S.C.C. File No. 30254 & 30314

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

C.D. (A YOUNG PERSON WITHIN THE MEANING OF THE *YOUTH CRIMINAL JUSTICE ACT*)

Appellant

-and-

C.D.K. (A YOUNG PERSON WITHIN THE MEANING OF THE *YOUTH CRIMINAL JUSTICE ACT)*

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW

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PART I – STATEMENT OF FACTS

1. At issue in the appeals of C.D. and C.D.K. is the interpretation of the term "violent offence" in subsection 39(1)(d) of the *Youth Criminal Justice Act* ("*YCJA*"), and the sentencing guidelines under sections 3 and 38 of the *YCJA* and the corresponding impact on the imposition of custodial sentences on young persons.

2. The Intervener Canadian Foundation for Children, Youth and the Law (the "Foundation") has been granted leave to file one factum in the appeals of C.D. and C.D.K. being heard together. The Foundation's Statement of Argument applies to both appeals.

3. The Foundation accepts and relies upon the facts as set out in the Facta of the Appellants. Where the facts are in dispute in these appeals, the Foundation takes no position.

4. As set out in the material filed in support of the Foundation's Motion for leave to intervene, the Foundation is a provincially incorporated charitable organization constituted for the purpose of promoting the rights of children and youth and their recognition as vulnerable individuals under the law.

5. The Foundation has considerable expertise in legal representation, advocacy, and policy and community development on behalf of children and youth in the youth justice and legal aid systems and more particularly with respect to the *YCJA* and its implementation. The Foundation has consulted directly with the federal government on issues relating to the *YCJA* and the *Young Offenders Act* ("*YOA*"). The Foundation brings a youth rights focus to these appeals.

PART II – QUESTIONS IN ISSUE

6. The Foundation accepts the Appellants' position with respect to the interpretation of "violent offence" in section 39(1)(a) of the *YCJA*. The Foundation further submits that incorporating the concept of "reasonable foreseeability of bodily harm" into the definition when no bodily harm has occurred fails to take into account the principles and purposes of the *YCJA* and to recognize the unique developmental stage of adolescence and to acknowledge Canada's international treaty obligations.

7. The Foundation accepts the Appellants' position with respect to the interpretation of the sentencing provisions set out in sections 3 and 38 of the *YCJA*. The Foundation will address the principles and test for a custodial sentence only in respect of this issue.

8. The Foundation will not be addressing the third issue identified by the Appellants as: the Alberta Court of Appeal erred in law in basing a sentence on facts which were not proven or admitted at the sentencing hearing in youth justice court.

PART III – STATEMENT OF ARGUMENT

9. The Foundation proposes to approach the issues by first addressing the context for the interpretation of the relevant provisions of the *YCJA*. Three aspects of the context will be addressed: the international law with which Canada is presumed to be in compliance; the developmental basis for a separate regime for young people in conflict with the law; and the purpose of the sentencing provisions, as they relate to custodial sentencing of young persons.

International Law

10. This Court has held that Canadian law must be interpreted to comply with Canada's international treaty obligations. The most significant international convention regarding the rights of children is the United Nations *Convention on the Rights of the Child* (the

"UNCRC"). The UNCRC is the most widely ratified and accepted human rights treaty of all time.

***Canadian Foundation for Children Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76, para. 31**

Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 09 June 2004

11. The Preamble to the UNCRC states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." Article 3 provides that in all actions concerning children by courts of law, the "best interests of the child shall be a primary consideration."

***Convention on the Rights of the Child*, 12 January 1992, preamble and art. 3**

12. Article 40 of the UNCRC requires State Parties to treat children recognized as having infringed the penal law in a manner consistent with the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society. In respect of dispositions or sentencing, Article 40.4. states:

> A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

***Convention on the Rights of the Child, supra*, art. 40**

13. Canada is also a signatory to the United Nations *International Covenant on Civil and Political Rights* (the "ICCPR"). Article 10 of that convention requires juvenile offenders to be accorded treatment appropriate to their age and Article 14 requires that procedures take into account their age and the desirability of promoting their rehabilitation.

***International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 10 & 14**

14. Significantly, the Preamble of the *YCJA* specifically acknowledges that Canada is a party to the UNCRC. However, while the *YCJA* establishes a separate justice system based upon

these international principles, it is respectfully submitted, that courts must also apply and interpret the provisions of the *YCJA* in a manner consistent with the UNCRC and the ICCPR, in order to ensure that the best interests, special needs, stage of development and circumstances of young people remain a central focus.

