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PART I – PROCEDURAL HISTORY

1. JFCY adopts the procedural history as set out by the parties.

PART II – OVERVIEW

2. The *Youth Criminal Justice Act* ("*YCJA"*) establishes a unique and separate system of criminal justice for young people and, in particular, a distinct sentencing regime founded on fundamentally different principles and policies than that for adults under the *Criminal Code.* Premised on the recognition of young people's inherent vulnerability and diminished moral culpability, and the consequent focus on rehabilitation, reintegration, and restorative justice, the *YCJA* establishes numerous sentencing options intended to be applied flexibly in order to impose meaningful consequences for criminal conduct while allowing a sentencing judge to take account of the personal circumstances of a youthful offender.

> *Youth Criminal Justice Act* ("*YCJA*", the "Act"), S.C. 2002, c. 1

3. Accordingly, this Court should decline to articulate a legal test for the imposition of a judicial reprimand. To do so would unduly limit the availability of this disposition in a manner not intended by Parliament, contrary to the *YCJA,* international law, the *Canadian Charter of Rights and Freedoms,* and principles and policies underlying the Act.

PART III – FACTS

4. JFCY substantially agrees with the facts as stated by the Respondents.

PART IV – LAW AND ARGUMENT

A. THE *YCJA* ESTABLISHES A DISTINCT SENTENCING REGIME FOUNDED ON DIFFERENT PRINCIPLES THAN THAT FOR ADULTS

a. Young people are inherently vulnerable and less morally culpable for their conduct

5. International, foreign, and Canadian legal traditions have recognized the inherent vulnerability of young people in society, and specifically in the criminal justice system, occasioned

by their lack of sophistication and maturity and their dependence on adults.

6. It is furthermore a matter of scientific, and international and domestic legal consensus that young people have a reduced capacity for moral judgment as compared to an adult. Indeed, widely accepted research into adolescent neurological and psychological development confirms that adolescents are physiologically and cognitively unable to think, reason, judge consequences, or make decisions like adults.

> Jones, B., Birdsell M., & Rhodes, E., "A Call For Enhanced Constitutional Protections for the Special Circumstances of Youth" (2013) 3:2 CR (7th) 350 at 352-359

7. The United States' Supreme Court, reviewing the law and social science, has confirmed that young people lack maturity and a developed sense of responsibility, resulting in disproportionate involvement in reckless behaviour as compared to adults. The Court recognized that young people are more vulnerable to negative influences and pressures, explained in part by "the prevailing circumstance that juveniles have less control, or less experience with control over their own environment". The Court concluded that young people are less morally culpable for their conduct:

> The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult. . . .
>
> *Roper v Simmons, supra* (internal quotes omitted), at pp 15-16

8. Children and young people cannot simply be viewed as miniature adults; a child's age is "far more than a chronological fact". Rather, "it is a fact that generates common-sense conclusions about behaviour and perception" that apply broadly to children as a class, that is: children are generally less mature and responsible than adults; lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; lack the capacity to exercise mature judgment and

possess only an incomplete ability to understand the world around them. These generalizations "exhibit the settled understanding that the differentiating characteristics of youth are universal".

> *JDB v North Carolina*, 131 S Ct 2394 at 2404 (2011) (US Sup Ct) at II B, p 9-10

9. The relative vulnerability and diminished capacity for moral judgment of young people has also been recognized by this Court and the Supreme Court of Canada and, has been recognized as principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms.*

10. In *DB,* the Supreme Court of Canada affirmed that the principle of diminished moral culpability in a principle of fundamental justice that underlies the entire youth criminal justice system. Abella J. explained that young people are entitled to a separate legal and sentencing regime because, as a result of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. They are therefore entitled to a presumption of diminished moral blameworthiness or culpability.

> *R v DB*, 2008 SCC 25, [2008] 2 SCR 3, at para 41

11. The Court furthermore affirmed that it is widely acknowledged that age plays a role in the development of judgment and moral sophistication and that young people lack a fully developed adult sense of moral judgment. They accordingly cannot be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals. The Court confirmed that this is a legal principle fundamental to the operation of a fair legal system, and is therefore a principle of fundamental justice.

> *R v DB, supra*, para 41

12. The Supreme Court has also commented that young people are recognized in Canadian and international law as inherently vulnerable as a class and that "the law attributes the heightened vulnerability based on chronology, not temperament."

> *AB (Litigation Guardian of) v Bragg Communications Inc.,* 2012 SCC 46, [2012] 2 SCR 567, at para 17 (internal citations omitted)

13. In *LTH,* in discussing the procedural protections required when a young person is subject to questioning by police, the Supreme Court recognized the vulnerability of young people within the criminal justice system as a result of their age, noting their relative lack of sophistication. This Court has similarly found that young people are to be treated differently than adults because of differences in vulnerability, maturity, experience and other factors related to their youth.

> *R v LTH*, 2008 SCC 49, [2008] 2 SCR 739, at para 3
>
> *R v KB*, [2003] OJ No. 3553, 67 OR (3d) 391 (ONCA), para 8

b. The need for special protections for young people are a matter of international legal consensus

14. In addition to its recognition in foreign and domestic jurisprudence, the inherent vulnerability of young people is reflected in international legal instruments, which recognize that, because of a young person's vulnerability and diminished moral culpability, young people are entitled to a separate and distinct system of criminal justice and enhanced care, protection, and assistance.

15. The United Nations Convention on the Rights of the Child ("*UNCRC*") – to which Canada is a signatory, is the most universally accepted human rights instrument in history and is expressly incorporated into the *YCJA*. The *UNCRC* recognizes that "childhood is entitled to special care and assistance" and requires "special safeguards and care, including legal protection" be afforded to young people "by reason of their physical and mental immaturity". The *UNCRC* accordingly requires that in all actions concerning children, including those undertaken by a court of law, the best interests of the child shall be a primary consideration.

