1 The Principles and Philosophy of the Youth Criminal Justice Act

I. Introduction: Why We Have a Separate Criminal Justice System for Young Persons

Canada's youth criminal justice laws have gone through several dramatic changes in the past 30 years. Our current legislation, the *Youth Criminal Justice Act*,[1] came into force on April 1, 2003. It replaced the *Young Offenders Act*,[2] which had been in place since 1984 and was amended on several occasions. Prior to that, the *Juvenile Delinquents Act*,[3] originally enacted in 1908, and amended many times over the course of the 20th century, was the country's governing legislation in this area.

These constant amendments and changes in legislation reflect the persistent uncertainty and lack of consensus in youth criminal justice policy. Youth crime conjures up a wide range of attitudes and feelings in a manner that adult crime typically does not. Often these sentiments are contradictory and at odds with one another. Attempts to reconcile and balance these competing interests produce legislative responses that are complicated and, at times, confusing.

Are children who commit criminal offences simply acting without thinking, their "crimes" a reflection of bad choices during a time of evolving maturity? Is their descent into criminality more a reflection of society's failure to care for its most vulnerable members than it is a statement of their moral weakness?[4] Or are these young persons—old enough to know better and capable of choosing right from wrong—the authors of their own misfortune and deserving of punishment? How one answers these questions in the abstract will often demonstrate which of the two camps one falls into, at least initially.

It is irrefutable that if we acknowledge the social, economic, personal, and other disadvantages faced by young people, we are then able to more comprehensively respond to offending behaviour and create opportunities for rehabilitation. Furthermore, if we fail to recognize the significance of issues such as poverty, social exclusion, inadequate parenting, physical and mental health concerns, discrimination, and insufficient social and child welfare systems, we may further fail children who need additional supports.

Choosing an appropriate "punishment" for a young person who engages in criminal behaviour is often extraordinarily challenging. And punishment, in whatever form, must always be balanced with efforts at reforming the young person, and their environment, to prevent recidivism. Such efforts will typically look to measures of social

1 SC 2002, c 1 [YCJA].
2 RSC 1985, c Y-1 [repealed] [YOA].
3 RSC 1970, c J-3 [repealed].
4 This was the governing philosophy of the *Juvenile Delinquents Act*: see *Morris v The Queen*, [1979] 1 SCR 405 at 431, 1978 CanLII 168, where it was held that "[t]he aim of the *Juvenile Delinquents Act* is that juvenile offenders should be assisted and reformed rather than punished."

support and intervention—education, family services, and health care, to name a few—that exist outside the boundaries of the criminal justice system. This, however, does not mean that the system itself does not or cannot play a role.

For young persons who commit truly serious crimes—violent assaults, armed robberies, sexual assaults, firearms offences, and even homicides—the possibility of incarceration will be a consideration. But when custody is appropriate, and to what extent it should be used, remains the most controversial aspect of youth criminal justice proceedings. Some are convinced it can be an effective tool against reoffending, but many believe it simply creates a breeding ground for future criminals.

There are no easy answers to these dilemmas. As the history of Canada's youth criminal justice legislation itself demonstrates, lawmakers have struggled with these issues for over 100 years. As times change, popular sentiment often changes as well. The scales of youth justice—ever in a precarious balance between efforts at rehabilitation and accountability, and a desire for denunciation and punishment—find themselves leaning one way or another. We will undoubtedly continue to grapple with finding appropriate approaches to the complexities of youthful offending.

Fundamentally, we must always keep in mind *why* we have a separate criminal justice system for young people: it is because we accept that children are in fact *different* from adults. They are still growing and maturing, independent yet dependent. Their character has not yet fully formed. Their brains are still developing in dramatic ways. Even if they have made terrible mistakes, they remain in a transitory stage of their lives. Their future remains open and full of possibility. We seek to help preserve their options and support their development. It is our duty to ensure that while we hold them accountable for their actions, we also focus on their rehabilitation and reintegration.