***Canadian Foundation, supra*, at para. 31**

***Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 71**

Distinct Regime for Young People

15. The youth criminal justice system is aimed at establishing a separate and distinct approach to crimes committed by young people. This approach extends to the level of culpability attributed to young people for crimes they have committed. In *Reference re Young Offenders Act (PEI)*, this Court stated that:

> … jurisdiction over young persons charged with a criminal offence acknowledges that what distinguishes this legislation from the Criminal Code is the fact that it creates a special regime for young persons. The essence of the young offenders legislation is a distinction based on age and on the diminished responsibility associated with this distinction. [emphasis added]

***Reference re Young Offenders Act (PEI)*, [1991] 1 S.C.R. 252, at para. 23**

***R. v. M.(J.J.)*, [1993] 2 S.C.R. 421, at para. 13-17**

16. Both Canadian legislation and common law consistently make distinctions in the treatment and culpability of children versus adults based on capacity and responsibility. Accordingly, when judging the degree to which young people are held responsible for their actions, age and developmental state will be determining factors. In *R. v. Hill*, this Court recognized the differences in accountability between adults and youth. Dickson C.J. stated that:

> I think it is fair to conclude that age will be a relevant consideration when we are dealing with a young accused person. For a jury to assess what an ordinary person would have done if subjected to the same circumstances as the accused, the young age of an accused will be an important contextual consideration.

***R. v. Hill*, [1986] 1 S.C.R. 313, at p. 332**

Age and Development

17. The Preamble of the *YCJA* recognizes that young people have special developmental characteristics and challenges that must be addressed in this purposefully unique regime. Both the Declaration of Principle (section 3) and Purpose and Principles of sentencing (section 38) of the *YCJA* require the imposition of just sanctions that have meaningful consequences for a young person found guilty of an offence and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. It is submitted that this approach requires special attention to be directed towards a young person's unique developmental characteristics: specifically, a less developed ability to anticipate the consequences of his or her actions; the tendency towards impulsive acts that are typically a factor in youth crime and youth behaviour generally; and the impact of stigmatization on the developing personal identity of the young person.

18. While Canadian courts have long acknowledged that young people have special protections under the law, the evidentiary basis for mitigating the consequences for youth crime has most recently been canvassed by the U.S. Supreme Court. In *Roper v. Simmons*, the U.S. Supreme Court specifically recognized that young people are more likely to act out of impulse since their ability to judge risk and the consequences of their behaviour is less developed than adults. The Court stated three general differences between young people under 18 and adults:

> First, … [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. … The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure… this is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their environment. … The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.
>
> ***Roper v. Simmons*, 543 U.S. 1 (2005), (U.S. Supreme Court), at pp. 15-16**

19. The majority of the U.S. Supreme Court relied upon the recent research in developmental psychology focused on adolescents. The evidence adopted by the Court, which is consistent with established law and expert commentary in Canada, confirms that adolescents approach risky behaviour in a substantially different way than adults, both in the perception of the risks involved in a particular activity as well as the susceptibility to group or peer influences. Steinberg and Scott, cited in *Roper v. Simmons*, summarized the findings as follows:

> … adolescents differ from adults in their assessment of and attitude toward risk. In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults. … A number of explanations for this age difference have been offered. First, youths' relatively weaker risk aversion may be related to their more limited time perspective, because taking risks is less costly for those with a similar stake in the future … Second, adolescents may have different values and goals than do adults, leading them to calculate risks and rewards differently … For example, the danger of some types of risk taking (e.g. driving well over the speed limit) could constitute reward for an adolescent but a cost to an adult. In addition, considerable evidence indicates that people generally make riskier decisions in groups than they do alone;… there is evidence both that adolescents spend more time in groups than do adults and, as noted earlier, adolescents are relatively more susceptible to the influence of others.
>
> ***Roper v. Simmons, supra,* at pp. 15-16**
>
> **Laurence Steinberg and Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty", (2003) 58 American Psychologist, no. 12, 4**

20. Canadian laws recognize that adolescence is a period during which decision-making capacity evolves and matures. There is a gradual conferring of power to make autonomous decisions leading up to adulthood at age 18 and beyond. Experts note that young people are generally capable of understanding what is morally wrong. Correspondingly, the youth justice system confers moral responsibility for crime at age 12 while mitigating the consequences in accordance with our understanding of the developmental realities of adolescence. The rationale behind the system has been summarized as as follows:

> There are two broad reasons for separate youth justice policies: 'diminished responsibility due to immaturity and special efforts designed to give young offenders room to reform in the course of adolescent years' (Zimring, 2000). …
>
> > [diminished responsibility] is <u>not merely a doctrine of juvenile justice but a principle of penal proportionality</u>. [emphasis added]

Anthony N. Doob and Carla Cesaroni, *Responding to Youth Crime in Canada*, (Toronto: University of Toronto Press, 2004), at 30, 31

Justice for Children and Youth, "Age-Based Legal Milestones for Youth in Ontario," *Professionally Speaking* (December 2000), online: <http://www.oct.ca/en/CollegePublications/PS/december_2000/legal.htm> (accessed 22 March, 2005)

21. Additionally, the developmental research confirms that adolescence is a period in which personal identity is being formed. As the majority of the Court in *Roper v. Simmons* held, "[t]he personality traits of juveniles are more transitory, less fixed." The impact of labelling and custodial sentences at this time in a young person's development can be counter to the aims of rehabilitation. Doob notes the increased recidivism of young people who are exposed to the system and to short periods of custody by way of a "short sharp shock". Steinberg describes this critical time as follows:

> The emergence of personal identity is an important developmental task of adolescence and one in which the aspects of psychosocial development discussed earlier play a key role. As documented in many empirical tests of Erickson's (1968) theory of adolescent *identity crisis*, the process of identity formation includes considerable exploration and experimentation over the course of adolescence…. Although the identity crisis may occur in middle adolescence, the resolution of this crisis, with the coherent integration of the various retained elements of identity into a developed *self*, does not occur until late adolescence or early adulthood… Often this experimentation involves risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior. For most teens, these behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behaviour that persist into adulthood.

Laurence Steinberg and Elizabeth S. Scott, *supra*, 6

Anthony N. Doob and Carla Cesaroni, *supra*, at 40-45

***Roper v. Simmons, supra*, at p.16**

22. There is very little research documenting the long-term consequences of youth custody imposed on young people during this significant period of their lives. Following the enactment of the *YOA*, Bala noted a very significant increase in the use of short-term sentences and argues that those sentences were unlikely to have therapeutic or rehabilitative value, and that in some cases may be harmful to a youth's development.

Nicholas Bala, *Youth Criminal Justice Law*, (Toronto: Irwin Law, 2003) at 445

23. Other experts suggest that what little data there is on the impact of custodial sentences documents short-term trauma and possible long-term psychological harm. Studies have documented the institutional risks of peer-on-peer violence, physical restraint and placement in isolation. They conclude that,

> The *Youth Criminal Justice Act*, by placing explicit restrictions on the use of custody, would appear to endorse the view that the use of custody represents a failure to find some more appropriate sanction to hold a youth accountable for his or her actions. Custodial sanctions do not appear to accomplish the various purposes sometimes attributed to them and can, instead, put youths at additional risk. [italics and emphasis added]

Anthony N. Doob and Carla Cesaroni, *supra,* at 228-239

Sentencing Principles in Respect of Custody

24. The *YCJA* was enacted, in part, in response to the high incarceration rates of youth in Canada. Under the previous *YOA*, Canada had the highest rate of incarceration for young people in the Western World, including the United States. One of the government's stated purposes in introducing the new *YCJA* was to rectify the overuse of custodial sentences.

Department of Justice Canada, "Youth Sentences," The YCJA Explained, online: <http://canada.justice.gc.ca/en/ps/yj/repository/2overvw/2010001g.html> (accessed 17 March 2005)

Anthony N. Doob and Carla Cesaroni, *supra*, at 204 - 217, 226 - 227

25. A stated government concern was the very high use of custody as a sentence under the *YOA*, particularly for less serious and non-violent offences. Research shows that under the *YOA*, there was little judicial consensus on the factors to be considered in determining custody. As a result, the *YCJA* includes "a fairly explicit set of statements defining the purpose and principles of sentencing." Whereas the general and somewhat vague sentencing provisions under the *YOA* resulted in judges adopting differing sentencing philosophies and practices, as well as the use of incarceration for minor offences, the *YCJA* specifies that explicit criteria must be met before a young person can be placed in custody. Section 38 specifically requires that all available sanctions other than custody be considered for all young persons regardless of the offence in question.