> United Nations, Convention on the Rights of the Child ("*UNCRC*"), Can. T.S. 1992 No. 3., Preamble, Article 3
>
> *YCJA*, *supra*, Preamble
>
> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 25

16. General Comment No. 10 of the UN Committee on the Rights of the Child elaborates that:

> Children differ from adults in their physical and psychological development, and their emotional

> and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.
>
> General Comment No 10 (2007) *Children's rights in juvenile justice, UNCRC,* 44th sess, UN Doc CRC/G/GC/10, para 10

17. Moreover, the *UNCRC* requires that young people engaged in the criminal justice system must be treated in a manner "consistent with the child's sense of dignity and worth" and "which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society". The dignity and worth of the child must be respected and protected at all stages of youth criminal justice involvement, from first contact with law enforcement to implementation of measures concerning the child. Those involved in the administration of juvenile justice must be knowledgeable about child development and what is appropriate to their well-being.

> *UNCRC*, *supra,* Article 40
>
> General Comment No 10, para 13

18. Reintegration requires that

> no action may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.
> General Comment No 10, *supra,* para 29

19. The *UNCRC* further requires that

> [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 both their circumstances and the offence.
>
> *UNCRC*, *supra,* Article 40, clause 4

20. The reaction to an offence should always be in proportion not only to the offence, but to the "age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society".

General Comment No 10, *supra,* para 71

21. As elaborated in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, a resolution of the United Nations General Assembly regarding the treatment of young people charged with criminal offences (the "*Beijing Rules*"), a purpose of domestic law and policy concerning juvenile justice is to minimize the necessity of criminal justice intervention in recognition of the harm that may be occasioned to a young person by such intervention.

> United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*Beijing Rules*"), A/RES/40/33, November 29, 1985.

22. The *Beijing Rules* further emphasize the promotion of the well-being of the juvenile and the principle of proportionality:

> 5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.
> Beijing Rules, supra, Article 5

23. The commentary to this section emphasizes that the first objective of juvenile justice is to promote the well-being of the youth. The second objective is achieving proportionality, recognized as an "instrument for curbing punitive sanctions". Rather than being punitive,

> the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions. . . .
>
> *Beijing Rules*, *supra,* Commentary to Article 5.1

24. Accordingly, Article 6 of the *Beijing Rules* specifically recognizes the need for discretion at all stages of proceedings and juvenile justice administration. While the *Beijing Rules* recognize the need for accountability in the exercise of any such discretion, the effective, fair, and human administration of youth criminal justice must "permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each individual case". The expert qualification and training of those using this

discretion is considered to be an appropriate safeguard on its exercise.

Beijing Rules, *supra,* Article 6 and Commentary

25. The *Beijing Rules* furthermore recognize the harm to young people of stigmatization and labelling, resulting from the permanent identification of young persons as delinquent or criminal. Accordingly, privacy concerning youth criminal justice involvement is of the utmost importance under the Rules and their records are strictly protected.

Beijing Rules, supra, Article 8 and 21

26. With respect to adjudication and disposition in particular, the Rules provide that this must be undertaken by a competent authority and shall be conducted in an atmosphere of understanding.

Beijing Rules, supra, Article 14

27. Dispositions are to be guided by principles of proportionality, not only to the gravity of the offence, but the circumstances and needs of the juvenile and the needs of society, restrictions on liberty are to limited to the possible minimum, and deprivation of liberty is appropriate only in the most serious acts of violence and where there is no other appropriate response. In all determinations of disposition, the well-being of the juvenile shall be <u>the</u> primary consideration.

Beijing Rules, supra, Article 17

28. Specifically, the commentary to this section provides that

> strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in <u>juvenile cases such considerations should always be outweighed by the interest in safe-guarding the well-being and the future of the young person.</u>

Beijing Rules, *supra,* Commentary to Article 17 (emphasis added)

29. The Rules accordingly require that a wide variety of disposition measures be made available to the competent authority "allowing for flexibility so as to avoid institutionalization to the greatest extent possible". Indeed, the Rules require that placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period. Indeed, "[l]ittle to no difference

has been found in terms of the success of institutionalization as compared to non-institutionalization" and young people are recognized as being particularly vulnerable to the negative influences and harms of institutionalization by virtue of their early stage of development. Disposition in juvenile cases, more so than in adult cases, "tends to influence the offender's life for a long period of time".

Beijing Rules, *supra,* Articles 18 and 19 and Commentary, Commentary to Article 23

c. International and constitutional legal principles find expression in the provisions of the *YCJA*

30. The *YCJA* – with its recognition of children's human rights, their unique and vulnerable place in society, and their unique position in the criminal justice system - reflects Parliament's intention to codify a distinct system of criminal justice as compared to adults. In fact, the provisions of the *YCJA* mirror the *UNCRC* and the *Beijing Rules* in almost every respect. To this end, the *YCJA* establishes enhanced procedural protections at all stages of criminal proceedings, from arrest to disposition to control over youth records.

31. As mentioned above at paragraph 17, the *UNCRC* has been specifically incorporated into the Preamble of the *YCJA*. The Preamble, and the requirements of the *UNCRC* and related comments and instruments referenced therein, accordingly forms an important interpretive lens for interpreting the intent of the *YCJA* and applying its provisions.

R v CD; R v CDK, 2005 SCC 78, [2005] 3 SCR 668, para 48
R v BWP; R BVN, 2006 SCC 27 at para 35, [2006] 1 SCR 941
R v DB, 2008 SCC 25 at para 60, [2008] 2 SCR 3
R v RC, 2005 SCC 61 at para 41, [2005] 3 SCR 99

32. The foundational principles of the youth criminal justice system are furthermore captured in the *YCJA*'s Declaration of Principle, which provides that the youth criminal justice system must be separate from that of adults and must be based on the principle of diminished moral blameworthiness. The Act is intended promote the protection of the public through holding young people accountable

through proportional measures consistent with their greater dependency and reduced maturity, promoting their rehabilitation and reintegration, and supporting the prevention of crime through addressing the circumstances underlying their behaviour. The system must protect the rights of young people, and promote timely intervention, both to reinforce the link between the offending behaviour and its consequences and in recognition of young persons' perception of time.

> *YCJA, supra,* s. 3(1)(a) and (b)

33. Measures taken against young people should reinforce respect for societal values, encourage the repair of harm done to victims and the community, and be meaningful for the individual young person given their personal circumstances, including their needs and level of development and should involve the young person's family and community in order to promote rehabilitation and reintegration.

> *YCJA, supra*, s. 3(1)(c)

34. Finally, the Act is to be liberally construed to ensure that young persons are dealt with in accordance with these principles.

