasis added). His reasons do not indicate he gave this requirement any consideration.

[87] The trial judge said he had reviewed the cases provided by Crown and defence counsel, but referred only to *R. v. B.S.*, from the Manitoba Court of Appeal.[65] I reproduced his comments at para. 38 of these reasons.

[88] I will return to *B.S.* shortly. Before I do, I will address three cases the judge was referred to by Crown counsel at sentencing: *R. v. N.P.*[66]; *R. v. S.C.Y.*[67]; and *R. v. C.Z.*[68]. Not only were two of them not representative of regional parity, they were all readily distinguishable as pointed out by M.M.'s counsel.

[89] N.P., aged 15, was sentenced to a 12 month CSO for the attempted anal penetration of an 8 year old. He had a history of inappropriate sexualized behaviour including convictions for three assaults that involved sexual touching. He had been placed on a two-year probation order which "did not have its desired effect".[69] The Youth Justice Court concluded the only alternative was a custodial sentence as N.P. was "a danger to children" and required an immediate therapeutic intervention in a structured environment.[70]

[90] S.C.Y. was sentenced for breaking and entering his girlfriend's home on three separate occasions and sexually assaulting her. Two of the sexual assaults involved threats and the use of a knife. The Youth Justice Court identified no

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[65] 2017 MBCA 102.
[66] [2005] N.J. No. 395.
[67] 2019 ABPC 53.
[68] 2021 BCPC 25.
[69] at para. 57.
[70] at para. 102.

mitigating factors, a number of aggravating factors and significant concerns for rehabilitation. Crown and defence viewed a custodial sentence as appropriate. The Youth Justice Court referenced *Arcand* and the language of "major sexual assault" and imposed a global CSO of 12 months.

[91] C.Z., a 16 year old Indigenous young person, was sentenced for sexually assaulting an intoxicated 14 year-old female acquaintance at a house party. Despite an early childhood characterized by trauma, chaos, abuse and poverty, C.Z. had no previous convictions. He had expressed remorse and the Youth Justice Court identified a number of factors supportive of C.Z.'s rehabilitation. The court imposed the jointly recommended sentence of 24 months' probation.[71]

[92] The trial judge did not mention *N.P.*, *S.C.Y.*, or *C.Z.* in his reasons so it is not possible to know whether he took them into account in his determination that custody was the only sentencing alternative for M.M. Only *N.P.* could be considered as "regional" but, as with *S.C.Y.* and *C.Z.*, it offered the trial judge no useful guidance.

[93] Crown counsel also provided the trial judge with *R. v. K.O.*, a decision of the Newfoundland and Labrador Court of Appeal,[72] which arguably qualifies for consideration under the principle of regional parity. K.O. was given a sentence of 24 months' probation following a conviction for sexual assault. K.O. was 15 when he forced his penis into the vagina of a 12 year old. The Court of Appeal upheld the sentence and made the following comment in conclusion:

> For this Court to intervene and impose a custodial sentence, in the circumstances of this case, would, as counsel for K.O. asserts, be tantamount to making a custodial sentence mandatory for sexual assault in the case of a youthful first offender. Such a decision would be inconsistent with the clear direction expressed by Parliament in the *YCJA*...[73]

[94] The court found the sentencing judge in *K.O.* had considered "relevant jurisprudence", in particular from the Supreme Court of Canada in *R. v. C.D.*; *R. v.*

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[71] The Crown at M.M.'s sentencing indicated he was relying on *C.Z.* immediately after saying he was "unable to assess what risk profile [M.M.] presented" because of factors he had identified from the pre-sentence report. It should be noted that in *C.Z.*, the Youth Justice Court observed the risk assessment in that case "was limited by the dearth of empirically validated actuarial instruments available to accurately estimate the risk of adolescent sexual reoffending" (at para. 28).

[72] 2012 NLCA 55

[73] at para. 65.

C.D.K.,[74] which had identified Parliament's intention in enacting the *YCJA* was "to reduce over-reliance on custodial sentences for young offenders".[75]

[95] It was *R. v. B.S.* that was on the trial judge's mind during the sentencing hearing. As M.M.'s counsel neared the end of her sentencing submissions, the trial judge asked her to respond to *B.S.*. He said the "Manitoba Court of Appeal tells me someone having sex with someone who is sleeping should be looking at jail because it's a major sexual assault". His comment foreshadowed his sentence and discloses error.