As our appreciation for the differences between adolescence and adulthood evolves, our youth justice system should continue to transform itself. This is not only to be expected but welcomed. In the words of United States Supreme Court Justice Sonia Sotomayor, "Children cannot be viewed simply as miniature adults."[5] Our justice system must always reflect this indisputable truth.

II. The Preamble

The YCJA's preamble contains a clear statement of Parliament's philosophical and moral rationale behind the need for new youth justice legislation. Much criticism had been levelled at the predecessor statute—the YOA—for lacking a clear and guiding set of values and principles. This did little to assist judges and lawyers in determining Parliament's intent and created much confusion and a lack of consistency in youth criminal justice court proceedings across the country.

5 *JDB v North Carolina*, 131 S Ct 2394 at 2404 (2011).

The YCJA aimed to fix this by articulating a clear philosophy of youth criminal justice and a clear direction for those interpreting and implementing the Act.

The YCJA's preamble reads as follows:

> 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.

A. How to Effectively Use the Preamble

While the utility of a preamble is generally a matter for debate, preambles remain of some weight in ascertaining parliamentary intent under current law. Before turning to the preamble itself, a short review may prove helpful.

Preambles provide a brief social context to the policy concerns that Parliament is addressing with the legislation in question. Preambles are intended to provide some general guidance to courts, particularly when they are called on to fill the gaps that are uncovered when applying a piece of legislation to problems that were not originally foreseen nor clearly captured by the statutory provisions in place.

As stated by the Ontario Court of Appeal, "the words of a statute take their colour and their meaning from their context and the Act's purpose."[6] An act's preamble may assist in that determination. Indeed, section 13 of the *Interpretation Act*[7] states

6 *R v Clarke*, 2013 ONCA 7 at para 21, citing *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 27.

7 RSC 1985, c I-21.

that "the preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object."

B. How the Supreme Court Has Interpreted the Preamble

The significance of the YCJA's preamble cannot be ignored. On a number of occasions, the Supreme Court of Canada has looked to its terms to assist in interpreting various provisions of the Act.

In *R v CD; R v CDK*,[8] which addressed what the proper definition of a "violent offence" should be under the Act, Bastarache J noted that the preamble demonstrates the Act is aimed at "restricting the use of custody for young offenders."[9] His Honour quoted the then minister of justice, Anne McLellan, when the YCJA was introduced for second reading in Parliament:

> The proposed *Youth Criminal Justice Act* is intended to reduce the unacceptably high level of youth incarceration that has occurred under the *Young Offenders Act*. The preamble to the new legislation states clearly that the youth justice system should reserve its most serious interventions for the most serious crimes and thereby reduce its over-reliance on incarceration.[10]

Similarly, in *R v BWP; R v BVN*,[11] which addressed whether general and specific deterrence were intended to be sentencing principles under the YCJA, Charron J held that "[i]t is quite clear in considering the preamble and the statute as a whole that Parliament's goal in enacting the new youth sentencing regime was to … *reduce the over-reliance on incarceration for non-violent young persons*."[12]

While the amendments to the YCJA contained in Bill C-10, the *Safe Streets and Communities Act*,[13] overturned the ultimate holdings regarding the definition of violent offence and the role of specific deterrence in these two decisions,[14] the preamble itself was not altered, and these comments remain of value in determining Parliament's intent in enacting the legislation in the first place. A strong intention to reduce the reliance on incarceration for non-violent offences remains.

8 2005 SCC 78.
9 *Ibid* at para 34.
10 *Ibid* at para 48, citing *House of Commons Debates*, 37-1, No 137 (14 February 2001) at 704.
11 2006 SCC 27.
12 *Ibid* at para 35 (emphasis in original).
13 Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess, 41st Parl, 2011 (assented to 13 March 2012), SC 2012, c 1 [Bill C-10; SSCA].
14 Discussed in detail in Chapter 10, Sentencing.

