

**IN THE SUPREME COURT OF CANADA**  
**(On Appeal from the Nova Scotia Court of Appeal)**

**BETWEEN:**

**L.T.H.**  
**(A YOUNG PERSON WITHIN THE MEANING OF**  
**THE YOUTH CRIMINAL JUSTICE ACT)**

**Appellant**

**- and -**

**HER MAJESTY THE QUEEN**

**Respondent**

---

**FACTUM OF THE INTERVENER**  
**JUSTICE FOR CHILDREN AND YOUTH**  
*Pursuant to Rule 42 of the Rules of the Supreme Court of Canada*

---

**Cheryl Milne (LSUC #27022C)**

Justice for Children and Youth  
415 Yonge Street, Ste. 1203  
Toronto, Ontario M5B 2E7

Tel: 416-920-1633

Fax: 416-920-5855

[milnec@lao.on.ca](mailto:milnec@lao.on.ca)

**Counsel for the Intervener**

**Shawna Y. Hoyte**

Dalhousie Legal Aid Service  
2209 Gottingen Street  
Halifax, Nova Scotia B3K 3B5

Tel: (902) 423-8105

Fax: (902) 42208067

[shawna.hoyte@dal.ca](mailto:shawna.hoyte@dal.ca)

**Counsel for the Appellant**

**William D. Delaney**

Public Prosecution Service (Appeal Branch)  
1505 Barrington Street  
Suite 1225, Maritime Centre  
Halifax, Nova Scotia B3J 3K5

Tel: 902-424-6795

Fax: 902-424-0653

[delanewd@gov.ns.ca](mailto:delanewd@gov.ns.ca)

**Counsel for the Respondent**

**Natalie Champagne**

Legal Aid Office  
73 Albert Street, Ground Floor  
Ottawa, ON K1P 1E3

Tel: 613-238-7931

Fax: 613-238-3410

[champanr@lao.on.ca](mailto:champanr@lao.on.ca)

**Ottawa Agent for the Intervener**

**Marie-France Major**

Lang Michener LLP  
300-50 O'Connor Street  
Ottawa, Ontario K1P 6L2

Tel: (613) 232-7171

Fax: (613) 231-3191

[mmajor@langmichener.ca](mailto:mmajor@langmichener.ca)

**Ottawa Agent for the Appellant**

**Henry S. Brown, Q.C.**

Gowling Lafleur Henderson LLP  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, Ontario  
K1P 1C3

Tel: 613-233-1781

Fax: 613-563-9869

[henry.brown@gowlings.com](mailto:henry.brown@gowlings.com)

**Ottawa Agent for the Respondent**

## TABLE OF CONTENTS

|   | <b>PAGE</b> |
|---|-------------|
| <b>PART I: OVERVIEW AND STATEMENT OF FACTS</b> .....  | 1           |
| Overview of the Intervener's Position .....   | 1           |
| Facts .....   | 1           |
| <b>PART II: QUESTIONS IN ISSUE</b> .....  | 2           |
| Issue One: What was the intention of Parliament regarding s.146 of the YCJA? .....  | 2           |
| Issue Two: Is it a subjective or objective test for adequacy under section 146 (2)(b)? .....  | 2           |
| Issue Three: The standard of proof for compliance under s.146 of the YCJA? .....  | 3           |
| <b>PART III: BRIEF OF ARGUMENT</b> .....  | 4           |
| Nature of the Protections and Procedural Requirements of s.146 .....  | 4           |
| Age and Developmental Rationale for Enhanced Protections.....   | 5           |
| Impact of Cognitive and Other Learning Disabilities .....   | 6           |
| Impact of the International Law .....   | 8           |
| <b>PART IV: SUBMISSIONS RELATING TO COSTS</b> .....   | 10          |
| <b>PART V: ORDER REQUESTED</b> .....  | 10          |
| <b>PART VI: TABLE OF AUTHORITIES</b> .....  | 11          |
| <b>PART VII: STATUTORY PROVISIONS</b> .....   | 13          |
| <i>Youth Criminal Justice Act</i> , Preamble and ss. 3, 146 .....   | 14          |
| United Nations <i>Convention on the Rights of the Child</i> , Can. T. S. 1992, No. 3, Preamble, Articles 3, 37, 40 .....  | 19          |
| United Nations <i>Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)</i> , adopted and proclaimed 14 December, 1990, Article 46 .....    | 23          |
| United Nations <i>Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)</i> , adopted 29 November 1985, arts. 1.4, 7 and 14.2 ..... | 23          |
| United Nations <i>Convention on the Rights of Persons with Disabilities</i> , signed by Canada March 30, 2006, Preamble, Articles 2, 13, 14 .....                   | 25          |