[96] *B.S.* does not represent regional parity. I am satisfied that the trial judge's incorporation of *B.S.* into his analysis invited error because the case utilized language – "major sexual assault" – and a sentencing approach followed by courts in other provinces, notably, Alberta, Saskatchewan and Manitoba, and not Nova Scotia.

[97] Crown counsel at M.M.'s sentencing hearing introduced the "major sexual assault" terminology and its jurisprudential underpinning to the trial judge in his submissions. In explaining why the Crown was seeking a custodial sentence for M.M., he said: "So this is what the Alberta Court of Appeal in *Arcand* defined as a major sexual assault".[76]

[98] *Arcand*, which focused on starting-point sentencing in the context of adult sexual offenders, is not the law in Nova Scotia.[77] *Arcand* should have had no relevance to M.M.'s sentencing. As these reasons emphasize, the *YCJA* does not employ a categorization of offences methodology for sentencing. And in contrast to *Arcand,* the focus in youth sentencing is not on denunciation and deterrence.[78]

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[74] 2005 SCC 78.
[75] *K.O.*, at para. 14.
[76] 2010 ABCA 363. *Arcand* defined a "major sexual assault" as a sexual assault that "is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs" (at para. 171). The court held that sexual intercourse with an unconscious complainant constituted a "major sexual assault" (at para. 266).
[77] *R. v. J.J.W.*, 2012 NSCA 96, at para. 21: "Nova Scotia has not adopted a starting point approach". *J.J.W.* was a sentence appeal involving an adult offender.
[78] For example, the court in *Arcand* noted s. 718.01 of the *Criminal Code* that requires a court sentencing an adult for abuse of a child to give primary consideration to the objectives of denunciation and deterrence (at para. 41). Also, at para. 274: "…this Court has repeatedly stressed that denunciation and deterrence must be given considerable weight in sentencing for major sexual assaults".

[99] In sentencing M.M., the trial judge did not refer to one of his own decisions—*R. v. J.K.*[79], from October 2018, where, following J.K.'s conviction for sexual assault, Judge Bégin sentenced him to 24 months' probation and 50 hours of community service work. As the judge detailed in his reasons for conviction, J.K. had sexually assaulted the victim, a friend, by violating her pre-established, clearly stated boundaries. He performed oral sex, digitally penetrated her, put his thumb in her anus, tried to put his penis in her anus, and performed sexual intercourse without a condom. The victim's Victim Impact Statement indicated she was receiving trauma therapy. She experienced panic attacks, insomnia, suicidal thoughts, anxiety, self-doubt, disassociation, self-harm, problems with school, and difficulties in relationships.

[100] The trial judge's oral decision in *J.K.* does not make it clear whether the sentence followed a joint submission by Crown and defence. Parenthetically, I note the judge referred to the sentence as consistent with "the principles of the *Criminal Code* for sentencing", which as I have said, do not apply to the sentencing of young persons.

[101] The judge evidently concluded 24 months of probation was a just sanction that constituted a meaningful consequence for J.K. and held him accountable for a highly intrusive sexual assault. He did not mention his decision in *J.K.* when deciding custody was the only sentencing option appropriate for M.M..

[102] The *R. v. E.M.* case I mentioned earlier was provided by the respondent Crown to "counterbalance any implied suggestion that custody has not been imposed in this region before for sexual assault on a young person without a criminal record".[80] However, the sentence in *E.M.* was not imposed on a "similar young person found guilty of the same offence committed in similar circumstances".

[103] E.M. was sentenced to a 120 day Custody and Supervision Order followed by 24 months of probation for sexual assaults he perpetrated on his younger sister over a period of more than two years. He admitted to: putting his penis in his sister's mouth; touching her breasts and buttocks; digital penetration; and removing her clothing. He attempted sexual intercourse but was thwarted by the parents returning home. The sister believed she would have been raped had that not

[79] unreported
[80] Respondent's Factum, at para. 82.

occurred. In her statement to police, the sister indicated there were 13 major incidents in total.

