Court File No. 31460

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

D.B.

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

Respondent

-and-

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THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF NOVA SCOTIA
THE ATTORNEY GENERAL OF MANITOBA
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
JUSTICE FOR CHILDREN AND YOUTH

Interveners

FACTUM OF THE INTERVENER JUSTICE FOR CHILDREN AND YOUTH

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FACTUM OF THE INTERVENER JUSTICE FOR CHILDREN AND YOUTH

PART I
STATEMENT OF FACTS

Overview of the Intervener's Position

1. Justice for Children and Youth (JFCY) agrees with the Respondent and takes the position that the Court of Appeal for Ontario did not err in declaring that ss. 62, 63, 64(1), 70, 72(1), 75 and 110 (2)(b) of the *Youth Criminal Justice Act,* S.C. 2002, c.1 (*YCJA*) infringe s. 7 of

the *Canadian Charter of Rights and Freedoms* and that such infringement is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the *Charter*.

2. JFCY's position is that the Ontario Court of Appeal did not err in declaring that the separate treatment of young persons under the age of 18 years constitutes a principle of fundamental justice. The Court of Appeal was correct in finding that young persons need to be treated differently than adults in administering criminal justice, because of their reduced maturity and increased vulnerability. JFCY's position is that the *United Nations Convention on the Rights of the Child (UNCRC)*, together with domestic legislation and the *Charter*, constitute legal recognition of the principle of separation of young persons and adults in the criminal justice system from a human rights and constitutional perspective.

3. JFCY's position is that the Ontario Court of Appeal was correct in declaring that to the extent that s. 72(2) places the burden on the young person to put evidence before the youth justice court to convince the youth justice court that he or she should be exempted from the presumptive adult sentence, it is not in accordance with the principle of fundamental justice derived from the presumption of innocence, namely that in sentencing, the Crown has the burden of proving beyond a reasonable doubt any aggravating circumstances in the commission of the offence. This violates the young person's rights under s.7 of the *Charter*, in a manner not justified under s.1, and is inconsistent with Canada's international obligations.

4. JFCY's position is that the Ontario Court of Appeal was correct in agreeing with the Québec Court of Appeal that the stigmatizing and labelling of a young person that can result from publicizing his or her identity sufficiently compromise the psychological security of that young person to engage the security of the person interest protected by s. 7 of the *Charter* and that it is not justified under s.1. Section 7 requires that the Crown must bear the burden of establishing those factors that yield the publication of identity and a more severe penalty for an offender.

Facts

5. JFCY accepts the facts as presented by the Appellant and Respondent and intervenes only in respect of the constitutional issues.

PART II
QUESTIONS IN ISSUE

6. JFCY's position with regard to the Appellant's questions is as follows:

(1) Did the Court of Appeal for Ontario err in declaring that ss. 62, 63, 64(1), 70, 72(1), 75 and 110(2)(b) of the ***YCJA*** as enacted infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

It is JFCY's position that the Court of Appeal for Ontario was correct in declaring that the impugned provisions infringed section 7 of the ***Charter***. It is further submitted that the impugned provisions do not accord with the principles of fundamental justice.

(2) Does "separate treatment of young persons and adults" constitute a principle of fundamental justice?

It is JFCY's position that "separate treatment of young persons and adults" in the criminal justice system constitutes a principle of fundamental justice.

(3) Do the impugned provisions compel a young person to "disprove" aggravating factors in sentencing?

It JFCY's position that the impugned provisions place an onus upon a young person to "disprove" aggravating factors in sentencing contrary to the principle of fundamental justice that in sentencing the Crown must assume the burden of demonstrating that a more severe penalty is warranted.

(4) If the impugned provisions violate section 7 of the ***Charter***, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the ***Charter***?

It is JFCY's position that the impugned provisions do not represent a reasonable limit prescribed by law under section 1 of the ***Charter***.

PART III
STATEMENT OF ARGUMENT

Impact of the International Law

7. JFCY's position is that the requirement of a distinct system of juvenile justice for children is an important principle of international law, which is reflected in the *Charter* as a principle of fundamental justice in s.7, within the youth criminal justice context. This Court has found that the *United Nations Convention on the Rights of the Child* (*UNCRC)* is incorporated by reference in the *YCJA*[1]. The *UNCRC,* which has been ratified by Canada (Can. T.S. 1992 No. 3), refers in its preamble to the child's need for special safeguards, including appropriate legal protection"[2] The Ontario Court of Appeal in this case found that the fundamental nature of the legal principle of a separate system of justice for children is "further reflected in the international treaty obligations Canada has undertaken".