Department of Justice Canada, *supra*

Anthony N. Doob, "Youth Court Judges' Views of the Youth Justice System: The Results of a Survey", Report to the Department of Justice Canada, at 39 - 47

Anthony N. Doob and Carla Cesaroni*, supra*, at 195 - 198

26. Canada has history of overcharging young people such that minor incidents end up in the court system. In Doob's survey of youth court judges, he found that judges cited an overreliance and overuse of the formal youth justice system in Canada, and have been critical of the unavailability and / or under use of non-court measures or alternative measures programs. A substantial portion of the judges surveyed,

> thought that many (half or more) of the cases coming before them could have been dealt with "just as adequately (or more adequately) outside of the youth court."

Anthony N. Doob*, supra,* at 7 - 14

27. Many young people involved in fights with classmates or family disputes are charged with the maximum very serious offence, and often plead guilty to the same, for relatively minor occurrences. For example :

- young person pled guilty to theft, charge involved stealing a piece of pepperoni;
  ***R. v. M.J.S.*, [2005] N.S.J. No. 64, N.S.S.C.**
- young person pled guilty to robbery; charge involved fight over bus fare between young people of the same age, both accused and victim punched each other; and
  ***R .v. T.T.*, [2001] O.J. No. 2936, (Ct. Just.)**
- young person pled guilty to assault with a weapon for hitting his sister with a telephone during fight.
  ***R. v. S.M.*, [2004] A.J. No. 534**

28. A rationale for needing new legislation is that the youth justice system responded harshly with sentences that, in some instances, were more severe than what were imposed on adults. For example, the Government of Canada statistics revealed that:

> For eight of the nine most common offences in youth court, youth received longer periods of custody than adults who receive custody for the same offence; in addition youth spend more time in custody than adults with similar sentences due to the adult conditional release provisions.

Department of Justice Canada*, supra*

Anthony N. Doob and Carla Cesaroni*, supra*, at 204 - 205

29. Despite explicit prohibitions to the imposition of custodial sentences for property offences, and despite the Respondent's assertion that use of custody is declining for young people in the youth justice system, the overall justice statistics for 2002/03 still show property offences accounting for the highest proportion (33%) of custody admissions for youth in Canada.

Canadian Centre for Justice Statistics*, Youth Custody & Community Services in Canada 2002/03*, Catalogue no. 85-002-XPE, Vol. 24, no. 9, pp. 5, 16

30. With respect to young people detained on judicial interim release, the most recent justice statistics show that remand accounted for half of the custody admissions for young people (with 33% of them related to property offences). In the 10 year period from 1992/93 to 2001/02 the number of youths in remand increased by 54%. Remand declined in 2002/03 by 11% but still represents a significant number of young people in custody and an increase of approximately 37% from 1992/93 levels.

Canadian Centre for Justice Statistics, *Youth Custody & Community Services in Canada 2002/03, supra,* pp. 3, 5

Canadian Centre for Justice Statistics, *Youth Custody & Community Services in Canada* 2001/02, Catalogue no. 85-002-XPE, Vol. 24, no. 3, p. 3

31. The rehabilitative goals of the *YCJA* for the long-term protection of society must be accorded overriding significance when assessing the criteria for the imposition of a custodial sentence. This Court has long recognized the significance of this goal in youth justice. The goal of rehabilitation is consonant with and in fact requisite for the goal of public safety. Serious concerns exist as to whether custodial dispositions further rehabilitation in any way. The dearth of evidence of the long-term effects of custody on young people is alarming and should recommend a cautious approach to custodial sentencing, especially in light of the evidence supporting community-based, non-custodial interventions cited in paragraph 18 of the Appellant C.D.K.'s factum.

32. The Respondent's desire to have a full range of sentences available on a broader range of offences would defeat the purposes of the *YCJA*. Further, Bala points out that courts have ignored the provisions of the *YOA* prohibiting the use of custody for child welfare purposes. He states:

> In some cases, some judges under the *YOA* were imposing custodial dispositions to address social needs or child welfare concerns of youths. Some custodial dispositions were a disproportionate response to the offence and could not be justified on accountability principles but were justified on the basis that they were intended to meet the needs of the youth and effect rehabilitation.
>
> **Nicholas Bala, *supra, at* 445**

Definition of Violent Offence

33. The Appellants' argument for a restricted approach to the definition of "violent offence" is supported by the three principles as discussed above: 1) international law supports an approach which is consistent with the young person's age and appropriate to his/her well-being and circumstances; 2) the criteria for imposition of a custodial sentence must not assume a standard of behaviour and forethought which is not associated with adolescence; and 3) custodial dispositions are to be used with caution and as a last resort, in light of the express purpose of the *YCJA* to reduce reliance on custody, in light of the lack of evidence of its rehabilitative function and in light of the potential harm.