> *YCJA, supra*, s. 3(2)

35. In *R v RC,* the Supreme Court of Canada recognized that

> In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons. In keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections, and to interfere with their personal freedom and privacy as little as possible.
>
> *R v RC, supra*, para 41

36. Similarly, in *R v SJL,* Deschamps J noted that the "governing principle of the *YCJA* maintains a justice system for young people that is separate from the system for adults". The creation of this system was based on recognition of the presumption of diminished moral blameworthiness of young persons and on their heightened vulnerability in dealing with the justice system". Accordingly, youth courts will "favour rehabilitation, reintegration and the principle of a fair and proportionate

accountability that is consistent with the young person's reduced level of maturity" as opposed to the adult system which "places greater emphasis on punishment". The Court noted that these are clear and decidedly different objectives.

> *R v SJL,* 2009 SCC 14, [2009] 1 SCR 426, paras 56, 64, 75

d. The *ÝCJA*'s sentencing provisions must be read in conjunction with the Act as a whole

37. All the provisions of the *YCJA* must be read as making meaningful these principles, but they are particularly clearly reflected in the sentencing provisions under Part 4 of the Act.

38. Under the *Young Offenders Act,* the predecessor legislation to the *YCJA,* Canada had one of the highest rates of incarceration in the western world, particularly for non-violent offences. Accordingly, Parliament enacted the *YCJA* with a view to reducing reliance on incarceration for young persons, and ensuring that the most serious interventions are reserved for the most serious offences. The Supreme Court in *R v BWP; R v BVN* noted that the *YCJA* significantly changed the Canadian youth justice system and the sentencing provisions of the Act "have been characterized as 'the most systematic attempt in Canadian history to structure judicial discretion regarding the sentencing of juveniles'".

> *Young Offenders Act,* RSC 1985, c Y-1 [repealed]
>
> Jones, B., Rhodes, E., Birdsell, M., Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner's Handbook (Toronto: Emond, 2016) at 214
>
> *R v BWP; R v BVN, supra*, para 19

39. Indeed, Part 4 of the *YCJA* establishes a distinct sentencing regime that ousts the application of all but a few of the sentencing provisions of the *Criminal Code,* none of which have application in the present case. This Court has held that the sentencing regime is completely different from that established under the *Criminal Code.*

> *YCJA, supra*, s. 50
>
> *R v Wobbes,* 2008 ONCA 567, para 73

40. While sentencing under the *Criminal Code* emphasizes denunciation, general deterrence, and

separation of offenders from society, the *YCJA* provides that 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.

YCJA, *supra*, s 38(1)

Compare to: *Criminal Code,* RSC 1985, c. C-46 as am., s. 718

41. Given that youthful offending does not reflect poor moral judgment or bad character in the same way as adult offending, the emphasis of youth criminal justice is on rehabilitation and reintegration rather than deterrence, denunciation, or retribution. As in *R v DB,* there is evidence "suggesting that as a result of this reduced judgment and maturity, young persons respond differently to punishment than adults, and that harsher penalties do not, by themselves, reduce youth crime".

R v DB, *supra*, at para 62-65

Roper v Simmons, *supra*, at III B, pp 16-18

42. In addition to the Act's Declaration of Principle at section 3, section 38(2) articulates additional considerations with respect to youth sentencing. In particular, a sentence imposed on a youth: must not be greater than that appropriate for an adult; must be similar to sentences imposed for similar offences against <u>similar young persons</u>; and must be proportionate to the seriousness of the offence and the degree of responsibility of the young person. Importantly, "degree of responsibility" must be read in conjunction with the recognition under s. 3(1)(b) that young persons as a class are considered to be less morally culpable for their conduct than adults.

YCJA, supra, s. 38(2), 3

43. Additionally, all available sanctions other than custody must be considered and the sentence ultimately imposed must be the least restrictive sentence capable of achieving the purposes set out in s. 38(1), be the one most likely to rehabilitate the young person and reintegrate him or her into society, and promote a sense of responsibility.

44. Subsection 38(2)(f) allows a court to consider denunciation and specific deterrence, that is,

whether the sentence will prevent the young person from re-offending in the future. However, this factor remains subject to the requirement that the sentence remain proportionate to the seriousness of the offence and the young person's degree of responsibility, and its consideration is not mandatory.

YCJA, supra, s. 38(2)(f)

45. Importantly, this Court has affirmed that general deterrence, which may lead to the imposition of a harsher sentence for adults, has no place in sentencing of young persons. Moreover, it has been recognized that non-custodial sentences may be denunciatory. Indeed, participation in the criminal justice system is itself denunciatory, particularly for young persons who may be more susceptible to the stigma of criminal justice involvement and whose perception of time is different than that of adults. In other words, mere participation in the criminal justice system over time may be sufficient to achieve specific deterrence and denunciation and may itself be adequate to hold a young person accountable and a sufficiently meaningful consequence for a young person.

R v AO, 2007 ONCA 144, [2007] OJ No 800 (ONCA), para 43
R v B-S(T), 2014 ONCJ 253 , para 94

46. Section 38 also directs the youth justice court to consider: the degree of participation by the young person in the commission of the offence, the harm done to victims and whether it was intentional or foreseeable, any reparation made by the young person, time spent in custody, previous findings of guilt, and any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purposes and principles of s. 38.

YCJA, supra, s. 38(3)

47. What the foregoing demonstrates, and as has been affirmed by this Court, sentencing under the *YCJA* is "offender-centric" – though not offender-exclusive – which, consistent with the stipulations of the *UNCRC* and the *Beijing Rules* and the principles and policies of the *YCJA,* means considering the personal circumstances, needs, stage of development, well-being, best interests, future development, and post-arrest and pre-sentence conduct, of the young person before the Court.

48. Taking account of these factors when crafting a sentence that will hold the young person accountable and impose meaningful consequences requires that a youth court judge be provided with significant flexibility and discretion, consistent with the *UNCRC* and *Beijing Rules*.

49. Section 42 of the *YCJA* sets out the available sentences under the Act and indicates that for all but the most serious violent offences, the sentencing judge may "impose any one of the following sanction or any number of them that are not inconsistent with each other". The available sanctions range from a judicial reprimand, to an absolute or conditional discharge, fines, restitution, probation, and, finally, custody and supervision orders of various lengths.