In addition, the Supreme Court has noted in a number of cases the significance of the preamble's reference to the United Nations *Convention on the Rights of the Child*,[15] and in each instance has used the UNCRC as an interpretive tool in its findings regarding the intent of the YCJA. In *R v CD; R v CDK*, Bastarache J turned to the UNCRC to inform his finding that Parliament intended to restrict the use of custody;[16] in *R v DB*, Abella J found evidence of "diminished moral culpability" as a Canadian legal principle (in fact a principle of fundamental justice) in the UNCRC;[17] and in *R v RC*,[18] Fish J turned to the UNCRC as support for his finding that Parliament has sought to provide enhanced procedural protections and minimally interfere with the personal freedom and privacy of young people.

III. Statement of Principles

Section 3 of the YCJA contains the Act's Declaration of Principle.

The Declaration of Principle, unlike the preamble, is included in the body of the YCJA and thus has direct statutory effect. Counsel should consider the Declaration of Principle to be the very foundation of the Act itself: its contents permeate into and influence every other section and area of the YCJA.

The New Brunswick Court of Appeal noted in *LRP v R*[19] that section 3 is "not a collection of pious wishes."[20] Indeed, section 3 captures the very essence of the YCJA itself and must assist all players in the youth justice system in determining appropriate outcomes at every stage of the proceedings.

Section 3 of the Act was amended in 2012 by Bill C-10, the SSCA. While Bill C-10 was an omnibus crime bill, the specific amendments affecting the YCJA came into force on October 23, 2012.[21]

Counsel must remember this date whenever reading case law that interprets section 3 of the YCJA. Cases decided on the basis of offence dates that precede October 23, 2012 must be read carefully because they will fail to reflect the important changes to that section that are contained in the amendments and discussed here.

15 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990), online (pdf): <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [UNCRC].

16 *Supra* note 8 at para 35.

17 2008 SCC 25 at paras 59, 60.

18 2005 SCC 61 at para 41.

19 2004 NBCA 76.

20 *Ibid* at para 3. The Court made this comment in the context of a sentencing decision under YCJA, s 38(2).

21 SSCA, ss 167-203. The amendments were brought into force by Order in Council SI/2012-48, which was filed July 4, 2012 in the *Canada Gazette*.

The transitional provisions of the SSCA helpfully state that the amendments to section 3 of the YCJA only apply to offences whose offence date falls after October 23, 2012.[22]

A. Section 3(1)(a): The Purpose of the Youth Justice System

Section 3(1)(a) of the YCJA addresses the purpose of the youth justice system in Canada:

> (a) the youth criminal justice system is intended to protect the public by
>
> (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
>
> (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
>
> (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour.

In its original, pre-amendment form, section 3 stated that the youth criminal justice system was 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.

These goals were designed to "promote the long-term protection of the public."

Case law decided under the section's original form noted that this section was intended to demonstrate that the youth criminal justice system was meant to be focused on rehabilitation and accountability.

The amendments contained in the SSCA altered this analysis somewhat. Protection of the public was moved to the top of the section from the bottom and the "long-term" qualifier was removed. The YCJA's priorities were also rearranged by listing accountability first rather than third and including "seriousness of the offence" as a key aspect of that principle.

Rehabilitation remains a guiding principle of the YCJA, as does its focus on addressing the "circumstances underlying" offending behaviour. Indeed, with respect to the latter, the post–Bill C-10 version of the Act specifically calls for the referral of young persons to "programs or agencies *in the community*" (emphasis added)—something

22 See SSCA, s 195; SI/2012-48.

lacking in the YCJA's original language. Presumably, this legislative direction demonstrates a renewed commitment by Parliament to using community-based and non-custodial measures in combatting youth criminality when appropriate.

B. Section 3(1)(b): What Makes the Youth Criminal Justice System Unique

Section 3(1)(b) lists the characteristics that distinguish the youth criminal justice system from the adult criminal justice system:

> (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
>
> (i) rehabilitation and reintegration,
>
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
>
> (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
>
> (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time.