34. The *YCJA* requires that sentencing specifically take into account the stage of development of the young person. The third branch of the definition of violent offence applied by the Alberta Court of Appeal in each of these appeals fails to take into account the realities of adolescence as a stage in development that is significantly different from adulthood in respect of precisely the ability to foresee consequences and anticipate risk. Although criminal responsibility may attach to actions where injury may be reasonably foreseen, as set out in para. 39 of the Respondent's factum in relation to C.D.K., it would be contrary to the sentencing principles of the *YCJA* to impose the most severe penalty, custody, for conduct where a mature adult might foresee risk of injury, but a young person does not, for developmental reasons, consider the risks.

35. The development of the young person in respect of personality formation is also relevant in respect of the stigma attached to young people labelled as offenders, even more so to violent offenders. This Court has recognized the importance of the privacy rights of the young person in respect to the rehabilitative goals of the *YCJA*. It is submitted that the impact of stigmatization associated with a label of "violent offender" need also be addressed in this case.

    ***F.N. (Re),* [2000] 1 S.C.R. 880, at para. 14**

36. It is submitted that the designation of a young person as a violent offender, especially for offences in which bodily harm is neither caused nor intended, may impede rehabilitation. Such designation creates an additional stigma: self-identification as a criminal and a perception in the young offender's mind that the world views him or her as a criminal. Frustration of the primary goal of rehabilitation in turn has a negative impact on public safety. As this Honourable Court stated:

    A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy.

    ***F.N. (Re), supra,* at para. 14**

37. It is submitted that by expanding the definition of "violent offence" to include offences (a) where bodily harm is not caused but is intended; and (b) where it is reasonably foreseeable bodily harm may occur, the Alberta Court of Appeal fails to acknowledge Parliament's stated intention to limit and reduce the imposition of custodial sentences and to limit discretion and variations across the country. Consider also that experts have found, what they call "the step principle", that the history of prior sentences that a young offender received was more important than the prior history of offending in determine what type of sentence was imposed on a young offender and that judges rarely de-escalate from a prior youth court sentence, even if a new offence is less serious than a prior offence.

    Nicholas Bala, *supra,* at 451

    Anthony N. Doob and Carla Cesaroni, *supra,* at 208 - 209

38. The Respondent suggests that the limits now placed upon judges in respect of custodial sentences in some way erode judicial discretion, virtually eliminating the power to order custody in compelling circumstances. This is simply not true. The legislation is a response to an enormous overuse of custodial sentencing and detention compares to all other democracies through the establishment of clearer guidance and emphasis on proportionality. It must be understood that an offence in which an adult might see the risk of harm but the harm does not occur, is less serious than the offence in which harm does result. In many of the instances cited by the Respondent, in which custody might be appropriate, the court has resort to three other criteria that might be applicable under section 39. This is born out by the statistics demonstrating the basis for many custodial sentences.

39. If the *YCJA* is to be construed so as to be consistent with the Preamble and Principles stated in section 3, this Court must ensure the youth criminal justice system reserves the most serious interventions for the most serious crimes. Arguments that broaden the conduct for which custody can be imposed on young people should be resisted. Steps taken towards curtailing any opportunity to increased reliance on custodial sentences are of utmost importance. Therefore this Court must interpret "violent offence" narrowly to prevent additional minor offences from attracting a possible custody order. Specifically, custodial sentences should not be considered an option for an expanded definition of offences where harm could possibly result even if unintended. The express legislative intention to reign in the type of occurrences that could lead to a custodial sentence will be nullified and society will fail to obtain the long-term protection the legislation tries to achieve in favour of short-term belief in a custodial system that has not demonstrated its efficacy for young people.

Sentencing Principles

40. The Respondent suggests that the Appellant has ignored specific principles of sentencing, in particular, the principle of reinforcing respect for societal values. In *R. v. Stone*, where the case concerned an *adult* male offender who killed his wife, this Court addressed the need to "bring the law into harmony with prevailing social values" and communicate society's growing social awareness and condemnation of violence against women. In that case, a

recent change to the *Criminal Code* required the court to specifically consider as an aggravating factor, evidence that the offender abused his spouse. This *Criminal Code* amendment formed the social context of the *R v. Stone* decision.