## PART I

### OVERVIEW AND STATEMENT OF FACTS

#### **Overview of the Intervener's Position**

1. The *Youth Criminal Justice Act*<sup>1</sup> (YCJA) provides an individualized approach to young people that ensures the enhanced protection and guarantee of their rights in the criminal justice system. This approach is consistent with international law and Canada's undertaking to provide special protective treatment to children based on their vulnerability and developmental challenges. In particular the Act seeks to address the unique vulnerabilities of young people in their interactions with persons in authority by providing procedural protections greater than those afforded adults.
2. Section 146 of the YCJA provides that no oral or written statement by a young person made to a person in authority is admissible against the young person unless specific procedures are followed which are tailored to the age and understanding of that young person. Section 146, read in light of the preamble and principles of the Act, in addition to the international law, common law and the *Charter*, mandates a strict individualized approach to ensure that young people understand their rights before providing a valid waiver of those rights. In this respect, a young person with cognitive disabilities must be appropriately accommodated to ensure his equal treatment by police.
3. Accordingly, Justice for Children and Youth (JFCY) takes the position that the learned trial judge was correct in finding that the Crown had failed to meet the burden, beyond a reasonable doubt, that the statements made by the young person, L.T.H. met the requirements of s.146 (2)(b), which provide specific criteria for voluntariness that apply to young persons in particular, to establish that the young person had a meaningful choice whether to speak or to remain silent.

#### **Facts**

4. JFCY accepts the facts as presented by the Appellant and Respondent and takes no position where they might disagree.

---

<sup>1</sup> S.C. 2002, c.1

**PART II**  
**QUESTIONS IN ISSUE**

**Issue One: What was the intention of Parliament regarding s.146 of the YCJA?**

**A. What was the intention of Parliament regarding s.146 of the YCJA?**

**B. What are the proper procedural requirements to be followed when police authorities question a young person, especially a young person with cognitive and other learning disabilities?**

5. JFCY takes the position that the intent of s.146 is to provide the enhanced procedural protections necessary to ensure that statements made by young people to persons in authority, and consequently, any waiver of their rights in making such statements, are knowing, intelligent and voluntary. The protections seek to address the developmental differences between young people and adults, while ensuring legal rights are protected. It imposes a duty on police officers to provide an explanation to an accused young person in such a way that the young person understands the serious consequences of choosing to answer the police officer's questions.

6. JFCY takes the position that the exercise of explaining the legal rights of an accused must be interactive between the police officer and the accused, and further, that inquiry into whether the youth has an operating mind and understands the nature of the rights he is waiving, is necessary for the Crown to meet its burden under s.146 of the YCJA.

**Issue Two: Is it a subjective or objective test for adequacy under section 146 (2)(b)?**

**A. Is the test to be applied under 146(2)(b) a subjective or objective test in light of section 146(2)(b) which reads, "clearly explained to the young person, in language appropriate to his age and understanding"?**

**B. Should a young person's experience with the criminal process under the YCJA be taken into account to determine if the young person understood his or her rights for purposes of s.146?**

7. JFCY takes the position that the enhanced procedural protections afforded to young persons under s.146 of the YCJA provide a subjective standard to determine whether the officer explained to the young person in language appropriate to **his or her** age and understanding. In this regard, JFCY takes the position that the learned trial judge was correct in finding the mere recitation of the waiver accompanied by the repeated question, "Do you understand?", was

inadequate in circumstances in which police have been notified that the young person has a disability that might impact his ability to understand his rights and/or the effect of the waiver of those rights. The *Charter* and international law require reasonable accommodation of a young person's disability based upon the individual needs of that young person to ensure equal access to justice.