The language found at the beginning of this section emphasizing that the youth criminal justice system "must be based on the principle of diminished moral blameworthiness or culpability" was not in the original text of the YCJA. The SSCA amended section 3(1)(b) of the YCJA to accord with the Supreme Court decision in *R v DB*,[23] where the Court held that section 7 of the *Canadian Charter of Rights and Freedoms*[24] guarantees, as a principle of fundamental justice, a presumption of diminished moral culpability in young persons and therefore required a presumption of lower sentences for young persons as well.

C. Section 3(1)(c): Imposing Sanctions on Youth

Section 3(1)(c) sets out principles that are to guide youth justice courts in the imposition of sanctions on young persons:

> (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,

23 *Supra* note 17.

24 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter].

(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.

D. Section 3(1)(d): Four Special Considerations

Section 3(1)(d) sets out four special considerations that should characterize proceedings involving young persons:

(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.

E. Section 3(2): Giving Life to the Foregoing Principles

Section 3(2) of the YCJA states that the Act is to be "liberally construed so as to ensure that young persons are dealt with in accordance with the principles"; the principles are set out in section 3(1). This reminder from Parliament instructs youth justice courts that in cases of ambiguity involving the interpretation of the Act's provisions, an interpretation that favours the fundamental principles found in section 3 is always to be given precedence.

F. How the Supreme Court Has Interpreted the YCJA's Declaration of Principle

As mentioned above, in *R v RC*,[25] Fish J looked to the UNCRC for guidance when applying the DNA provisions of the *Criminal Code*[26] to a 13-year-old young person

25 *Supra* note 18.
26 RSC 1985, c C-46.

found guilty of stabbing his mother in the foot with a pen and striking her in the face after a dispute over dirty laundry.

The DNA provisions exist within the *Criminal Code*, and the YCJA does not modify them explicitly when they are applied to young persons. Nevertheless, when deciding how to apply those provisions to a young person, Fish J noted the following in *R v RC*:

> In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons. In keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections, and to interfere with their personal freedom and privacy as little as possible.[27]

His Honour went on to note that the trial judge did not err by taking into account the underlying principles and objectives of the youth criminal justice legislation in balancing the governing factors under the DNA provision in question.[28]

Thus, the "principles and objectives" of the youth criminal justice system were held to be a relevant consideration in interpreting *Criminal Code* provisions as they apply to young persons.

In *R v BWP; R v BVN*,[29] an Indigenous young person pleaded guilty to manslaughter and another young person to aggravated assault. The issue for the Supreme Court to decide was whether or not general deterrence applied as a sentencing principle under the YCJA.

In holding that general deterrence was not incorporated in the YCJA's sentencing regime, the Supreme Court noted that the YCJA's fundamental principles represented a dramatic shift from what preceded it. Charron J explained:

> Parliament did not simply amend its predecessor, the YOA, it repealed it. The YCJA is a complex piece of legislation that has substantially changed the Canadian youth justice system at various stages of the process including: at the front end, by encouraging greater use of the diversionary programs; at bail hearings, by substantially limiting pretrial detention; and in the adult sentencing process, by the presumptive application of adult sentences for some of the most serious offences.[30]

Similarly, in *R v SJL*,[31] the Supreme Court had an opportunity to comment on the important differences in the adult and youth justice systems in Canada.

SJL and another youth were arrested with 16 adults following a major police investigation into drug trafficking activities by a criminal organization in Quebec. Two

27 *Supra* note 18 at para 41.
28 *Ibid* at para 51.
29 *Supra* note 11.
30 *Ibid* at para 19.
31 2009 SCC 14.

issues before the Supreme Court were whether or not the Crown could prefer a direct indictment against the young persons, and if the Crown could try the young persons jointly with their adult co-defendants.

The Supreme Court held that the youth and adult accused persons could not be jointly tried. In coming to that conclusion, Deschamps J commented on the fundamental differences between our adult and youth justice systems.