[104] E.M. was aggressive and persisted in victimizing his sister despite her efforts to resist him using force. Judge Beach held that E.M. had "repeatedly wounded and ignored" the level of trust that exists between a brother and sister. The judge found a number of mitigating factors, including that E.M. was open to treatment which she viewed as "critical".[81] She expressed the view that while it may have been an appropriate case for a Deferred Custody and Supervision Order, that sanction was not available for offences involving serious bodily harm.[82]

[105] In concluding my discussion on the regional parity issue, I find the trial judge erred by overlooking s. 38(2)(b) as one of the sentencing principles he was obligated to take into account, and by incorporating in his analysis concepts that are inapplicable to sentencing young persons for sexual assault in Nova Scotia.

Determining M.M.'s Sentence

[106] Where appellate review determines the sentencing judge has made a consequential error in principle, the court then performs its own sentencing analysis to determine a fit sentence.[83] As *Friesen* directs, in conducting the fresh sentencing analysis,

> …the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle…[84]

[107] Having concluded the judge made errors in principle in imposing a sentence of Custody and Supervision on M.M., we must now perform our own sentencing analysis which requires that we "apply the principles of sentencing afresh to the facts".[85]

[108] The applicable principles have already been extensively reviewed in these reasons. In the circumstances of this case, a CSO is not the proper sanction for holding M.M. accountable. I am satisfied a period of probation is the appropriate meaningful consequence for M.M. that will promote his rehabilitation and

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[81] *E.M.*, transcript of sentencing decision at page 18.
[82] *YCJA*, s. 42(5)(a).
[83] *Lacasse*, at para. 43.
[84] at para. 28.
[85] *R. v. Friesen*, 2020 SCC 9, at para. 27.

reintegration into society. Probation represents: the least restrictive sentence capable of achieving the purposes of s. 38(1) of the *YCJA*, will be most likely to rehabilitate M.M. and reintegrate him into society, and will serve to promote a sense of responsibility in M.M. and an acknowledgement of the harm done to J.D. and the community.

[109] I would vary M.M.'s sentence by setting aside the Custody and Supervision and Probation Orders and imposing a period of 12 months' probation. Relevant to varying M.M.'s sentence from custody to probation are these factors: M.M.'s apologies by text to J.D. which indicate remorse; his engagement in therapy and his insights into the critical issue of consent; and the collateral consequences he suffered as a result of the offence. I have taken into account the factors set out in Section 38(3) of the *YCJA*, including s. 38(3)(d) which requires that consideration be given to the 31 days spent in detention by M.M. before he was released on bail pending this appeal.

Conclusion

[110] I would allow the appeal, set aside the trial judge's sentence, and order that M.M. serve 12 months on probation pursuant to s. 42(2)(k) of the *YCJA*, subject to the following conditions:

- Keep the peace and be of good behaviour.
- Appear before the Youth Justice Court when required by the court to do so.
- Report to a supervisor at 14 Court Street, Suite #206, Victoria Court, Truro, Nova Scotia within 2 days of the release of this decision, and thereafter as required and in the manner directed by your supervisor.
- Participate in assessment, counselling and programming as directed by your supervisor, including but not limited to mental health assessment and counselling, and violence intervention and prevention.
- Make reasonable efforts to locate and maintain employment; or
- Enroll in an education or training program as directed by your supervisor;
- Do not contact or communicate with, or attempt to contact or communicate with, directly or indirectly, J.D.

- Do not go to or enter onto the residential property or premises of J.D.

- Do not associate with or be in the company of persons known to you to have a criminal record, *Controlled Drugs and Substances Act* record, Youth Court record or Youth Justice Court record.

- Do not have in your possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance; and do not have in your possession any weapon as defined by the *Criminal Code*.

[111] Finally, there are two orders that I would impose pursuant to the *Youth Criminal Justice Act* and the *Criminal Code*. These were not addressed at M.M.'s original sentencing. There is no judicial discretion in relation to these orders, they are mandatory. M.M. will be subject to: a firearms prohibition order under s. 109 of the *Criminal Cod*e and s. 51(1) of the *YCJA* and a DNA Order pursuant to s. 487.051(1) of the *Criminal Code*.[86] In accordance with s. 51(2) of the *YCJA*, the duration of the prohibition order will be for two years from the date M.M. was found guilty, that is, May 25, 2021.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Van den Eynden, J.A.

[86] Sexual assault contrary to s. 271 of the *Criminal Cod*e is a "super-primary designated offence" under s. 487.04(1) of the *Code* (*R. v. S. (C.)*, 2011 ONCA 252, at para. 30).