SCC File Nos: 30512 & 30514

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND MANITOBA)

First Case No. 30512

BETWEEN

B.V.N.

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Second Case No. 30514

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

B.W.P.

Respondent

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PART I – STATEMENT OF FACTS

1. At issue in the appeals is whether deterrence is a factor in sentencing a young person under the Youth Criminal Justice Act ("YCJA").

2. The Intervener, the Canadian Foundation for Children, Youth and the Law (the "Foundation"), has been granted leave to file one factum in the appeals relating to B.V.N. and B.W.P. Its Statement of Argument applies to both appeals.

3. The Foundation takes no position respecting the facts.

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

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

PART II – INTERVENER'S POSITION ON QUESTIONS IN ISSUE

6. The Appellants have raised the following issues:

   (a) As a matter of logic and principle, should Youth Justice Court judges employ the concept of general deterrence in sentencing youth?
   (b) As a matter of statutory interpretation, has the *Youth Criminal Justice Act (*"YCJA"*)* excluded the principle of general deterrence in sentencing young offenders?

(c) Was the specific jail sentence imposed on the appellant B.V.N. unduly influenced by general deterrence, and hence unduly long ?

(d) Did the Manitoba Court of Appeal err in holding that deterrence may not be considered in sentencing under the *Youth Criminal Justice Act*?

(e) Did the Manitoba Court of Appeal err in principle in its interpretation of section 42(2)(o) of the *Youth Criminal Justice Act*?

7. The Foundation restricts its submissions to the issue of whether general deterrence is a sentencing factor in the *Youth Criminal Justice Act*.

8. It is the position of the Foundation that general deterrence plays no part, either philosophically, legislatively or at international law in the sentencing of young persons under the YCJA and that applying deterrence to the sentencing of young people would undermine the sentencing principles expressed in the YCJA.

PART III – STATEMENT OF ARGUMENT

INTERNATIONAL OBLIGATIONS AND STANDARDS

9. The Preamble of the YCJA specifically acknowledges and incorporates Canada's ratification of the United Nations Convention on the Rights of the Child (the "UNCRC'). This Court has held that Canadian law must be interpreted as being compliant with Canada's international treaty obligations, such as its obligations under the UNCRC. Because of the Preamble, this obligation is heightened with respect to the YCJA. Furthermore, the Supreme Court of Canada has increasingly recognized the *Convention on the Rights of the Child* in other contexts where children's rights are affected.

> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76 at para. 32 [TAB 1]**
> ***Baker v. Canada (Minister of Citizenship and Immigration),***
> **[1999] 2 S.C.R. 817 at para. 69 [TAB 2]**
> ***R. v. Sharpe,* [2001] 1 S.C.R. 45 at para. 19 [TAB 3]**
> ***Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 at para. 7 [TAB 4]**

10. As signatory to the UNCRC, Canada has undertaken to provide special protective treatment to children, based on their vulnerability. The Preamble of the UNCRC states: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." This protection cannot include using a sentence for an individual young person as an object lesson for other potential offenders. It is not special protection for the individual young person to impose a sentence that is designed to have an effect on other potential offenders.

UNCRC, Preamble [TAB A]

11. When a young person has been found guilty of an offence, Article 40 of the UNCRC requires State Parties to take into account the child's age and to promote the child's dignity and self worth, and to help the child re-integrate and assume a constructive role in society. The focus is on rehabilitation, not general deterrence. Article 37 provides that imprisonment shall be used only as a measure of last resort and for the shortest appropriate time. This focus on the individual young person is consistent with the YCJA, which was enacted after Canada signed the UNCRC. Canada is also signatory to the United Nations International Covenant on Civil and Political Rights. Article 10 requires juvenile offenders to be treated in an age-appropriate way. Compliance with these international treaties would prohibit the use the deterrence as a sentencing principle, since there is no evidence that length or severity of sentence acts as a deterrent for young people. Rather, young people operate under an illusion of immortality; it is the certainty of being caught, not the severity of punishment that may act as a deterrent. Furthermore, it is not re-integrative or rehabilitative to use a young person as an object lesson to deter others.