Her Honour noted that the "governing principle of the YCJA … maintains a justice *system* for young people that is separate from the system for adults."[32] Furthermore, "[t]he creation of this system was based on recognition of the presumption of diminished moral blameworthiness of young persons and on their heightened vulnerability in dealing with the justice system."[33]

Youth justice courts "favour rehabilitation, reintegration and the principle of a fair and proportionate accountability that is consistent with the young person's reduced level of maturity," whereas the adult criminal justice system "places greater emphasis on punishment."[34]

Deschamps J further noted that these are clear and decidedly different objectives and how judges conduct trials will often reflect these differences.[35]

In *R v KJM*,[36] the Supreme Court addressed whether the presumptive ceilings previously established by the Court in *R v Jordan*[37] also apply to young persons.

The 15-year-old appellant had been charged with stabbing the complainant in the face with the head of a box cutter. Approximately 18.5 months post charge, the appellant brought a section 11(b) Charter application.

In writing for the majority, Moldaver J discussed the enhanced need for timeliness in youth justice court proceedings. His Honour recognized that the right to be tried within a reasonable time has "special significance" for young persons for at least five reasons: reinforcing the connection between actions and consequences, reducing psychological impact, preserving the right to make full answer and defence, avoiding potential unfairness, and advancing societal interests.[38]

His Honour went on to hold that the *Jordan* presumptive ceilings *do* apply to youth justice court proceedings, explaining that the existing *Jordan* framework is capable of accommodating the enhanced need for timeliness in youth cases.[39]

32 *Ibid* at para 56 (emphasis in original).
33 *Ibid* at para 64.
34 *Ibid* at para 75.
35 *Ibid*.
36 2019 SCC 55.
37 2016 SCC 27.
38 *R v KJM*, *supra* note 36 at paras 50-55.
39 *Ibid* at para 62.

His Honour further noted that the enhanced need for timeliness in youth matters is a relevant factor to consider in applications under section 11(b) because the tolerance for delay in this context will continue to be lower than in adult proceedings.[40]

His Honor stated:

> The enhanced need for timeliness in youth cases cannot, in my view, be reduced to a set "youth discount," and its weight will vary depending on the circumstances. Nonetheless, it requires as a general rule that youth matters should proceed in a timely manner, and the Crown and the justice system must do their part to ensure this objective is met.[41]

IV. Canada's International Law Commitments

A. The United Nations Convention on the Rights of the Child

The UNCRC was ratified by Canada in 1991.[42] It is an international human rights treaty that grants all children (aged 17 and under) a comprehensive set of rights, including civil, political, economic, social, and cultural rights. It is the most ratified human rights treaty in the history of the United Nations.

By signing the treaty, Canada, along with almost every other country in the world, has pledged to conform to certain internationally accepted minimum standards for the treatment of children.

The YCJA directly acknowledges the UNCRC in its preamble; however, the UNCRC itself has never been formally adopted into Canadian law by an act of Parliament. As a result, it does not directly form a part of Canadian criminal law.[43]

Nevertheless, as noted by the Supreme Court in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, "A treaty should be considered when interpreting statutes that purport to implement the treaty, in whole or in part. The treaty is relevant at the context stage of the statutory interpretation exercise."[44] There is no need to find textual ambiguity. Thus, the text of the UNCRC may assist counsel in advising the youth justice court on how to interpret or apply various provisions of the YCJA. Indeed, the Supreme Court stated earlier in *Baker v Canada (Minister of Citizenship and Immigration)* that the "values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future."[45]

40 *Ibid* at para 75.
41 *Ibid* at para 72.
42 *Supra* note 15.
43 See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699.
44 2022 SCC 30 at para 44. See also *Baker v Canada (Minister of Citizenship and Immigration)*, *ibid* at para 70.
45 *Supra* note 43 at para 71 [*Baker* cited to SCR].