> *YCJA, supra*, s. 42

50. With respect to the charges in the case at bar, nothing in the Act limits the imposition of any sentence nor requires that any particular sentence be imposed. Rather, the imposition of a fit sentence – one that appropriately holds a young person accountable through meaningful consequences and measures proportionate to the seriousness of the offence and their personal circumstances – is appropriately left to the discretion of the youth court judge.

51. This consistent with Parliament's intention and the *UNCRC* and *Beijing Rules*. Indeed, Parliament has recognized that crafting an appropriate sentence, even for serious offences,

> requires a careful consideration of all the circumstances of the offence and flexibility for the judge to design a sentence that will hold the young person accountable for the offence by imposing meaningful consequences while promoting the rehabilitation of the young person. This is the approach taken in the youth criminal justice act. It is based on the assumption that judges are quite capable of exercising their discretion appropriately. . . .
>
> Bill C-7 is a much more balanced, fair and effective approach to youth justice. It would require meaningful consequences to be imposed yet recognizes that such consequences do not necessarily require incarceration or sending a young person to an adult system. It emphasizes the importance of prevention, rehabilitation and reintegration. It recognizes that young persons are still maturing and should be treated differently from adults. It recognizes that the circumstances of an offence can be complicated and that judges should be able to consider these circumstances in determining a fair, proportionate sentence.
>
> Canada, House of Commons, *Hansard,* 37th Parl, 1st Sess, No 67 (29 May 2001) at 1020, 1025

52. Accordingly, Parliament has delegated the responsibility for crafting appropriate youth sentences to youth court judges who, after having heard all the elements of the case before them and after consideration of the facts, are best placed to determine the appropriate sentence. They are accordingly entitled to deference in this regard.

Hansard, supra, at 1020

53. Indeed, as the Supreme Court has noted and has stated above at paragraph 40, the *YCJA* reflects Parliament's comprehensive effort to reform sentencing and "structure judicial discretion", with the aim of reducing incarceration and reliance on custodial sentences. Had Parliament wished to limit the availability of particular sentencing options for particular offences, it could have done so and indeed did so with respect to the most serious offences. Rather, the Act directs sentencing judges to consider the least restrictive means of achieving accountability and meaningful consequences, while promoting rehabilitation and reintegration.

R v BWP; R v BVN, supra, para 19

54. This interpretation is not only consistent with international law, but is consistent with section 3(2), that is, that the Act is to be given a liberal construction, as well as the principles of statutory interpretation, both that legislation considered to be remedial and the principle of implied exclusion.

Interpretation Act (R.S.C. 1985, c. I-21), s. 12

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at 248-249

e. The relevance of statutory access periods

55. The disposition of a charge carries with it a statutorily defined access period during which time the *YCJA* record remains accessible, after which the record is no longer generally available to actors within the criminal justice system. During the applicable access period, a finding of guilt may appear, for example, on a vulnerable sector or criminal record check.

YCJA, supra, s. 119(2)

56. For a judicial reprimand, the access period is two months, after which time the record is

sealed and subject to destruction, and should no longer be generally accessible. As a further example, for an absolute discharge, the period of retention is one year. For an indictable offence, the period ending five years after the sentence has been completed.

YCJA, supra, s. 119(2)(c), (e), (h)

57. Indeed, as the Respondents have noted, there is little deterrent value or other public interest in access to youth records (as opposed to adult criminal records) particularly given that the *YCJA* provides that youth records be maintained only for a finite period and the Act's emphasis on privacy for young persons and the concern that they not be unduly stigmatized or labelled, consistent with the *UNCRC* and the principles of diminished moral blameworthiness, rehabilitation, and reintegration.

R v RP, 2004 ONCJ 190, p 12
R v DB, *supra*, at para 84

58. The Supreme Court in *R v DB* further noted that stigmatizing and labelling a young person as an offender can damage the young person's developing self-image and his sense of self-worth. Identification of a young person outside the youth criminal justice system makes the young person vulnerable to greater psychological and social stress, and in so doing, renders the impact of their involvement with the criminal justice system more severe.

59. Similarly, in *Re FN*, the Supreme Court noted that "[s]tigmatization or premature 'labelling' of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy." The privacy protections were accordingly recognized as being designed to "maximize the chance of rehabilitation for young offenders."

FN (Re), 2000 SCC 35, [2000] 1 SCR 880, at para 14

60. In *Toronto Star,* a case considering the publication provisions under Part 6 of the *YCJA,* Cohen J., in a passage cited with approval by the Supreme Court of Canada, noted that:

> The concern to avoid labelling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the Act. . . . the protection of privacy of young persons has undoubted constitutional significance . . . . The protection of privacy is a cornerstone of the Act, and, as I have argued, is recognized as having a critical relationship to rehabilitation which promotes the long-term protection of society, the stated objective of the Act.
>
> *Toronto Star v Ontario*, 2012 ONCJ 27 (OCJ), at para 40, 77
>
> *AB v Bragg Communications, supra*, at para 18

61. By contrast, while there is little public interest in the length of access with respect to youth records, in addition to the harms of stigmatization, an open record may have numerous practical detrimental effects for a young person, impacting their access to education or employment, or setting them up for breaches and attendant adult convictions, which may transform their youth record to an adult record, with permanent and lasting consequences.

> *YCJA, supra*, s. 119(9)

62. Accordingly, the concern to avoid stigmatization and labelling is relevant to the promotion of rehabilitation and reintegration. It is appropriate for a sentencing judge to consider the criminal justice footprint associated with a particular disposition as "relevant information before the court", though not in the way the Crown suggests.

> *YCJA, supra*, s. 42(1)

63. Under s. 59, a sentence other than custodial sentence may be subject to review on the ground that, *inter alia,* the terms of the sentence are adversely affecting the opportunities available to the young person to obtain services, education or employment or any other appropriate grounds. This can be done even after the sentence is served in order to alter the applicable access period. If a youth court can consider these factors after a sentence is imposed, it stands to reason that a court may properly consider the collateral effects of a particular disposition prior to imposing a sentence.