***R. v. Stone,* [1999] 2 S.C.R. 290, at para. 238 - 242**

41. We submit that the sentencing principles relating to deterrence and denunciation stated in that adult, spousal murder case cannot apply to offences committed by young persons whose development in terms of impulse control and reduced likelihood of considering risks and consequences is not complete. In fact, Parliament reflected current societal values when it repealed the *YOA* and enacted the *YCJA* effective April 1, 2003. The principal social change since that time is our understanding of adolescent development as described in the social science research and adopted by the U.S. Supreme Court in *Roper v. Simmons*.

R. v. Stone, supra

42. Parliament expressed its sentencing principles in section 38 of the *YCJA* as informed by the UNCRC and section 3 of the *YCJA*. A youth sentence must be the least restrictive, most rehabilitative sentence that is capable of achieving the purpose set out in s. 38(1) of the *YCJA* after all available alternatives to custody have been considered and must promote a sense of responsibility and be proportionate to the seriousness of the offence. Rather than sentences as a reaction to uninformed societal values, society must be educated about the efficacy of sentencing options.

***YCJA*, s. 38(2)**

43. Under the *YOA*, this Honourable Court found that:

> in the long run, society is best protected by the reformation and rehabilitation of a young offender. In turn, the young offenders are best served when they are provided with the necessary guidance and assistance to enable them to learn the skills required to become fully integrated, useful members of society.

***R. v. M.(J.J.), supra,* at para. 26**

***Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at para. 83**

44. Accountability and rehabilitation are not competing factors. They are complementary - a young person may accept responsibility better in a setting where there are choices, rather than in a structured custodial setting. Or a young person may refuse to feel accountable in a custodial setting where there is no incentive to develop adult judgement. Accountability and rehabilitation go hand in hand. Accountability does not, therefore, require dependence on custodial sentences. Furthermore, rehabilitation for *young people* is most likely in a community setting while custody leads to stigma and the self-fulfilling criminal prophecy:

> While custody is clearly needed for some young offenders, in most cases young offenders are more likely to be rehabilitated in a community-based program. There is a growing body of research that indicates that treatment programs for chronic young offenders are most likely effective in reducing recidivism if they address the underlying problems that youths are experiencing in their families, communities, and schools, and if the treatment is undertaken in the context of working with the youth and family in their community.
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> **Nicholas Bala, *supra,* p. 446**
>
> ***F.N. (Re), supra*, at para. 14**

45. Canada's history of overrelying on custodial dispositions, the enactment of the *YCJA* to reduce the use of custody and Canada's obligations under Articles 3 and 40 of the UNCRC militate for the Appellants' assertion that the Crown must satisfy the court that there are no non-custodial options that would satisfy the purpose set out in s.38(1) of the *YCJA.*

46. In conclusion, it is our respectful submission that the prevailing social science literature that concludes that a child's maturity, personal identity and assessment of risks and consequences are not fully developed until after adolescence; Canada's treaty obligations to consider the best interests of the child as a primary factor in decision-making in proceedings affecting them; the lack of evidence that custody for young people is rehabilitative and the evidence that custody can harm incarcerated young people; the government's expressed intent after extensive national and local consultations to reduce the availability of custodial sentences for young people in the interests of rehabilitation and the long-term protection of society, Parliament's historic first reference to the UNCRC in the Preamble of the *YCJA*; and Canada's obligations under international law as proponent and signatory to the UNCRC; and

our understanding that accountability, acceptance of responsibility and meaningful consequences can be best achieved in community settings so that the most serious intervention (custody) should be reserved for the most serious crimes – all support the submission that custody is a last resort, a potential consequence for violent offences where bodily harm is attempted or caused.

As set out in Bala's glossary, a "violent offence" is:

> Not directly defined in the Act, but based on the definition of a "serious violent office", a violent offence is an offence in the commission of which a young person causes or attempts to cause bodily harm. It is possible for a youth who has committed a violent ofence that has not caused serious injury to be dealt with by extradjudicial sanctions or receive a non-custodial sentence.
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> **Nicholas Bala, *supra,* at p. 589**

PART IV – COSTS

47. The Foundation does not seek costs nor does it believe that costs should be ordered against it.

PART V - ORDER SOUGHT

48. The Foundation respectfully requests that the appeal be allowed.

All of which is respectfully submitted this 28th day of March, 2005.

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PART VII – STATUTORY PROVISIONS