8. Although a young person's experience with the criminal process may be a factor in determining whether a young person understood a waiver, care must be taken to understand the context of that experience. Research has shown that there is no relation between the amount of experience a young person has had with the justice system and his or her understanding of rights.

### **Issue Three: The standard of proof for compliance under s.146 of the YCJA?**

**A. What is the standard of proof for compliance under s.146?**

**B. Should section 146(2) and (4) be read as a whole with the standard being, beyond a reasonable doubt or should the standard of proof under section 146(2) be determined on a balance of probabilities?**

9. JFCY takes the position that the interpretation of s.146, in light of the common law and the *Charter* (particularly as the preamble and s.3 of the YCJA gives special guarantees of the rights and freedoms of young persons), requires that the Crown prove beyond a reasonable doubt that there has been compliance with the provision to the extent that the enhanced procedural protections therein go to the voluntariness and operating mind of the young person in waiving his or her rights prior to making a statement to persons in authority.

### PART III BRIEF OF ARGUMENT

#### **Nature of the Protections and Procedural Requirements of s.146**

**10.** The majority of this Court has held that in the context of the interrogation of a detainee by an obvious person in authority, the test for voluntariness and the s.7 based right to silence are functionally equivalent.<sup>2</sup> It was made clear that the Crown must prove voluntariness beyond a reasonable doubt and that this includes the requisite mental capacity for an effective waiver and to make an active choice with respect to the right to silence.<sup>3</sup> It should be noted that this Court made specific reference to the importance of the caution where a suspect has not consulted with counsel.<sup>4</sup>

**11.** Section 146(2) of the YCJA incorporates and enhances both the common law confessions rule and the *Charter* rights to silence and to consult with counsel. It makes clear the additional procedures that must be followed in order to provide the “special guarantees” of the rights and freedoms of young people. It therefore follows that where those additional protections are a prerequisite to a valid waiver of his or her right to silence and the right to consult with counsel, the standard of proof of compliance with the additional protections must be beyond a reasonable doubt.

**12.** The test in respect of whether an adult has been denied his or her right to silence has been clearly stated to be an objective one under both the common law and the *Charter*.<sup>5</sup> However, the wording of the YCJA mandates an individualized subjective approach vis-à-vis young people. The cases that established this principle predate the YCJA,<sup>6</sup> and if Parliament wished for police to use an objective approach, based on the reading on a standard form explanation of the rights of an accused, it had an opportunity to make the change with the introduction of the *Youth Criminal Justice Act* in 2001. In the place of the phrase “... in language appropriate to his or her age and understanding...”, Parliament could have substituted “in language appropriate for a person of the

---

<sup>2</sup> *R. v. Singh*, [2007] S.C.J. No. 48 at para. 8

<sup>3</sup> *Ibid.* at paras.25 (citing *R. v. Whittle*, [1994] 2 S.C.R. 914) and 30

<sup>4</sup> *Ibid.* at para. 33

<sup>5</sup> *Ibid.* at para. 36

<sup>6</sup> *R. v. M.A.M.* (1986), 32 C.C.C. (3d) 566 (B.C. Court of Appeal) at pp. 571-2; *R. v. C.J.M.* (1987), 29 C.C.C. (3d) 569 (Man. Q.B.) at pp. 574-6; *R. v. B.C.W.*, (1986) 27 C.C.C. (3d) 481 (Man. C.A.) at p. 486

accused's age," or "in language that is plain and clear to a young person." Instead, Parliament chose to import the exact language of the YOA into the YCJA.