> *YCJA*, *supra*, s. 59(2)(d)
>
> *R v KD* (6 April 2012), Toronto (Youth Ct.) (unreported) [1]

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[1] JFCY has undertaken at least four such sentence reviews in this calendar year, one of which was after the sentence had been completed specifically for the purpose of addressing the access period (*R v KD*). However, these decisions are not reported and the provisions of the *YCJA* prevent us from disclosing the relevant records.

B. APPLICATION TO THE PROPOSED TEST FOR A REPRIMAND

64. The Crown has invited this Court to articulate a test for the appropriate imposition of a reprimand as a youth sentence. This Court should decline to articulate such a test. Indeed, a test limiting the availability of a reprimand is contrary to the sentencing regime under the *YCJA,* Parliament's intention, the *Charter,* and Canada's international legal commitments.

65. The Crown relies on various commentary to suggest variously that a reprimand exists to be imposed in circumstances where charges should not have been brought before the court at all *and* where an absolute discharge is appropriate. The proposed analysis ignores the fact that a reprimand, like an absolute discharge and indeed any other disposition under the Act, is a finding of guilt. It is illogical to suggest that a reprimand is to be used where a youth ought not to have been found guilty when it is only available after a finding of guilt.

66. Moreover, there is by no means any suggestion in the *YCJA* or commentary that a reprimand is *only* available in circumstances where charges ought not to have been brought to trial. Similarly, the Crown has referred to literature suggesting that a reprimand ought only to be available where pre-sentence restrictions were so disproportionate so as to be abusive, a test which approaches a test akin to an abuse of process and one which this Court should reject.

67. Rather, the suggestion in the literature is that a reprimand *may* be imposed where charges could have been dealt with by way of extrajudicial measures, that is, pre-trial diversion. Indeed, the *YCJA* recognizes that extra-judicial measures themselves may be an appropriate and adequate means of holding a young person accountable and imposing meaningful consequences. Similarly, a reprimand may well be sufficient to accomplish the objectives of the *YCJA.*

YCJA, supra, s. 4

68. Indeed, the literature itself recognizes the relative severity of a reprimand:

> To some degree, the perceived leniency of a reprimand is in the eyes of the beholder. Some young persons, particularly those who have never come into conflict with the criminal law, may be profoundly influenced by the judicial reprimand. The fact is that the reprimand *is* a formal court sanction, which requires the young person to experience the court process: they appear in court and are found guilty by a judge. This process is likely to have an impact on at least some first time youthful offenders. . . .
> In addition, while a judicial reprimand is arguably the most lenient youth sentence that can be imposed under the *YCJA,* it is not a particularly lenient criminal justice system response because a guilty finding has been entered against the young person. He or she has been exposed to the court process and the judicial system, and thus must endure the stigma and repercussions attached to that. A record of the reprimand remains accessible for two month from the time the guilty finding is entered.
>
> Davis-Brown, S. *Canadian Youth and the Criminal Law* (Markham: LexisNexis, 2009) at 388-9.

69. Moreover, a young person may have engaged in pre-sentence rehabilitative measures such that the sentencing judge may find that meaningful consequences have already been achieved and no further intervention is warranted. In such cases, no further order of the court will be necessary to hold the person accountable; any further measures imposed would be simply punitive.

70. The Crown, however, appears to be suggesting that this Court import the analysis under s. 42(2)(b) for an absolute discharge, that is, that the measure is in the best interests of the young person and not contrary to the public interest, as in *R v JR*, with the additional requirement that a reprimand only be preferred only if it is in the public interest that records of the offence become inaccessible after two months. This Court should reject this approach.

71. Such an approach is contrary to the principles of statutory interpretation, as discussed above. Had Parliament intended to narrow the application of a reprimand, or import such a test, it could have done so and elected not to.

72. Other courts have commented that the statutory "test" for an absolute discharge, and questions concerning the length of the retention period, adds very little in the youth context. Considering the public interest in youth records retention, the Court stated:

> . . . I think it is highly unlikely that Parliament intended such a result. Unlike adult discharges, where there is a clearly identifiable public interest in maintaining the deterrent and denunciatory

> value of a criminal record , there is no similar identifiable public interest in what can only be seen as the technical and scarcely known workings of the "record access period" provisions of the Act. It is hard to imagine that it was intended to be a pivotal issue in youth sentencing. I think it is likely that the draftsman simply borrowed discharges from adult sentencing law and failed to consider whether they had any real meaning in the youth system where the "conviction vs no conviction" distinction has not been carried forward.

R v RP, supra, p 12

73. The Court also commented that there is no significant deterrent value or other public stake in access to youth records as there is for adult records. However, as discussed above, a young person's rehabilitation and reintegration may be significantly impacted by an open youth record. This ought to be the only relevant consideration with respect to the access period. This Court should decline to require its consideration in the manner suggested by the Crown where Parliament did not.

74. Moreover, the other factors suggested by the Crown – that a reprimand be in the interests of the young person and not contrary to the public interest – add nothing to the analysis a sentencing judge must undertake in accordance with the governing principles of the sentencing regime and *YCJA* in general. Indeed, in every case involving a young person, all actions taken must prioritize the well-being and best interests of the young person and must take into account the public interest both in holding young persons accountable for their actions and promoting their rehabilitation and reintegration. These principles suffuse the entire sentencing regime and are not augmented by reading the factors suggested by the Crown into s. 42(2)(a).

75. A reprimand may well accomplish these objectives, and any further or more restrictive order, particularly a custodial sentence, would simply be punitive and therefore contrary to the objectives of the *YCJA,* one of which is specifically to reduce reliance on incarceration for youth.

R v DB, *supra*, para 41-44

76. Finally, the Crown has asserted that a reprimand be reserved for only the most minor offences and appears to suggest that a reprimand can never be an appropriate sentence for the type of offence

at issue in the case at bar, suggesting that a custodial sentence is "the norm". With respect, this imports into the *YCJA* an "offence-" rather than "offender-centric" analysis that fails to appropriately acknowledge the distinct features of the youth criminal justice system and undermines the flexibility and discretion accorded to judges to impose the consequences most appropriate in the circumstances.