B. Highlights of the Text of the UNCRC

Article 3(1) of the UNCRC declares its general principle—that "[i]n 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."[46] By declaring the "best interests of the child" to be a *primary* consideration in such matters, the drafters of the Convention indicated that it was not necessarily the *exclusive* consideration. However, the best interests of the child is the *only* primary consideration and thus arguably deserves a place of prominence. Nonetheless, considerations other than the "best interests of the child" will be factored into determining appropriate state action as well.

The UN Committee on the Rights of the Child adopted General Comment No 14 (2013) interpreting this section of the UNCRC at its 62nd session (January 14 to February 1, 2013).[47] The committee held that upholding a child's best interests is a threefold concept:

1. it serves as a *substantive right*, to have the child's best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake that can be invoked before a court;
2. it is a *fundamental, interpretive legal principle*, which requires that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen; and
3. it qualifies as a *rule of procedure*, requiring that whenever a decision is to be made that will affect a specific child, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child concerned.

Article 37(b) requires that 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."[48] Article 37(c) requires that every child "deprived of liberty shall be treated … in a manner which takes into account the needs of persons of his or her age."[49]

Article 40 addresses penal law specifically and mandates that signatories to the Convention recognize that children accused of violating the law must be treated in a

46 *Supra* note 15.

47 *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, 62nd Sess, UN Doc CRC/C/GC/14 (2013), online (pdf): <https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf>.

48 UNCRC, *supra* note 15.

49 *Ibid.*

manner consistent with their age and with an eye to their eventual reintegration into society:

> 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.[50]

Article 40(2)(b) further requires certain due process rights for child defendants:

> 2. … States Parties shall … ensure that: …
>
> (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; …
>
> (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body … in the presence of legal or other appropriate assistance … ;
>
> (iv) Not to be compelled to give testimony or to confess guilt; …
>
> (vii) To have his or her privacy fully respected at all stages of the proceedings.[51]

Article 40(3) speaks to the importance of having a separate justice system for children. Member states are expected to have justice systems for children separate from those for adults and to establish a minimum age below which children "shall be presumed not to have the capacity to infringe the penal law." States are also expected to utilize measures for dealing with children "without resorting to judicial proceedings" whenever possible through a "variety of dispositions … to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."[52]

C. How the Supreme Court Has Applied the UNCRC

In *R v RC*,[53] Fish J looked to the UNCRC for guidance when applying the DNA provisions of the *Criminal Code* to a young person found guilty of stabbing his mother in the foot with a pen. Fish J noted that the UNCRC mandates "enhanced procedural protections" for young persons that should be considered by youth justice courts when applying legal tests that are otherwise ostensibly the same for adult and young offenders.

50 *Ibid*.
51 *Ibid*.
52 *Ibid*.
53 *Supra* note 18.

In *R v CD; R v CDK*,[54] Bastarache J applied the UNCRC to the sentencing provisions of the YCJA. When attempting to decide what was or was not a "violent offence" under the Act, His Honour noted that the Convention spoke to utilizing custody as a "last resort." This in turn helped drive the Supreme Court's analysis in adopting a restrictive interpretation of such a definition because it represented the primary means by which a young person could be eligible for a custodial disposition.[55]

Finally, in *R v DB*, the Supreme Court addressed whether or not the presumption of diminished moral culpability for younger persons was a long-standing legal principle worthy of protection under section 7 of the Charter. In determining that it was, Abella J noted that the UNCRC provided assistance in this regard, specifically paragraph 1 of article 40.[56]

D. The Beijing Rules

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* were adopted by the General Assembly on November 29, 1985.[57] The rules set out desirable principles and practices for the administration of juvenile justice systems and represent the minimum conditions accepted internationally for the treatment of juveniles.