UNCRC, Articles 37 and 40 [TAB A]

United Nations International Covenant on Civil and Political Rights, Article 10 [TAB A]

12. The only primary consideration in the UNCRC is the best interests of the child. Article 3 requires that in all actions concerning children, courts, administrative bodies and legislative bodies shall make the best interests of the child a primary consideration. The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of

understanding. It cannot be in the best interests of the individual child before the court to impose a sentence that sends a message to other young people who are not.

UNCRC, Article 3 [TAB A]
The Beijing Rules, United Nations Resolution A/RES/40/33, November 29, 1985, 96th Plenary, Rule 14.2 [TAB A]

13. In 1985, the United Nations passed Resolution 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (" The Beijing Rules"). Although this pre-dates the UNCRC in 1989, several of the fundamental principles have been incorporated into the UNCRC and they are expressly referred to in the Preamble to the UNCRC. Rule 5 requires:

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

Sentences that take into account the effect of the sentence on others, cannot be proportional for the individual offender.

The Beijing Rules, ibid., Rule 5 [TAB A]

14. Rule 17 sets out the guiding principles in disposition:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society;
(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; …
(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

Similarly Rule 19 provides that "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period". As has been submitted, deterrence, by its very nature cannot be proportional. A sentence which is harsher to deter others cannot be the possible minimum for the individual offender. A young person's well-being is not enhanced by punishing him or her for what others may or may not do in the future.

The Beijing Rules, ibid., Rules 17 and 19 [TAB A]

15. In 1990, by resolution of the General Assembly, the United Nations passed Rules for the Protection of Juveniles Deprived of their Liberty. The core principles (Fundamental Perspectives) of these Rules re-affirm The Beijing Rules and emphasize that deprivation of liberty of a young person should be a disposition of last resort and for the minimum period and

should be limited to exceptional cases. The Rules are intended to establish minimum standards with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society. They do not preclude the application of standards that are more conducive to ensuring the rights, care and protection of young persons.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res.45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 [TAB A]

16. The same year, the United Nations also passed Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"). The Fundamental Principles of The Riyadh Guidelines acknowledge that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood. This characteristic of youth has also been recognized by Supreme Court of the United States.

The Riyadh Guidelines, G.A. res. 45/112 Fundamental Principles, 5(e) [TAB A]

***Roper v. Simmons*, 543 U.S. 1 (2005) at 16 [TAB 5]**

17. The Foundation submits that Canada's international obligations under the UNCRC and the YCJA and its obligations to comply with international standards in the administration of justice for young people require Youth Justice Courts to impose sentences that ensure the care and protection of youthful offenders, that avoid the detrimental effects of detention as much as possible, that are proportional above all, and that consider the well-being of the individual offender. International standards do not allow any room for using a young person, or his or her sentence, as a tool to send a message to others.

HISTORY OF SENTENCING PRINCIPLES

18. The principles of sentencing developed through the common law. When it was enacted, the *Young Offenders Act* was as silent as the *Criminal Code* on the principles of sentencing. In 1993, this Honourable Court found that deterrence was a sentencing principle under the *Young Offenders Act*, albeit, a principle of less importance than for adult offenders.

***R.v. M.(J.J.),* [1993], 2 S.C.R. 421 at 431-436**

19. There have been several attempts to rationalize and structure the exercise of discretion in sentencing. In 1984, a bill, the Criminal Law Reform Act which would have outlined principles for the exercise of discretion in sentencing, died on the order paper. The Sentencing Commission proposed proportionality as a paramount principle in 1987. Finally and for the first time, Parliament amended the *Criminal Code* by expressly codifying sentencing principles in 1995 (effective 1996). Sentencing principles for adults were codified in section 718, 718.1 and 718.2 of *the Criminal Code* and include deterrence in subsection 718(b) in Part XXIII of the *Criminal Code*. Section 718 of the *Criminal Code* provides:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: …
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences … .

A. Manson, *Law of Sentencing* (2001) (QL), C. 4 D (1) [TAB 6]
***Criminal Code*, ss.718 – 718.2 [TAB A]**

20. Notwithstanding the inclusion of the principle of deterrence, the purpose and effect of this codification was found by this Court to be remedial in nature and directed at reducing the use of prison as a sanction. It was found to have changed the common law.