**13.** Trial and appellate courts in several provinces have held that reading a standard form, even if the form is written in very plain language, does not suffice to establish that a young person has had his rights explained to him in language "appropriate to his age and understanding." This is true even if the accused signs a waiver form and answers affirmatively when asked orally if he understands.<sup>7</sup>

### **Age and Developmental Rationale for Enhanced Protections**

**14.** As Bala notes, "a significant body of social-science research indicates that adolescents do not have the same understanding of legal concepts as adults and are less likely to appreciate the consequences of making a statement confessing guilt or waiving the right to a lawyer."<sup>8</sup> Studies have consistently shown that young people do not understand what a "right" is and are less likely to understand the meaning of the warning that police give against self-incrimination.<sup>9</sup>

**15.** Although the enhanced procedural protections found in s.146 of the YCJA are clearly aimed at addressing the developmental needs of young persons in their interaction with police, they are insufficient unless the procedures are followed in a manner tailored to the individual young person rather than based upon stereotypical and/or erroneous assumptions. For example, in one Canadian study the authors summarized the literature as follows:

Overall, the studies found that many participants did not adequately understand their rights, that simplified versions of rights warnings did not increase understanding, that education improved surface knowledge but not deeper understanding, that understanding was related to assertion of rights, and that participants' level of understanding of rights-related vocabulary was overestimated, both by their lawyers and by themselves. Studies have also found that variables such as age, verbal ability, and gender predict rights understanding. [...]

Interestingly, in a study that examined both students and young offenders, amount of previous experience with the legal system was not positively associated with understanding of rights... [references omitted].<sup>10</sup>

---

<sup>7</sup> *Ibid.* and *R. v. I.(L.R.) and T.(E.)*, [1993] 4 S.C.R. 504 at para. 35

<sup>8</sup> Nicholas Bala, *Youth Criminal Justice Law* (Irwin Law: Toronto, 2003) at p.210

<sup>9</sup> Anthony Doob & Carla Cesaroni, *Responding to Youth Crime in Canada* (University of Toronto Press: Toronto, 2004) at p.37

<sup>10</sup> Michele Peterson-Badali, et al. (1999). "Young people's experience of the Canadian youth justice system: interacting with police and legal counsel." *Behav. Sci. Law* 17: 455-465 at p. 456

16. Meaningful use of the right to legal counsel demands that a young person understand not only that they have this right and that it means they can have a lawyer, but also that they understand why they might want to have a lawyer present.<sup>11</sup> It is not enough to explain rights in simple language – the possible consequences of giving up rights should be outlined in an iterative and interactive communication process in order to evaluate understanding.<sup>12</sup>

17. It is both common sense and consistent with what we know about adolescents to have required a more careful and interactive approach with the young person, L.T.H. in particular, given his learning disabilities. Research confirms that understanding of Miranda rights is affected both by IQ and special education status in addition to age.<sup>13</sup> In any event, if the police officer does not engage the young person in a dialogue about his rights, there is no basis upon which the officer could choose language appropriate to his understanding.

18. It was also correct for the learned trial judge to discount the evidence of the police officer as to L.T.H.'s prior experience with the justice system given the lack of a demonstrated link between comprehension of Miranda rights and experience in the justice system.<sup>14</sup> For example, if there has been no attempt by a young person who has been arrested a number of times in the past to assert his or her rights in any of those previous encounters, there could be no demonstrable evidence from which to infer comprehension of those rights.

### **Impact of Cognitive and Other Learning Disabilities**

19. The impact of cognitive and learning disabilities is a serious issue in the youth justice system. It has been estimated that as many as 75% of incarcerated young people in Canada have cognitive or learning disabilities.<sup>15</sup> The Learning Disabilities Association of Canada in its official definition of learning disabilities states that they “refer to a number of disorders which

---

<sup>11</sup> Rona Abramovitch, Karen Higgins-Biss & Stephen Biss (1993) “Young persons’ comprehension of waivers in criminal proceedings.” *Can J. Crim.* 35: 309-322, at p. 310

<sup>12</sup> Rona Abramovitch, Michele Peterson-Badali & Meg Rohan (1995). “Young people’s understanding and assertion of their rights to silence and legal counsel.” *Can J. Crim.* 37: 1-18 at p. 17

<sup>13</sup> Naomi Goldstein, et al. (2003) “Juvenile offenders’ Miranda rights comprehension and self-reported likelihood of offering false confessions.” *Assessment*. Vol 10, No. 4: 359-369 at p. 367