8. The principles of constitutional and statutory interpretation require that, whenever possible, the *Charter* should be interpreted in a manner consistent with international law, and specifically, with Canada's international human rights obligations.[3] The development of international human rights "was an important influence leading to an entrenched guarantee of rights and freedoms in this country."[4] Accordingly, the values and principles reflected in international human rights law inform the context in which the *Charter* was enacted and in which its provisions must be read.[5]

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[1] *R. v. R.C.* [2005] S.C.J. No. 62 at para. 41.
[2] *R. v. D.B.*, [2006] 79 OR (3d) 698 at para. 58.
[3] R. Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworth, 2002) at 422. See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70-71.
[4] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at para. 57.
[5] *Baker*, *supra* note 3 at para. 70.

9. The Supreme Court has held that Canadian law must be interpreted to comply with Canada's international treaty obligations.[6] Once Canada has internationally obligated itself to ensure the protection of certain fundamental freedoms within its borders, it should generally be presumed that the Charter provides "protection at least as great as that afforded by similar provisions in those international human rights documents which Canada has ratified."[7] We look to international law as evidence of the principles of fundamental justice.[8] In considering the content of the phrase "in accordance with principles of fundamental justice" in *Re B.C. Motor Vehicle Act*, Lamer J. wrote at p. 512:

> ... they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice...[9]

International Law and the Principles of Fundamental Justice

10. As signatory to and proponent of the *UNCRC*, Canada has undertaken to provide special protective treatment of children based on their vulnerability. The Preamble to the *UNCRC* states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." Article 3 provides that in all actions concerning children by courts of law, the "best interests of the child shall be a primary consideration**."** *This is the only consideration that is characterized as primary.*

11. Article 40 of the *UNCRC* requires State Parties to treat children who have infringed the penal law in a manner consistent with the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society, in respect of dispositions or sentencing. In other words, rehabilitation is at the "heart of the legislative and judicial intervention with young persons."[10]

> 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

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[6] *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76 at para. 31.
[7] *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 349-50. See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056.
[8] *Suresh v.Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 60.
[9] *Re B.C. Motor Vehicle Reference* [1985] 2 S.C.R. at 512.
[10] *Reference re: Bill C-7 respecting the criminal justice system for young persons*, [2003] Q.J. No. 2850, (C.A.); 175 C.C.C. (3d) 321 (Que. C.A.) at para. 215 [*Reference re: Bill C-7*].

> 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.[11]

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

13. These principles are repeated in many other international instruments pertaining to youth justice. Rules and guidelines adopted by the United Nations General Assembly state that the best interests of a young person should be of paramount importance,[12] that juveniles (defined as every person under the age of 18) should be detained separately from adults,[13]and most comprehensively, that nations develop a juvenile justice system that emphasizes the well-being of the juvenile and that conducts proceedings in a manner "conducive to the best interests of the juvenile" and in "an atmosphere of understanding".[14]

14. Furthermore, international human rights instruments raise concerns about the risks of longer periods of incarceration for youth as opposed to adults because of their early stage of development and their vulnerability to negative influences. Rule 19.1 of the *Beijing Rules*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, provides:

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

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[11] *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 40 [*UNCRC*].
[12] *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)*, adopted and proclaimed 14 December, 1990, art. 46.
[13] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted 14 December 1990, arts. 11(a) and 29.
[14] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, adopted 29 November 1985, arts. 1.4 and 14.2 [*The Beijing Rules*].

> are certainly more acute for juveniles than for adults because of their early stage of development.[15]

15. The youth justice principles of non-disclosure and rehabilitation are inextricably linked in the international law as they are in Canadian domestic law. The *UNCRC* requires Canada to guarantee the child's right to have his or her privacy fully respected at all stages of the proceedings.[16] *The Beijing Rules* link this right to the harm caused by publicity and the process of labeling, and further states that "no information that may lead to the identification of a juvenile offender shall be published."[17]

16. Section 8 of The *Bejing* Rules also provide for the protection of privacy of young people because of the long term risks of labelling.