77. Such a limitation on the use of a reprimand represents a substantial interference with discretion and flexibility of judge to craft an appropriate sentence that is meaningful to the young person, taking into account not only the gravity of the offence, but the vulnerability of young people in society and in the criminal justice system in general and their diminished moral culpability, as well as their personal circumstances and characteristics, including appreciation for rehabilitation that may have occurred prior to sentencing. The *YCJA,* and indeed international law and the *Charter,* require that a youth court be accorded substantial discretion, flexibility, and deference to select the least restrictive sentence that will promote their rehabilitation and reintegration of the young person before the Court. Indeed, flexibility and discretion are essential elements of the sentencing regime established under Part 4, particularly in light of the principles of the Act.

PART V – ORDER SOUGHT

78. JFCY takes no position as to the disposition of the appeal. Should this Court substitute its own decision for that of the court below, the Court must be guided in its analysis by the relevant principles and policies of the *YCJA* as set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2017.

Jane Stewart & Mary Birdsell
Justice for Children and Youth

SCHEDULE A – LIST OF AUTHORITIES

Cases

Roper v Simmons, 543 US 551 (2005) (US Sup Ct), at III B.

JDB v North Carolina, 131 S Ct 2394 at 2404 (2011) (US Sup Ct) at II B.

R v DB, 2008 SCC 25, [2008] 2 SCR 3.

AB (Litigation Guardian of) v Bragg Communications Inc., 2012 SCC 46, [2012] 2 SCR 567.

R v LTH, 2008 SCC 49, [2008] 2 SCR 739.

R v KB, [2003] OJ No. 3553, 67 OR (3d) 391 (ONCA).

R v CD; R v CDK, 2005 SCC 78, [2005] 3 SCR 668.

R v BWP; R BVN, 2006 SCC 27, [2006] 1 SCR 941

R v RC, 2005 SCC 61, [2005] 3 SCR 99

R v SJL, 2009 SCC 14, [2009] 1 SCR 426.

R v Wobbes, 2008 ONCA 567.

R v AO, 2007 ONCA 144, [2007] OJ No 800 (ONCA).

R v B-S(T), 2014 ONCJ 253.

R v RP, 2004 ONCJ 190.

FN (Re), 2000 SCC 35, [2000] 1 SCR 880.

Toronto Star v Ontario, 2012 ONCJ 27 (OCJ).

Secondary Sources

Jones, B., Birdsell M., & Rhodes, E., "A Call For Enhanced Constitutional Protections for the Special Circumstances of Youth" (2013) 3:2 CR (7th) 350.

Jones, B., Rhodes, E., Birdsell, M., *Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner's Handbook* (Toronto: Emond, 2016).

Canada, House of Commons, *Hansard,* 37th Parl, 1st Sess, No 67 (29 May 2001).

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014).

Davis-Brown, S. *Canadian Youth and the Criminal Law* (Markham: LexisNexis, 2009).

General Comment No 10 (2007) *Children's rights in juvenile justice,* UNCRC, 44th sess, UN doc CRC/G/GC/10.

SCHEDULE B – LEGISLATIVE PROVISIONS

United Nations, Convention on the Rights of the Child, Can. T.S. 1992 No. 3.

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

…

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. 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 both to their circumstances and the offence.

Article 25

. . .

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29, 1985

The Beijing Rules

1. Fundamental perspectives

1.1 Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family.

1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.

1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for
intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

1.4 Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.
1.5 These Rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State.

1.6 Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

Commentary

These broad fundamental perspectives refer to comprehensive social policy in general and aim at promoting juvenile welfare to the greatest possible extent, which will minimize the necessity of

intervention by the juvenile justice system, and in turn, will reduce the harm that may be caused by any intervention. . . .

5. Aims of juvenile justice

5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

Commentary

Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)

The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.

In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles.

6. Scope of discretion

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

Commentary

Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and humane juvenile justice administration: the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each individual case; and the need to provide checks and balances in order to curb any abuses of discretionary power and to safeguard the rights of the young offender. Accountability and professionalism are instruments best apt to curb broad discretion. Thus, professional qualifications and expert training are emphasized here as a valuable means of ensuring the judicious exercise of discretion in matters of juvenile offenders. (See also rules 1.6 and 2.2.) The formulation of specific guidelines on the exercise of discretion and the provision of systems of re
view, appeal and the like in order to permit scrutiny of decisions and accountability are emphasized in this context. Such mechanisms are not specified here, as they do not easily lend themselves to incorporation into international standard minimum rules, which cannot possibly cover all differences in justice systems.

8. Protection of privacy

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

Commentary

Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle. (The general contents of rule 8 are further specified in rule 2 1.)

14. Competent authority to adjudicate

14.1 Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.

14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

Commentary

It is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority. "Competent authority" is meant to include those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates as well as administrative boards (for example the Scottish and Scandinavian systems) or other more informal community and conflict resolution agencies of an adjudicatory nature.

The procedure for dealing with juvenile offenders shall in any case follow the minimum standards that are applied almost universally for any criminal defendant under the procedure known as "due process of law". In accordance with due process, a "fair and just trial" includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defences, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc. (See also rule 7.1.)

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.
17.2 Capital punishment shall not be imposed for any crime committed by juveniles.

17.3 Juveniles shall not be subject to corporal punishment.

17.4 The competent authority shall have the power to discontinue the proceedings at any time.

Commentary

The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:

(a) Rehabilitation versus just desert;

(b) Assistance versus repression and punishment;

(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

(d) General deterrence versus individual incapacitation.

The conflict between these approaches is more pronounced in juvenile cases than in adult cases. With the variety of causes and reactions characterizing juvenile cases, these alternatives become intricately interwoven.

It is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles. Therefore the essential elements as laid down in rule 17.1, in particular in subparagraphs (a) and (c), are mainly to be understood as practical guidelines that should ensure a common starting point; if heeded by the concerned authorities (see also rule 5), they could contribute considerably to ensuring that the fundamental rights of juvenile offenders are protected, especially the fundamental rights of personal development and education.

Rule 17.1 (b) implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.

In line with resolution 8 of the Sixth United Nations Congress, rule 17.1 (b) encourages the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young. Thus, full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind. Probation should be granted to the greatest possible extent via suspended sentences, conditional sentences, board orders and other dispositions.

Rule 17.1 (c) corresponds to one of the guiding principles in resolution 4 of the Sixth Congress which aims at avoiding incarceration in the case of juveniles unless there is no other appropriate response that will protect the public safety.