<sup>14</sup> *Ibid*; Thomas Grisso. (2006) “Adolescents’ decision making: A developmental perspective on constitutional provisions in delinquency cases.” *New Eng. J. on Crim. & Civ. Confinement* 32: 3-14, at p. 11

<sup>15</sup> Doob & Cesaroni, *supra*, note 9, at p. 233; Bala, *supra*, note 8, at p.33

may affect the acquisition, organization, retention, understanding or use of verbal or nonverbal information.”<sup>16</sup>

**20.** The duty of police officers is particularly critical in cases where the accused is a young person with a disability that might cause him to have decreased written or verbal comprehension skills, or to be more vulnerable to coercion. In the situation where the police receive information indicating that the young person might have a learning or other mental disability, there is an increased burden on the Crown to prove that the officer taking the statement provided an explanation to the accused that the accused understood.<sup>17</sup>

**21.** The role of police officers is particularly critical in cases where the accused is a young person with a disability that might cause him to have decreased written or verbal comprehension skills, or to be more vulnerable to persuasion. In the case where the police receive information indicating that the young person might have a learning disorder or other mental disability, there is an increased burden on the Crown to prove that the officer taking the statement provided an explanation to the accused that the accused understood.<sup>18</sup>

**22.** Actors in the criminal justice system must be alive to mental health issues that do not manifest themselves outwardly. Police officers must engage young people during the explanation of their rights because people afflicted with learning disabilities sometimes use pseudo-sophisticated language, even when they do not understand the nature of what is being explained to them.<sup>19</sup>

**23.** If the accused chooses to waive his right to consult with counsel and an adult, the accused should be informed that the law requires the presence of a lawyer and another trusted adult during the giving of a statement, unless he wishes to provide it without their presence.<sup>20</sup> The exchange should involve asking the accused person to explain in his own words the roles of police officers and lawyers and the nature of the rights he is waiving. In some cases, when an officer learns that a young person has a learning disability, it is the duty of the officer to ensure

---

<sup>16</sup> Learning Disabilities Association of Canada. *Official Definition of Learning Disabilities*. Adopted January 30, 2002.

<sup>17</sup> *R. v. M.A.M.* (1986), 32 C.C.C. (3d) 566 (B.C. Court of Appeal)

<sup>18</sup> *R. v. M.A.M.* (1986), 32 C.C.C. (3d) 566 (B.C. Court of Appeal); *R. v. M.C.* [2006] A.J. No. 99 (Alta. Prov. Ct.) at para. 74

<sup>19</sup> *R. v. M.L.*, [2000] S.J. No. 17 (Sask. Youth Ct.) at para. 39

<sup>20</sup> *R. v. S.S.*, [2005] O.J. No. 2552 (C.A.) at paras. 32 and 35

that the young person has received special assistance from a lawyer or another trusted person, in order to ensure that the his rights are protected.<sup>21</sup>

**24.** Where the police receive information that the accused has a learning disability, and the officer taking the statement makes no attempt beyond reading the standard form waiver to the accused for ‘yes’ or ‘no’ responses, the requirement under s.146 of the YCJA is not met and the statement should be excluded.

### **Impact of the International Law**

**25.** This Court has found that the United Nations *Convention on the Rights of the Child* (UNCRC) is incorporated by reference in the YCJA.<sup>22</sup> 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.”<sup>23</sup>

**26.** Articles 37 and 40 of the UNCRC require Canada to treat children who have infringed the penal law or who have been deprived of their liberty in a manner consistent with the promotion of the child’s sense of dignity and worth and which takes into account the child’s age, as well as to provide them with prompt access to legal and other appropriate assistance.