Just as the UNCRC has been referenced by the Supreme Court to help resolve matters of statutory interpretation involving the YCJA, so too have the Beijing Rules. In *R v DB*, Abella J cited the Beijing Rules when addressing the nature of the Act's privacy protections and ultimately decided that the onus to lift a publication ban of a young person's identity must always fall on the Crown as part of the rights guaranteed under section 7 of the Charter, even when that young person is subjected to an adult sentence.[58]

1. Highlights of the Beijing Rules

Rule 5 mandates a member nation's "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."

Rule 7 requires that

> 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

54 *Supra* note 8.

55 The definition has since been statutorily amended. See Chapter 10.

56 *R v DB*, *supra* note 17 at para 60.

57 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UNGAOR, 40th Sess, UN Doc A/RES/40/33 (1985) 206, online (pdf): <https://www.ohchr.org/sites/default/files/beijingrules.pdf>.

58 *Supra* note 17 at para 85.

> 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 [criminal law] proceedings [affecting juveniles].

Rule 8 addresses the juvenile's right to privacy and states that it "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."

V. Bill C-10: The Safe Streets and Communities Act

Bill C-10, the SSCA, was introduced to the House of Commons by the justice minister on September 20, 2011. The Bill passed a final vote in the House of Commons on March 12, 2012 and received royal assent on March 13, 2012. Part 4 of the Bill contains a series of amendments to the YCJA and was originally entitled *Sébastien's Law* when it was first introduced as a stand-alone piece of legislation in an earlier session of Parliament.[59] It was named in memory of Sébastien Lacasse, who was stabbed to death by a group of young people in Laval, Quebec in 2004.

Bill C-10 includes several measures that seemed designed to adjust the YCJA's emphasis on rehabilitation and reintegration toward one more centred on the protection of society and on holding young people accountable for their actions. These amendments came into force on October 23, 2012.[60]

The content of Bill C-10 will be examined throughout this book because it amended various sections of the YCJA.

As previously discussed, the Declaration of Principle in section 3 of the YCJA was one of the areas amended by the legislation. The government's stated primary objective underlying the legislation was to make the immediate "protection of society" an explicit goal of the YCJA.[61] This is in contrast to the Act's original language that focused on the "long-term" protection of society, presumably achieved through an emphasis on rehabilitation and reintegration of young offenders into the community.

VI. Summary: Arguments for Crown Prosecutors and Defence Counsel

When addressing matters in youth justice court, how should Crown prosecutors and defence counsel structure their arguments effectively in light of these principles?

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59 *Sébastien's Law*, or Bill C-4, had been previously introduced in the 40th session of Parliament but remained before the Standing Committee on Justice and Human Rights before the election call on March 26, 2011. The version introduced as part 4 of the Bill C-10 omnibus crime bill was modified somewhat from its original form.

60 *Order Fixing Various Dates as the Day on which Certain Sections of the Act Come into Force*, SI/2012-48 (4 July 2012) C Gaz II, vol 146, no 14, setting October 23, 2012 as the in-force date for ss 167-203 of the SSCA.

61 Canada, Department of Justice, *Backgrounder: Protecting Canadians from Violent and Repeat Young Offenders Component of the Safe Streets and Communities Act* (September 2011).

A. Crown Prosecutors

Crown prosecutors should bear in mind that the youth criminal justice system must be kept separate and apart from the adult criminal justice system. It is based on fundamentally different values and principles. Those values and principles animate the exercise of core Crown discretion from the beginning of a young person's involvement with the criminal justice system to the end. Every single decision a Crown prosecutor makes should respect the values of the YCJA.[62]

However, the YCJA also states clearly that the "youth criminal justice system is intended to protect the public" and that young persons should be held "accountable" for their actions through measures that are "meaningful" and "proportionate to the seriousness of the offence and the degree of responsibility of the young person."[63]

Accordingly, young persons will be held "decidedly but differently accountable" for their actions.[64] Accountability, as a principle of the youth criminal justice system, still calls for youth justice courts to impose outcomes that are properly reflective of societal values.[65] That those values will take into account the young person's age and place an emphasis on rehabilitation and reintegration does not mean they can or should ignore the nature of the offence itself nor the harm done to victims and the community.