> 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).[18]

17. The principal that young people under 18 years of age cannot be held to the same standard of accountability is also reflected in international human rights treaties with respect to capital punishment which prohibit the pronouncement of death penalties against anyone who was under 18 years at the time of the offence. [19]

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[15] *Ibid*. at rule 19.1.
[16] *UNCRC, supra* note 11 at Art. 40.
[17] *The Beijing Rules, supra* note 14 at rules 8.1 and 8.2
[18] *Ibid*.
[19] See for example: *UNCRC, supra* note 11 at arts. 37 & 40; *International Covenant on Political & Civil Rights, Dec 1966*, art 6(5) & 14, 999 U.N.T. S. 171; *Geneva Convention Relative to the Protection of Civilians in The Time of War, Aug. 12, 1948*, art. 68, 75 U.N.T.S. 3.

18. Canada's international obligations to all children who have committed offences, support a *presumption* that juvenile offenders are not to be treated like adults. A presumption of an adult sentence, regardless of parole eligibility, is anathema to this fundamental principle of international juvenile justice. Similarly, a *presumption* of public disclosure of a young person's identifying information, despite the imposition of a youth sentence, is not consistent with the international obligation to protect the privacy and promote the rehabilitation of the young person.

19. The Appellant has suggested that since youth justice legislation in other countries, notably the United States, England and Wales, Australia and New Zealand allow for mandatory or automatic transfers of young people to adult court, the provisions of the *YCJA* are somehow in accordance with international law.[20]It should be noted that the United Nations Committee on the Rights of the Child, in its concluding observations in respect of Canada's last report on compliance with the *UNCRC*, has strongly criticized Canada for its imposition of adult sentences on young people and its failure to adequately protect the privacy of young people in the criminal justice system.[21] Clearly, the Committee does not view Canada as being in compliance with international law as represented by the *UNCRC*. Further, JFCY submits that the analysis of the constitutional rights of Canadian young people is set in the context of Canada's international commitments and the context of Canada's own legislative history.

Separate Youth Justice System as a Principle of Fundamental Justice

20. The Ontario Court of Appeal's analysis of the principles of fundamental justice in relation to the youth justice system meets the three criteria set out by the Supreme Court:

1. It must be a legal principle; and
2. There must be sufficient consensus that the alleged rule or principle is vital or fundamental to our societal notion of justice; and

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[20] Appellant's Factum, p.31, para. 59.

[21] **Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Canada* (2003) CRC/C/15/Add.215 at para. 56-57.**

3. It must capable of being identified with precision and applied to situations in a manner that yields predictable results.[22]

21. While the Appellant now states that the principle is that "any person" is entitled to recognition of his or her reduced maturity as a principle of fundamental justice, the Appellant endorsed at the Court of Appeal separate treatment for young persons under the age of 18 in particular. Further, the Appellant's earlier contention that young persons are entitled to recognition of their reduced maturity as a principle of fundamental justice, did not go far enough for the Court of Appeal for Ontario in respect of the youth justice system and, in fact, lacked the precision required and would otherwise fail as a principle of fundamental justice for being too vague.[23] The principle is more accurately and precisely stated by the Ontario Court of Appeal:

> It is a principle of fundamental justice that young offenders should be dealt with separately and not as adults in recognition of their reduced maturity. Put another way, the system of criminal justice for young persons must be premised on treating them separately, and not as adults, because they are not yet adults. There can be no doubt that this is a legal principle.[24]

22. The Appellant has mischaracterized the principle of fundamental justice as a process for determining the criminal responsibility of ***any person*** commensurate with that person's age and level of maturity, thereby stating that in the case of "young persons" this principle will not necessarily, but "often" be satisfied by a legal and logistical "separation" from adults. They claim that it is not the separate treatment itself that stands as the identifiable principle of fundamental justice. This characterization is contrary to the characterization of the Court of Appeal for Ontario in this case, as well as Canadian legislation, jurisprudence of this Court, and international law which apply the principal of a separate system to ***all*** young persons up to the age of 18 years. No adult has the right to the protections afforded by right under the *YCJA* and previous youth criminal legislation as well as those under international law such as the *UNCRC*. For example, they cannot claim the right to be tried in a separate court system, nor can they claim the right to privacy protections, even if they can prove a

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[22] *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.), supra* note 6 at para. 8.
[23] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 631-32.
[24] R. v. *D.B., supra* note 2 at para. 55-56.

reduced level of maturity which might, for example, be commensurate with that of a 15 year old. Of course, neither does their reduced level of maturity lead to a loss of privileges which they have by virtue of their age, such as the right to vote.