The provision prohibiting capital punishment in rule 17.2 is in accordance with article 6, paragraph 5, of the International Covenant on Civil and Political Rights.

The provision against corporal punishment is in line with article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the draft convention on the rights of the child.

The power to discontinue the proceedings at any time (rule 17.4) is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, circumstances may become

known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case.

18. Various disposition measures

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

(a) Care, guidance and supervision orders;

(b) Probation;

(c) Community service orders;

(d) Financial penalties, compensation and restitution;

(e) Intermediate treatment and other treatment orders;

(f) Orders to participate in group counselling and similar activities;

(g) Orders concerning foster care, living communities or other educational settings;

(h) Other relevant orders.

18.2 No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

Commentary

Rule 18.1 attempts to enumerate some of the important reactions and sanctions that have been practised and proved successful thus far, in different legal systems. On the whole they represent promising opinions that deserve replication and further development. The rule does not enumerate staffing requirements because of possible shortages of adequate staff in some regions; in those regions measures requiring less staff may be tried or developed. The examples given in rule 18.1 have in common, above all, a reliance on and an appeal to the community for the effective implementation of alternative dispositions.

Community-based correction is a traditional measure that has taken on many aspects. On that basis, relevant authorities should be encouraged to offer community-based services.
Rule 18.2 points to the importance of the family which, according to article 10, paragraph l, of the International Covenant on Economic, Social and Cultural Rights, is "the natural and fundamental group unit of society". Within the family, the parents have not only the right but also the responsibility to care for and supervise their children. Rule 18.2, therefore, requires that the separation of children from their parents is a measure of last resort. It may be resorted to only when the facts of the case clearly warrant this grave step (for example child abuse).

19. Least possible use of institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

Commentary

Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.

Rule 19 aims at restricting institutionalization in two regards: in quantity ("last resort") and in time ("minimum necessary period"). Rule 19 reflects one of the basic guiding principles of resolution 4 of the Sixth United Nations Congress: a juvenile offender should not be incarcerated unless there is no other appropriate response. The rule, therefore, makes the appeal that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, offences and institutions. In fact, priority should be given to "open" over "closed" institutions. Furthermore, any facility should be of a correctional or educational rather than of a prison type.

21. Records

21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.

21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

Commentary

The rule attempts to achieve a balance between conflicting interests connected with records or files: those of the police, prosecution and other authorities in improving control versus the interests of the juvenile offender. (See also rule 8.) "Other duly authorized persons" would generally include, among others, researchers.

23. Effective implementation of disposition

23.1 Appropriate provisions shall be made for the implementation of orders of the competent authority, as referred to in rule 14.1 above, by that authority itself or by some other authority as circumstances may require.

23.2 Such provisions shall include the power to modify the orders as the competent authority may deem necessary from time to time, provided that such modification shall be determined in accordance with the principles contained in these Rules.

Commentary

Disposition in juvenile cases, more so than in adult cases, tends to influence the offender's life for a long period of time. Thus, it is important that the competent authority or an independent body (parole board, probation office, youth welfare institutions or others) with qualifications equal to those of the competent authority that originally disposed of the case should monitor the implementation of the disposition. In some countries, a juge de l'exécution des peines has been installed for this purpose.
The composition, powers and functions of the authority must be flexible; they are described in general terms in rule 23 in order to ensure wide acceptability.

Youth Criminal Justice Act, S.C. 2002, c. 1

Preamble

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms;

AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

…

Declaration of Principle

Section 3

3 (1) The following principles apply in this Act:

(a) the youth criminal justice system is intended to protect the public by

(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,

(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and

(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

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

(i) reinforce respect for societal values,

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

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the

extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

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

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

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

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

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

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

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

Section 4

4 The following principles apply in this Part in addition to the principles set out in section 3:

(a) extrajudicial measures are often the most appropriate and effective way to address youth crime;

(b) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;

(c) extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and

(d) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is

consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who

(i) has previously been dealt with by the use of extrajudicial measures, or

(ii) has previously been found guilty of an offence.

Section 38

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

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

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

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

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

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

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

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

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

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

(f) subject to paragraph (c), the sentence may have the following objectives:

(i) to denounce unlawful conduct, and

(ii) to deter the young person from committing offences.

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

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

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

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

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

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

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

Section 42

42 (1) A youth justice court shall, before imposing a youth sentence, consider any recommendations submitted under section 41, any pre-sentence report, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person, and any other relevant information before the court.

(2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, the court shall impose a sanction set out in paragraph (q) or subparagraph (r)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:

(a) reprimand the young person;

(b) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;

(c) by order direct that the young person be discharged on any conditions that the court considers appropriate and may require the young person to report to and be supervised by the provincial director;

(d) impose on the young person a fine not exceeding $1,000 to be paid at the time and on the terms that the court may fix;

(e) order the young person to pay to any other person at the times and on the terms that the court may fix an amount by way of compensation for loss of or damage to property or for loss of income or support, or an amount for, in the Province of Quebec, pre-trial pecuniary loss or, in any other province, special damages, for personal injury arising from the commission of the offence if the value is readily ascertainable, but no order shall be made for other damages in the Province of Quebec or for general damages in any other province;

(f) order the young person to make restitution to any other person of any property obtained by the young person as a result of the commission of the offence within the time that the court may fix, if the property is owned by the other person or was, at the time of the offence, in his or her lawful possession;

(g) if property obtained as a result of the commission of the offence has been sold to an innocent purchaser, where restitution of the property to its owner or any other person has been made or ordered, order the young person to pay the purchaser, at the time and on the terms that the court may fix, an amount not exceeding the amount paid by the purchaser for the property;

(h) subject to section 54, order the young person to compensate any person in kind or by way of personal services at the time and on the terms that the court may fix for any loss, damage or injury suffered by that person in respect of which an order may be made under paragraph (e) or (g);

(i) subject to section 54, order the young person to perform a community service at the time and on the terms that the court may fix, and to report to and be supervised by the provincial director or a person designated by the youth justice court;

(j) subject to section 51 (mandatory prohibition order), make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made under it if an accused is found guilty or convicted of that offence, other than an order under section 161 of the *Criminal Code*;

(k) place the young person on probation in accordance with sections 55 and 56 (conditions and other matters related to probation orders) for a specified period not exceeding two years;