Article 37 (c): Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

Article 37 (d): Every child deprived of his or her liberty shall the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

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

---

<sup>21</sup> *R. v. M.C.*, [2006] A.J. No. 99 (Alta. Prov. Ct.) at para. 74

<sup>22</sup> *R. v. R.C.*, [2005] 3 S.C.R. 99 at para. 41

<sup>23</sup> United Nations *Convention on the Rights of the Child*, Can. T. S. 1992, No. 3

age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

**27.** These principles are repeated in many other international instruments pertaining to youth justice and to children more generally. Rules and guidelines adopted by the United Nations General Assembly state that the best interests of a young person should be of paramount importance,<sup>24</sup> that basic procedural safeguards such as the presumption of innocence, the right to remain silent and the right to the presence of a parent or guardian be guaranteed and that proceedings be conducted in a manner "conducive to the best interests of the juvenile" and in "an atmosphere of understanding."<sup>25</sup>

**28.** On March 30, 2007, Canada signed, although has not yet ratified, the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>26</sup> The Preamble recognizes that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" and that "children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children." Articles 13 and 14 of the *Convention* speak to the need for age-appropriate accommodations in regard to access to justice for persons with disabilities and in the context of the deprivation of their liberty. Article 2 defines "reasonable accommodation" as follows:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;<sup>27</sup>

**29.** These international obligations, together with the *Youth Criminal Justice Act*, the common law and the *Charter*, constitute legal recognition of the primary consideration of the best interests of the child, the right of disabled children to dignity and special care, and the right of every child accused of having infringed the criminal law to be treated in manner consistent with the promotion of the child's sense of dignity and worth.

---

<sup>24</sup> *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, adopted and proclaimed 14 December, 1990, art. 46

<sup>25</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, adopted 29 November 1985, arts. 1.4, 7 and 14.2 [*The Beijing Rules*]

<sup>26</sup> *United Nations Convention on the Rights of Persons with Disabilities*, signed by Canada March 30, 2006

<sup>27</sup> *Ibid*, art. 2

**30.** In regard to the present case, the international law together with the equality rights under s.15 of the *Charter* were appropriately applied by the trial judge in her insistence on an individualized approach to the application of s.146 in light of L.T.H.'s learning disability. An objective standard that fails to take into account the need to accommodate the particular cognitive and/or learning disabilities of the young person would fail to meet the minimal "reasonable accommodation" required by the international as well as domestic law<sup>28</sup> and would have the effect of discriminating against all young people with cognitive disabilities.

**PART IV**  
**SUBMISSIONS RELATING TO COSTS**

**31.** JFCY makes no submission in relation to costs in this matter.

**PART V**  
**ORDER REQUESTED**

**32.** JFCY respectfully requests permission to present oral argument.

**33.** JFCY joins the appellant in requesting this court grant the appeal.

All of which is respectfully submitted

Dated at Toronto this 9th day of January, 2008.

---

Cheryl Milne  
Of counsel for the Intervener

---

Gary Magee  
Of counsel for the Intervener

---

<sup>28</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at 277-78.

## PART VI

### TABLE OF AUTHORITIES

| <u>Cases</u>   | <u>Paragraph</u> |
|--|------------------|
| <i>Eaton v. Brant County Board of Education</i> , [1997] 1 S.C.R. 241  | 30               |
| <i>R. v. Singh</i> , [2007] S.C.J. No. 48  | 10, 12           |
| <i>R. v. B.C.W.</i> , (1986) 27 C.C.C. (3d) 481 (Man. C.A.)  | 12, 13           |
| <i>R. v. C.J.M.</i> (1987), 29 C.C.C. (3d) 569 (Man. Court of Queen’s Bench)   | 12, 13           |
| <i>R. v. I.(L.R.) and T.(E.)</i> , [1993] 4 S.C.R. 504   | 12, 13           |
| <i>R. v. M.A.M.</i> (1986), 32 C.C.C. (3d) 566 (B.C. Court of Appeal)  | 12, 13, 20, 21   |
| <i>R. v. M.C.</i> , [2006] A.J. No. 99 (Alta. Prov. Ct.)   | 21, 23           |
| <i>R. v. M.L.</i> , [2000] S.J. No. 17 (Sask. Youth Ct.)   | 22               |
| <i>R. v. S.S.</i> , [2005] O.J. No. 2552 (C.A.)  | 19               |
| <i>R. v. R.C.</i> , [2005] 3 S.C.R. 99   | 25               |
| <br><u>Other Authorities</u>   |                  |
| Rona Amramovitch, Karen Higgins-Biss & Stephen Biss (1993) “Young persons’ comprehension of waivers in criminal proceedings.” <i>Can J. Crim.</i> 35: 309-322                            | 16               |
| Rona Abramovitch, Michele Peterson-Badali & Meg Rohan (1995). “Young people’s understanding and assertion of their rights to silence and legal counsel.” <i>Can J. Crim.</i> 37: 1-18    | 16               |
| Nicholas Bala, <i>Youth Criminal Justice Law</i> (Irwin Law: Toronto, 2003)  | 14, 19           |
| Anthony Doob & Carla Cesaroni, <i>Responding to Youth Crime in Canada</i> (University of Toronto Press: Toronto, 2004)   | 14, 19           |
| Naomi Goldstein, et al. (2003) “Juvenile offenders’ Miranda rights Comprehension and self-reported likelihood of offering false confessions.” <i>Assessment</i> . Vol 10, No. 4: 359-369 | 18               |