23. Furthermore, the Appellant's characterization is sufficiently vague that it lacks the precision required to satisfy the principles of fundamental justice.

Application of the Criteria

It must be a legal principle

24. The principle that young people are to be treated separately from adults has been long established as part of Canadian law. Further, the international law is consistent with the general approach taken in Canada toward youth criminal justice. The *YCJA* is the culmination of various pieces of legislation dealing with youth criminal justice. Young people were first treated differently in 1894 when those under age 16 years were subject to separate trials.[25] Since the enactment of the *Juvenile Delinquents Act* in 1908, Parliament has made a definitive choice to treat youth differently from adults in a more comprehensive youth justice regime, offences by young people were seen as evidence of the condition of delinquency, which could be treated by the state who stood in the position of the parent, and the primary goal was rehabilitation.[26] With the enactment of the *Young Offenders Act* in 1985, and consistent with the *UNCRC*, young people include all minors under 18.

25. This principle is well established in the Preamble to the *YCJA*, which emphasizes society's "responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood." The Preamble also emphasizes that the Act as a whole is a contextual approach to youth justice. In particular, it seeks to address the underlying causes of youth crime, respond to the needs of youth, and provide support to youth at risk for offending.

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[25] *R. v. M.(S.H.)[S.H.M.]*, [1989] 2 S.C.R. 446, L'Heureux-Dubé, J., dissenting at paras. 470-71.
[26] Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 7.

26. The youth criminal justice system is aimed at establishing a separate and distinct approach to crimes committed by young people. This approach extends to the level of culpability attributed to young people for crimes they have committed.[27] In *Reference re Young Offenders Act (PEI)*, the Supreme Court stated that:

> … jurisdiction over young persons charged with a criminal offence acknowledges that what distinguishes this legislation from the Criminal Code is the fact that it creates a special regime for young persons. The essence of the young offenders legislation is a distinction based on age and on the ***diminished responsibility associated with this distinction***.[28] [emphasis added]

There must be consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate

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

> I think it is fair to conclude that age will be a relevant consideration when we are dealing with a young accused person. For a jury to assess what an ordinary person would have done if subjected to the same circumstances as the accused, the young age of an accused will be an important contextual consideration.[29]

28. The Preamble of the *YCJA* recognizes that young people have special developmental characteristics and challenges that must be addressed in this intentionally unique regime. According to the Department of Justice Canada, the *YCJA* ensures that:

- *Young people are tried in youth court separate from adults, **where all the protections suitable to their age are in place.*** **[**emphasis added][30]

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[27] *R. v. M.(J.J.)*, [1993] 2 S.C.R. 421 at 428-30.

[28] *Reference re Young Offenders Act (PEI)*, [1991] 1 S.C.R. 252 at 268.

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

[30] Department of Justice Canada, "Youth Justice Renewal: Youth Justice Fact Sheet," online: <http://canadajustice.gc.ca/en/ps/yj/aboutus/yje.html>.

- *The principles of the YCJA provide clear direction, establish structure for the application of principles and thereby resolve inconsistencies.* ***These principles reinforce that the criminal justice system for youth is different than the one for adults.*** [emphasis added][31]

29. Both the *YCJA* and the *YOA* before it extend to youth justice courts exclusive jurisdiction in respect of offences alleged to have been committed by young persons, and stipulate that, notwithstanding any other Act of Parliament, the young person shall be dealt with according to their terms.[32]

30. In considering whether the protections of youth criminal justice legislation applied to all young persons or just those who could prove their reduced level of maturity this Court found that the protections applied to all young persons. This Court rejected the approach which would have found protections based on levels of maturity rather applying specifically to all young persons under 18 years.