(l) subject to subsection (3) (agreement of provincial director), order the young person into an intensive support and supervision program approved by the provincial director;

(m) subject to subsection (3) (agreement of provincial director) and section 54, order the young person to attend a non-residential program approved by the provincial director, at the times and on the terms that the court may fix, for a maximum of two hundred and forty hours, over a period not exceeding six months;

(n) make a custody and supervision order with respect to the young person, ordering that a period be served in custody and that a second period — which is one half as long as the first — be served, subject to sections 97 (conditions to be included) and 98 (continuation of custody), under supervision in the community subject to conditions, the total of the periods not to exceed two years from the date of the coming into force of the order or, if the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of coming into force of the order;

(o) in the case of an offence set out in section 239 (attempt to commit murder), 232, 234 or 236 (manslaughter) or 273 (aggravated sexual assault) of the *Criminal Code*, make a

custody and supervision order in respect of the young person for a specified period not exceeding three years from the date of committal that orders the young person to be committed into a continuous period of custody for the first portion of the sentence and, subject to subsection 104(1) (continuation of custody), to serve the remainder of the sentence under conditional supervision in the community in accordance with section 105;

(p) subject to subsection (5), make a deferred custody and supervision order that is for a specified period not exceeding six months, subject to the conditions set out in subsection 105(2), and to any conditions set out in subsection 105(3) that the court considers appropriate;

(q) order the young person to serve a sentence not to exceed

(i) in the case of first degree murder, ten years comprised of

(A) a committal to custody, to be served continuously, for a period that must not, subject to subsection 104(1) (continuation of custody), exceed six years from the date of committal, and

(B) a placement under conditional supervision to be served in the community in accordance with section 105, and

(ii) in the case of second degree murder, seven years comprised of

(A) a committal to custody, to be served continuously, for a period that must not, subject to subsection 104(1) (continuation of custody), exceed four years from the date of committal, and

(B) a placement under conditional supervision to be served in the community in accordance with section 105;

(r) subject to subsection (7), make an intensive rehabilitative custody and supervision order in respect of the young person

(i) that is for a specified period that must not exceed

(A) two years from the date of committal, or

(B) if the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal,

and that orders the young person to be committed into a continuous period of intensive rehabilitative custody for the first portion of the sentence and, subject to subsection 104(1) (continuation of custody), to serve the remainder under conditional supervision in the community in accordance with section 105,

(ii) that is for a specified period that must not exceed, in the case of first degree murder, ten years from the date of committal, comprising

(A) a committal to intensive rehabilitative custody, to be served continuously, for a period that must not exceed six years from the date of committal, and

(B) subject to subsection 104(1) (continuation of custody), a placement under conditional supervision to be served in the community in accordance with section 105, and

(iii) that is for a specified period that must not exceed, in the case of second degree murder, seven years from the date of committal, comprising

(A) a committal to intensive rehabilitative custody, to be served continuously, for a period that must not exceed four years from the date of committal, and

(B) subject to subsection 104(1) (continuation of custody), a placement under conditional supervision to be served in the community in accordance with section 105; and

(s) impose on the young person any other reasonable and ancillary conditions that the court considers advisable and in the best interests of the young person and the public.

. . .

Section 50

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

Section 59

59 (1) When a youth justice court has imposed a youth sentence in respect of a young person, other than a youth sentence under paragraph 42(2)(n), (o), (q) or (r), the youth justice court shall, on the application of the young person, the young person's parent, the Attorney General or the provincial director, made at any time after six months after the date of the youth sentence or, with leave of a youth justice court judge, at any earlier time, review the youth sentence if the court is satisfied that there are grounds for a review under subsection (2).

(2) A review of a youth sentence may be made under this section

(a) on the ground that the circumstances that led to the youth sentence have changed materially;

(b) on the ground that the young person in respect of whom the review is to be made is unable to comply with or is experiencing serious difficulty in complying with the terms of the youth sentence;

(c) on the ground that the young person in respect of whom the review is to be made has contravened a condition of an order made under paragraph 42(2)(k) or (l) without reasonable excuse;

(d) on the ground that the terms of the youth sentence are adversely affecting the opportunities available to the young person to obtain services, education or employment; or

(e) on any other ground that the youth justice court considers appropriate.

. . .

Section 119(2)

119(2) The period of access referred to in subsection (1) is

(a) if an extrajudicial sanction is used to deal with the young person, the period ending two years after the young person consents to be subject to the sanction in accordance with paragraph 10(2)(c);

(b) if the young person is acquitted of the offence otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, the period ending two months after the expiry of the time allowed for the taking of an appeal or, if an appeal is taken, the period ending three months after all proceedings in respect of the appeal have been completed;

(c) if the charge against the young person is dismissed for any reason other than acquittal, the charge is withdrawn, or the young person is found guilty of the offence and a reprimand is given, the period ending two months after the dismissal, withdrawal, or finding of guilt;

(d) if the charge against the young person is stayed, with no proceedings being taken against the young person for a period of one year, at the end of that period;

(e) if the young person is found guilty of the offence and the youth sentence is an absolute discharge, the period ending one year after the young person is found guilty;

(f) if the young person is found guilty of the offence and the youth sentence is a conditional discharge, the period ending three years after the young person is found guilty;

(g) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is a summary conviction offence, the period ending three years after the youth sentence imposed in respect of the offence has been completed;

(h) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is an indictable offence, the period ending five years after the youth sentence imposed in respect of the offence has been completed;

(i) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an offence punishable on summary conviction committed when he or she was a young person, the latest of

(i) the period calculated in accordance with paragraph (g) or (h), as the case may be, and

(ii) the period ending three years after the youth sentence imposed for that offence has been completed; and

(j) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an indictable offence committed when he or she was a young person, the period ending five years after the sentence imposed for that indictable offence has been completed.

. . .

Section 119(9)

119(9) If, during the period of access to a record under any of paragraphs (2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult,

(a) section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;

(b) this Part no longer applies to the record and the record shall be dealt with as a record of an adult; and

(c) for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

Criminal Code

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Interpretation Act (R.S.C. 1985, c. I-21)

Section 12

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29, 1985. Rule 8.

Rule 8. Protection of privacy

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

Commentary
Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle. (The general contents of rule 8 are further specified in rule 2 1.)