- Learning Disabilities Association of Canada. *Official Definition of Learning Disabilities*. Adopted January 30, 2002. 19
- Michele Peterson-Badali, et al. (1999). "Young people's experience of the Canadian youth justice system: interacting with police and legal counsel." *Behav. Sci. Law* 17: 455-465 15
- Thomas Grisso. (2006) "Adolescents' decision making: A developmental perspective on constitutional provisions in delinquency cases." *New Eng. J. on Crim. & Civ. Confinement* 32: 3-14 18

## PART VII

### STATUTORY PROVISIONS

| <u>Title</u>   | <u>Page</u> |
|--|-------------|
| <i>Youth Criminal Justice Act</i> , Preamble and ss. 3, 146  | 14          |
| United Nations <i>Convention on the Rights of the Child</i> , Can. T. S. 1992, No. 3<br>Preamble and Articles 3, 37, 40  | 19          |
| <i>United Nations Guidelines for the Prevention of Juvenile Delinquency</i><br>( <i>The Riyadh Guidelines</i> ), adopted and proclaimed 14 December, 1990,<br>Article 46 | 23          |
| <i>United Nations Standard Minimum Rules for the Administration of Juvenile</i><br><i>Justice (The Beijing Rules)</i> , adopted 29 November 1985, Arts. 1.4, 7, 14.2     | 23          |
| United Nations <i>Convention on the Rights of Persons with Disabilities</i> ,<br>signed by Canada March 30, 2006, Preamble, and Articles 2, 13, 14                       | 25          |

## **Youth Criminal Justice Act**

**2002, c. 1**

Y-1.5

[Assented to February 19th, 2002]

An Act in respect of criminal justice for young persons and to amend and repeal other Acts

### **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**

### **Policy for Canada with respect to young persons**

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

(a) the youth criminal justice system is intended to

- (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
  - (ii) rehabilitate young persons who commit offences and reintegrate them into society,
- and

(iii) ensure that a young person is subject to meaningful consequences for his or her offence

in order to promote the long-term protection of the public;

(b) the criminal justice system for young persons must be separate from that of adults and 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.

### **Act to be liberally construed**

(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).

## **EVIDENCE**

### **General law on admissibility of statements to apply**

**146.** (1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.

### **When statements are admissible**

(2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;

(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

(i) the young person is under no obligation to make a statement,

(ii) any statement made by the young person may be used as evidence in proceedings against him or her,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

(i) with counsel, and

(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

### **Exception in certain cases for oral statements**

(3) The requirements set out in paragraphs (2)(b) to (d) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

### **Waiver of right to consult**

(4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver

(a) must be recorded on video tape or audio tape; or

(b) must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

### **Waiver of right to consult**

(5) When a waiver of rights under paragraph (2)(c) or (d) is not made in accordance with subsection (4) owing to a technical irregularity, the youth justice court may determine that the waiver is valid if it is satisfied that the young person was informed of his or her rights, and voluntarily waived them.

### **Admissibility of statements**

(6) When there has been a technical irregularity in complying with paragraphs (2)(b) to (d), the youth justice court may admit into evidence a statement referred to in subsection (2), if satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and their rights are protected.