***R. v. Gladue*, [1999] 1 S.C.R. 688 at 714**
A. Manson, *Law of Sentencing*, supra , C. 4 D (4) [TAB 6]

21. In 1995 the *Young Offenders Act* was also amended, perhaps in response to the decision of this court in *J.J.M.*, and specifically reduced the availability of custodial dispositions and required youth courts to provide reasons for custodial sentences when imposed. Neither deterrence nor proportionality was mentioned, although rehabilitative purposes were strengthened. See also paragraphs 30 to 32 of the factum of the intervener, the Youth Criminal Defence Office.

22. Nonetheless, Canada continued to incarcerate young people at a rate much higher than other Western nations, at a rate higher than adult offenders and for longer periods of custody than adults who received custody for the same offence.

PURPOSE AND INTERPRETATION OF YCJA

23. A review of incarceration statistics in Canada demonstrates that youths are given custodial sentences at a rate four times higher than those given to adults. In fact, Canada could be described as a world leader in imprisoning youth, with an incarceration rate twice that of the United States (despite its much more serious youth crime problem) and ten to fifteen times that of many European countries, Australia and New Zealand.

> **Department of Justice, "Youth Sentencing: Trends to be Addressed" in YCJA Explained**
> **http:www.justice.gc.ca/en/ps/yj/repository/3modules/04youth/3040001a.html, visited July 19, 2005 [TAB 7]**
> **S. Anand, "Crafting Youth Sentences: The Roles of Rehabilitation, Proportionality, Restraint, Restorative Justice, and Race Under the *Youth Criminal Justice Act*" (2003), 40 Alta. L. Rev. 943 at para. 2**
> **N. Bala, *Youth Criminal Justice Law* (2003) at 19 and 444**
> **See also, Paragraph 22, Factum of the Intervener, the Youth Criminal Justice Office with respect to the intent of Parliament**
> **YCJA, Preamble [TAB A]**

24. With respect to other historical developments from the decision of this Court in J.J.M. to the enactment of the YCJA, the Foundation adopts the submissions of the appellant B.V.N. in paragraph 24 to 45 of his factum and see paragraphs 48 to 60 of the factum of the Respondent B.W.P.

25. As well as reducing the over-reliance on incarceration, the YCJA focuses on the long-term protection of society through rehabilitation and reintegration of youthful offenders, crime prevention by addressing the circumstances underlying a young person's offending behaviour, and accountability through fair and proportionate meaningful consequences for the individual offender.

> **Declaration of Principle, section 3 YCJA [TAB A]**

26. In hearings on Bill C-3 (the YCJA), before a Standing Committee of Parliament, witnesses expressed their serious concerns with the omission of deterrence in the sentencing principles set out in section 38. Nonetheless, no amendment to include deterrence was passed. Indeed, as Tustin and Lutes have said,

> The principle of general deterrence contained in the *Young Offenders Act* has been purposely removed from this legislation, as research has shown that general deterrence is ineffective for adults, and especially ineffective where youths are concerned.
>
> **Evidence, Standing Committee on Justice and Human Rights, December 7, 1999 at 1209-1210: http://www.parl.gc.ca/InfoComDoc/36/2/JUST/Meetings/Evidence/justev08-e.htm, visited July 20, 2005 [TAB 8]**
> **L.Tustin and R.E.Lutes, *A Guide to the Youth Criminal Justice Act*, (2005) at p.65 [TAB 9]**

27. There is no statistically significant evidence that deterrence is effective to achieve these statutory goals. Indeed, a sentence that aims to deter other youth from offending does not relate to the rehabilitation and reintegration of the actual offender before the court. Deterrence does not threaten the most vulnerable and marginalized, for example, street youth. Deterrence of others does not relate to the circumstances underlying the offending youth's behaviour. As has been submitted, punishing one convicted offender for the potential effect on other youth is anathema to the mandatory requirement that youth sentences be fair and proportionate for the offender. In fact, no evidence of the effectiveness of deterrence was cited in *J.J.M.*

> Despite the serious lack of supporting evidence and the basic intellectual poverty of the idea, it [deterrence] seems to be a powerful one and Canadian courts have accepted it uncritically. What evidence there is, suggests that it is the certainty of conviction rather than the severity of sentence which constitutes the deterrent factor in criminal law.
>
> **C. Ruby, *Sentencing*, 4th ed. (1994) at p.6 [TAB 10]**
> **A. Manson, *Law of Sentencing*, supra, C. 3 C (1) [TAB 6]**
> **See also *Roper v. Simmons*, supra, at 18 [TAB 5]**
> **N. Bala, *Youth Criminal Justice Law*, supra, chapter 2 (C) and studies cited therein**