> Parliament has recognized the problems and difficulties that beset young people when confronted with authority. … it must be remembered that the section is to protect all young people of 17 years or less. A young person is usually far more easily impressed and influenced by authoritarian figures. No matter what the bravado and braggadocio that young people may display, it is unlikely that they will appreciate their legal rights in a general sense or the consequences of oral statements made to persons in authority; certainly they would not appreciate the nature of their rights to the same extent as would most adults. Teenagers may also be more susceptible to subtle threats arising from their surroundings and the presence of persons in authority. A young person may be more inclined to make a statement, even though it is false, in order to please an authoritarian figure. It was no doubt in recognition of the additional pressures and problems faced by young people that led Parliament to enact this code of procedure.[33]
>
> It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted. … the additional protection which must be provided to all young people under the age of eighteen.[34]

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[31] Department of Justice Canada, "Why did the Government Introduce New Youth Justice Legislation?" online: <http://canadajustice.gc.ca/en/ps/yj/ycja/why.html>.
[32] Youth Criminal Justice Act, S.C. 2002, c.1, s. 14; Young Offenders Act, R.S., 1985, c. Y-1, s. 5(1).
[33] *R. v. J.(J.T.) [J.T.J.]*, [1990] 2 S.C.R. 755 at 766-67.
[34] *Ibid*. at 768.

31. While Canadian courts have long acknowledged that young people have special protections under the law, the evidentiary basis for mitigating the consequences for youth crime has recently been canvassed by the U.S. Supreme Court. In *Roper v. Simmons*, a murder sentencing case, the U.S. Supreme Court specifically recognized that young people are more likely to act out of impulse since their ability to judge risk and the consequences of their behaviour is less developed than adults.[35] The evidence adopted by the U. S. Supreme Court, which is consistent with established law and expert commentary in Canada, confirms that adolescents approach risky behaviour in a substantially different way than adults, both in their perception of the risks involved in a particular activity as well as their susceptibility to group or peer influences.[36]

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

> There are two broad reasons for separate youth justice policies: 'diminished responsibility due to immaturity and special efforts designed to give young offenders room to reform in the course of adolescent years' (Zimring, 2000).
>
> …
>
> [diminished responsibility] is ***not merely a doctrine of juvenile justice but a principle of penal proportionality***. [emphasis added][37]

33. This Court has most recently recognized the reduced maturity and vulnerability of young persons as a reason for a separate criminal justice system including the special principles and protections for young persons in the interpretation of the provisions for collecting

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[35] *Roper v. Simmons*, 543 U.S. 1 (2005), (U.S. Supreme Court) at 15-16.

[36] Laurence Steinberg & Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty" (2003) 58(12) *American Psychologist* 1009 at 1012.

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

D.N.A. [38] It was held that those provisions of the *Criminal Code* do not operate in the same way for adults and young persons.

34. International law supports the principle that children need special protections within the youth justice system. The *YCJA* is premised on this as a fundamental requirement. In addition, the empirical evidence suggests that these supports for young people are an essential component of a fair justice system. Doob states:

> Looking at this research as a whole, it is clear that we cannot assume that young people have sufficient knowledge of the legal system and the criminal law provisions that govern proceedings in the youth justice system to fully and freely participate in criminal proceedings against them.[39]

It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person

35. The *YCJA* contains both a Preamble and a Declaration of Principle to clarify the principles and objectives of the youth justice system. The Preamble contains significant statements from Parliament about the values governing the legislation. These statements guide the interpretation of the legislation and include the following:

- Enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their ***right to privacy,*** are protected. (emphasis added)

- Society has a responsibility to address the developmental challenges and needs of young persons.

- Young persons have rights and freedoms, including those set out in the United Nations *Convention on the Rights of the Child.*

- The youth justice system should reserve its most serious interventions for the most serious crimes and reduce the over-reliance on incarceration.

36. JFCY submits that the Attorney General of Ontario's reframing of the principle deliberately makes it more vague such that it falls short of the standard, whereas the

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[38] *R. v. R.C.*, *supra* note 1 at para. 41.
[39] Doob and Cesaroni, *supra* note 37 at 39-40.

principle that young people under the age of 18 years who offend the law are to be treated separately from adults in the criminal justice system is a clear and manageable standard. Canada has a long legislative history that provides special protections to young people in accordance with their needs. Phrased another way, the principle is that young people are presumed not to be treated the same as adults.

37. The issue in this case is not whether a young person can ever receive an adult sentence, but simply who should bear the onus of proving that an adult sentence is appropriate or not. Placing the burden on the young person offends the principle of fundamental justice that the presumption be the treatment of the young person separate from the adult system, including adult sentences. It is simply inconsistent with the stated intent of the legislation to treat young people the same as adults in the criminal justice system.