### **Statements made under duress are inadmissible**

(7) A youth justice court judge may rule inadmissible in any proceedings under this Act a statement made by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was made under duress imposed by any person who is not, in law, a person in authority.

**Misrepresentation of age**

(8) A youth justice court judge may in any proceedings under this Act rule admissible any statement or waiver by a young person if, at the time of the making of the statement or waiver,

(a) the young person held himself or herself to be eighteen years old or older;

(b) the person to whom the statement or waiver was made conducted reasonable inquiries as to the age of the young person and had reasonable grounds for believing that the young person was eighteen years old or older; and

(c) in all other circumstances the statement or waiver would otherwise be admissible.

**Parent, etc., not a person in authority**

(9) For the purpose of this section, a person consulted under paragraph (2)(c) is, in the absence of evidence to the contrary, deemed not to be a person in authority.

**Convention on the Rights of the Child**  
**Adopted and opened for signature, ratification and accession by**  
**General Assembly resolution 44/25**  
**of 20 November 1989**

*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 23*

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

### *Article 37*

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### *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.

**United Nations Guidelines for the Prevention of Juvenile Delinquency  
(The Riyadh Guidelines)  
Adopted and proclaimed by General Assembly resolution 45/112  
of 14 December 1990**

46. The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance. Criteria authorizing formal intervention of this type should be strictly defined and limited to the following situations: (a) where the child or young person has suffered harm that has been inflicted by the parents or guardians; (b) where the child or young person has been sexually, physically or emotionally abused by the parents or guardians; (c) where the child or young person has been neglected, abandoned or exploited by the parents or guardians; (d) where the child or young person is threatened by physical or moral danger due to the behaviour of the parents or guardians; and (e) where a serious physical or psychological danger to the child or young person has manifested itself in his or her own behaviour and neither the parents, the guardians, the juvenile himself or herself nor non-residential community services can meet the danger by means other than institutionalization.

---

**United Nations Standard Minimum Rules for the Administration of  
Juvenile Justice ("The Beijing Rules")  
Adopted by General Assembly resolution 40/33 of 29 November 1985**

**GENERAL PRINCIPLES**

**1. Fundamental perspectives**

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.

**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. Such care measures for the young, before the onset of delinquency, are basic policy requisites designed to obviate the need for the application of the Rules.

Rules 1.1 to 1.3 point to the important role that a constructive social policy for juveniles will play, inter alia, in the prevention of juvenile crime and delinquency. Rule 1.4 defines juvenile justice as an integral part of social justice for juveniles, while rule 1.6 refers to the necessity of constantly improving juvenile justice, without falling behind the development of progressive

social policy for juveniles in general and bearing in mind the need for consistent improvement of staff services.

Rule 1.5 seeks to take account of existing conditions in Member States which would cause the manner of implementation of particular rules necessarily to be different from the manner adopted in other States.

## **7. Rights of juveniles**

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

### **Commentary**

Rule 7.1 emphasizes some important points that represent essential elements for a fair and just trial and that are internationally recognized in existing human rights instruments (See also rule 14.). The presumption of innocence, for instance, is also to be found in article 11 of the Universal Declaration of Human rights and in article 14, paragraph 2, of the International Covenant on Civil and Political Rights. Rules 14 seq. of these Standard Minimum Rules specify issues that are important for proceedings in juvenile cases, in particular, while rule 7.1 affirms the most basic procedural safeguards in a general way.

## **ADJUDICATION AND DISPOSITION**

### **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.)

**Convention on the Rights of Persons with Disabilities**  
**Adopted by General Assembly resolution 61/106**  
**on 13 December 2006**  
**Opened for signature, ratification and accession**  
**on 30 March 2007**  
**(signed by Canada on 30 March 2007)**

**Preamble**

*The States Parties to the present Convention,*

*e. Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

*r. Recognizing* that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

**Article 2 – Definitions**

For the purposes of the present Convention:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

**Article 13 - Access to justice**

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

**Article 14 - Liberty and security of person**

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:  
a) Enjoy the right to liberty and security of person;

b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.