28. Philosophically, it is submitted, deterrence as a stand-alone sentencing principle is devoid of moral authority and engenders, not respect for law and societal values, but disrespect. General deterrence assumes, in the absence of clear evidence, that the punishment provides a lesson to others who will consequently be deterred in the future. Empirical studies have questioned the assumption and consequently question the validity of the justification itself. Philosophically then, one might suggest that a community, for a future societal benefit, should implement deterrent, rehabilitative, and incapacitative programs, regardless of guilt. But any process that would choose individuals without blame or responsibility and inflict pain on them against their will for possible future benefit to others is not a just process. Although differing in degree, it is

similarly disproportionate and unfair to sentence a guilty young person more harshly than their personal responsibility warrants.

A. Manson, *Law of Sentencing* (QL), supra, paraphrase of C. 3 C [TAB 6]

29. Sentences for young people should be based on their effectiveness in the interests of the long-term protection of society. Information about the effectiveness of measure taken to address youth crime should be publicly available and acted upon. See also paragraph 40 of the factum of the intervener, the Youth Criminal Defence Office. There is no evidence that custodial sentences deter other young people from offending and there is evidence that jurisdictions with higher, longer sentencing rates also have higher youth violent crime rates rates and that reducing incarceration also reduces youth violent crime.

YCJA, Preamble [TAB A]
See A. Manson, supra, at C. 3 C (1) and the research cited therein [TAB 6]
L. Feldman, M. Males and V. Schiraldi, "A Tale of Two Jurisdictions: Youth Crime and Detention Rates in Maryland & the District of Columbia" (October 2001) http://www.buildingblocksforyouth.org/dcmd/dcmd.html, visited July 21, 2005 [TAB 11]
Center on Juvenile and Criminal Justice, "Reforming the System" www.cjcj.org/jjic, visited July 21, 2005 [TAB 12]

30. The Foundation adopts the submissions of the appellant B.V.N in his factum at paragraphs 32 to 34 and 54 to 58, by the Respondent B.W.P. in his factum at paragraph 27, and by the Intervener, the Youth Criminal Defence Office, in its factum at paragraphs 6 and 17 to 19.

31. The Foundation also adopts the submissions with respect to jurisdictional limits on the Youth Justice Court at paragraphs 7 to 16 of the factum of the intervener, the Youth Criminal Defence Office but would add one comment with respect to s. 38 of the YCJA and the different jurisdictional powers of a superior court compared to those of a Youth Justice Court.

32. Indeed, it would be a legal anomaly for a superior court, sitting as a Youth Justice Court, to be able to apply general deterrence as a sentencing principle through the use of its inherent jurisdiction when a provincial court, sitting as a Youth Justice Court, could not. In addition, it would contravene the YCJA requirement that sentences be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances.

YCJA, s.38(2) (b) [TAB A]

ACHIEVING THE GOAL OF GENERAL DETERRENCE

33. The deterrence that is permitted by the YCJA is not as a factor in sentencing, but crime prevention and a community responsibility towards all young people as set out in the 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 … .
>
> **YCJA, Preamble [TAB A]**

34. In the most serious cases where the offence meets all of the statutory (sections 61 to 74 YCJA) and constitutional requirement for receiving an adult sentence and the young person meets the age requirements for a presumptive offence, then s. 74 of the YCJA causes Parts XXIII (sentencing) and XXIV (dangerous and long-term offenders) of the *Criminal Code* to apply to that young person. Where the Crown believes that deterrence is an appropriate factor to be considered in sentencing, it can then ask the court to consider deterrence under section 718 of the *Criminal Code*.

PART IV - COSTS

35. The Foundation does not seek costs nor does it believe that costs should be awarded against it.

PART V – ORDER SOUGHT

36. The Foundation respectfully requests that the appeal of BVN be allowed and that the appeal of BWP be denied.

All of which is respectfully submitted this 21st day of July, 2005.

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PART VI

TABLE OF AUTHORITIES

PART VII

STATUTES, REGULATIONS, RULES, TREATIES