Application of the Test to the Principle of the Best Interests of the Child

38. JFCY relies upon the argument advanced by the Respondent that the *Canadian Foundation* case is distinguishable due to the context in which this principle is advanced (i.e. as a protective shield in a youth-oriented system rather than a sword in the adult criminal context). It is further submitted that this principle informs the analysis of the other principles enunciated in the *Québec Reference*,[40] specifically the goal of rehabilitation and the prevention of stigmatization through nondisclosure of identity, as all of these principles work together to promote the best interests of the young person.

Application of the Test to the Principle of Rehabilitation

39. The role of rehabilitation is an equally well-established principle in the sentencing of young persons, since the enactment in 1908 of the *Juvenile Delinquents Act*. As one commentator stated, "Under the *Juvenile Delinquents Act*, rehabilitation was the engine that drove sentencing decisions."[41]

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[40] *Reference re: Bill C-7, supra* note 10

[41] Sanjeev Anand, "Crafting youth sentences: the roles of rehabilitation, proportionality, restraint, restorative justice, and race under the *Youth Criminal Justice Act*" (2003) 40(4) Alta. L. Rev. 943 at 946.

40. In 1993, the Supreme Court reaffirmed the rehabilitative goal of youth sentencing in *R. v. M.(J.J.),*[42] where the court held that the ultimate aim of all youth sentences must be the reform and rehabilitation of the young people sentenced. In *R. v. Southam,* the Ontario Court of Appeal affirmed the statement of the lower court that "*the protection and rehabilitation of young people involved in the criminal system is a social value of super ordinate importance*".[43] Rehabilitation depends significantly on timeliness and the end of stigma.

41. The *YCJA* continues and strengthens this approach to youth sentencing. Both the Declaration of Principle (section 3) and Purpose and Principles of sentencing (section 38) of the *YCJA* require the imposition of just sanctions that have meaningful consequences for a young person found guilty of an offence and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. Contrary to the Appellant's assertion that this goal competes with others under the *YCJA*, the goal of rehabilitation is consistent with and in fact requisite for the goal of public safety.

Application of the Test to the Principle of Confidentiality

42. Juvenile justice legislation in Canada has afforded privacy protections to young people since as early as 1894.[44] More recently, this Court has found domestic law as well as international law requires special privacy protections for 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.[45]

43. In interpreting the *YCJA*, the Quebec Court of Appeal affirmed that the law protecting the privacy and identity of a young person is "*the cornerstone of the Canadian youth justice system."* [46] That Court went on to state that this principle is reflected in the specific protection of a young person's privacy in s.3(1)(b)(iii) of the *YCJA* "*in terms of additional procedural measures to provide for fair treatment in protecting their rights, particularly to*

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[42] *M.(J.J.) supra* note 27 at 427.
[43] *R. v. Southam Inc.* (1984), 48 O.R. (2d) 678, (Ct. Just.) at QL 11, aff'd (1986) 53 O.R. (2d) 663 (C.A.), leave to appeal to S.C.C. refused (1986), 25 C.C.C. (3d) 119.
[44] *S.H.M. supra*, note 25 at 470.
[45] *R. v. R.C., supra* note 1 at para. 41.
[46] *Reference re: Bill C-7, supra* note 10 at 276.

privacy." The protection of privacy enhances the young person's chances of being rehabilitated, which is beneficial not only to the young person, but also to society as a whole. It is in the public interest to have young people move on without record or public knowledge of their misconduct.

44. This Honourable Court has held "*the essence of privacy, however, is that once invaded, it can seldom be regained."* [47] Any record or personal information retained, increases the risk that the information may inadvertently or incorrectly be disclosed. This can have a greater impact on young people, because of their greater dependency and their vulnerability. Speaking to the need for confidentiality Binnie, J. for the Court stated,

> Stigmatization of 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. In the long run, society is best protected by preventing recurrence. Lamer C.J. in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, pointed out in another context that non-publication is designed to "maximize the chances of rehabilitation for 'young offenders'"(p.883).[48]

45. The developmental research confirms that adolescence is a period in which personal identity is being formed. As the majority of the Court in *Roper v. Simmons* held, "[t]he personality traits of juveniles are more transitory, less fixed."[49] The impact of labelling and custodial sentences at this time in a young person's development can be counter to the aims of rehabilitation. Doob notes the increased recidivism of young people who are exposed to the system and to short periods of custody by way of a "short sharp shock".[50] Steinberg describes this critical time as follows:

> The emergence of personal identity is an important developmental task of adolescence and one in which the aspects of psychosocial development discussed earlier play a key role. As documented in many empirical tests of Erickson's (1968) theory of adolescent *identity crisis,* the process of identity formation includes considerable exploration and experimentation over the course of adolescence….