While the YCJA clearly places an emphasis on rehabilitation and community-based dispositions, as the severity of an offence increases, and if the young person's degree of personal responsibility for the offence is considered high, the principles of accountability, proportionality, and meaningful consequences may take precedence.[66]

Prosecutors should also be mindful that, as key decision-makers in the youth criminal justice system, they have a duty to emphasize promptness and speed given young persons' perception of time.[67] Matters should never be allowed to stall in a youth justice case and should always be treated with high priority.

B. Defence Counsel

It is important for defence counsel to keep the YCJA preamble (including the UNCRC) and the section 3 principles in mind at every stage of their representation of young people in the youth criminal justice system. They are not just considerations at sentencing—but are equally relevant at bail, during discussions with the Crown attorney, in helping to discover and craft community-based responses to a young person's behaviour, in sentencing, and in the pursuit of sentence reviews. Counsel should

62 *R v RC*, *supra* note 18 at para 36.
63 YCJA, ss 3(1)(a), (b), (c).
64 *R v DB*, *supra* note 17 at para 1.
65 *R v AO*, 2007 ONCA 144 at para 48.
66 *Ibid*; *R v SNJS*, 2013 BCCA 379 at para 29; *R v AAZ*, 2013 MBCA 33 at para 65.
67 YCJA, s 3(1)(b)(v).

make reference to the preamble and principles in negotiations at every stage and in all submissions to the court.

Defence counsel must remember that the YCJA expressly provides that young persons are entitled to a "presumption of diminished moral blameworthiness or culpability"[68] and that this is also recognized as a constitutional right under section 7 of the Charter.[69] This is because young persons have "heightened vulnerability, less maturity and a reduced capacity for moral judgment."[70]

Defence counsel must stress that any sanction from a youth court judge should promote the rehabilitation and reintegration of the young person with a particular focus on the specific needs and level of development of the young person. The preamble makes clear that the focus is on the individual young person, therefore requiring that any sanction has to be specifically "meaningful for the individual young person given his or her needs."[71]

A young person can take their rehabilitation and reintegration into their own hands. Experienced youth criminal justice court judges have been known to say that if a young person has already done everything that a court might impose (as part of a sentence) to rehabilitate themself, then a court may be satisfied that no further sanction is required.

Defence counsel must also be vigilant in ensuring that they are working with and for their young client in a manner consistent with a respect for the young person's position as an accused person—that is, with rights to due process and the opportunity to meaningfully instruct counsel after having been fully informed of the choices to be made. Young people are entitled to instruct counsel from a position of having been fully informed. It is counsel's responsibility to ensure that the young person has been apprised of their legal entitlements and obligations, and that privilege is rigorously protected. Counsel's duty to follow the young client's instructions is no different than when instructed by an adult client. Working with a young person may mean having to explain things differently or communicating in a developmentally appropriate way, but with no less rigour or precision.

Although recognizing that young people have a "reduced level of maturity," defence counsel must ensure that their client is involved in the court process and is meaningfully involved because the YCJA specifically mandates that young persons have the "right to be heard in the course of and to participate in the processes" and to be involved and participate in the decisions that affect them.[72] The young person is the one facing the criminal law jeopardy, is the person for whom sanctions must be

68 YCJA, ss 3(1)(b), 72(1)(a).
69 *R v DB*, *supra* note 17.
70 *Ibid* at para 41.
71 YCJA, s 3(1)(c)(iii).
72 YCJA, s 3(1)(d)(i).

individually crafted, and is the person from whom the lawyer must take instructions. Having said that, young people often need trusted adult supporters to help them comfortably make decisions. Counsel may need to help their young client to identify and then communicate with such supportive adults. It may be a parent—the YCJA actually provides that the young person's parents "should be informed of measures or proceedings involving their children"[73]—but it may be another trusted supporter.

73 YCJA, s 3(1)(d)(iv).