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[47] *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 119.
[48] *Re F.N.*, [2000] 1 S.C.R. 880 at para.14.
[49] *Roper v. Simmons, supra* note 35 at 16.
[50] Doob and Cesaroni, *supra* note 37 at 40-45.

> Although the identity crisis may occur in middle adolescence, the resolution of this crisis, with the coherent integration of the various retained elements of identity into a developed *self*, does not occur until late adolescence or early adulthood… Often this experimentation involves risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior. For most teens, these behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behaviour that persist into adulthood.[51]

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Procedural Principle of Fundamental Justice

46. JFCY adopts the arguments of the Respondent in respect of the criminal law principle that the Crown bears the burden of proving the circumstances which may result in an aggravated penalty, in this case an adult sentence for a young person. However, it is worth noting that this principle derives from the presumption of innocence, which international law dictates applies equally to youth.[52] In other words, principles of fundamental justice require that the Crown must assume the burden of proving beyond a reasonable doubt the seriousness and circumstances in the commission of an offence when applied to a young person, consistent with the internationally accepted presumption that youth are not to be treated like adults. This is particularly important since young people's lack of maturity, may reduce their ability to understand and therefore present mitigation and other factors which may impact the ability to rebut the presumption, thereby jeopardizing the fairness of proceedings against them.

Section 1

47. International law is relevant to the s.1 analysis. As Lamer C.J. stated in *Slaight*:

> Given the dual function of s.1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial objectives which may justify restrictions upon those rights.[53]

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[51] Laurence Steinberg and Elizabeth S. Scott, *supra* note 36 at 1014.
[52] *UNCRC*, *supra* note 11 at art. 40; *The Beijing Rules*, *supra* note 16 at Rule 7.1.
[53] *Slaight*, *supra* note 7 at 1056-1057.

48. The Appellant offers no evidence to support the efficacy of adult sentencing which would support a presumption of its application to all young persons over 14 who have committed the prescribed offences. Serious concerns exist as to whether custodial dispositions further rehabilitation in any way. Doob has further noted that there is very little scientific evidence of the long term consequences of imposing adult sentences on young people. What little is known is based upon U.S. research which suggests that treating young people like adults has a negative impact on rehabilitation.[54]

49. Following the decision of the Québec Court of Appeal in the *Québec Reference* the federal government chose not to appeal to this Court. It is submitted that this is a significant factor in the analysis of whether the objectives of the legislation are pressing and substantial. The Hon. Martin Cauchon, Minister of Justice and Attorney General of Canada at the time of the decision on the decision of the Quebec Court of Appeal in *Reference re: Bill C-7,* stated he would not be filing an appeal, because:

> We believe there is a way to meet the objective of the legislation without appealing. As I have said, this fall we will proceed with amendments to the act in order to clarify the situation. In that way we will meet the objective while respecting the Canadian Charter of Rights because we believe in the Canadian Charter of Rights and—[55]

50. Given the significance of the Charter breach in question, the Appellant has failed to demonstrate that the presumption fails to minimally impair the right in question. The Respondent is not seeking a declaration that adult sentences are unavailable under any circumstances. The objectives of the legislation, as stated by the Appellant, can clearly be met by the shifting of the onus back to the Crown Attorney in accordance with well-accepted criminal law principals.

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[54] Doob and Cesaroni, *supra* note 37 at 184-185.

[55] *37th Parliament, Official Report of Debates (Hansard) 100 (12 May 2003) at 1450 (Hon. Martin Cauchon).*

PART IV
SUBMISSIONS RELATING TO COSTS

51. The Intervener makes no submission in relation to costs.

PART V
ORDER REQUESTED

52. Justice for Children and Youth respectfully requests permission to present oral argument.

53. JFCY respectfully requests that the appeal be dismissed.

All of which is respectfully submitted.

Date at Toronto this 28th day of June, 2007.

Cheryl Milne Of counsel for the Intervener Justice for Children and Youth	Lee Ann Chapman Of counsel for the Intervener Justice for Children and Youth

PART VI
TABLE OF AUTHORITIES

Other Authorities

Authors

PART VII
LEGISLATION

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United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted 29 November 1985.

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