

**Submission on Bill C-25  
An Act to amend the Youth Criminal Justice Act**

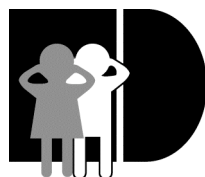
**Submission to the Standing Committee on Justice and Human Rights  
House of Commons**

**Submitted by**

**Matthew Geigen-Miller, Vice-President  
matthew@dci-canada.org**

**on behalf of  
Defence for Children International-Canada**

**February 29, 2008**



**Defence for Children  
International-Canada**

[www.dci-canada.org](http://www.dci-canada.org)

a worldwide movement for children's rights

**SUBMISSION OF DCI-CANADA ON BILL C-25: AN ACT TO  
AMEND THE YOUTH CRIMINAL JUSTICE ACT**

**EXECUTIVE SUMMARY**

**DCI-CANADA’S APPROACH TO YOUTH JUSTICE POLICY**

DCI-Canada embraces and advocates a two-fold approach to the development and implementation of youth justice policy: these must be (1) child rights based, and (2) evidence based.

***Child Rights Based Approach.*** DCI-Canada’s child rights based approach to youth justice policy draws on international standards including the *Convention on the Rights of the Child*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Guidelines for the Prevention of Juvenile Delinquency. It includes the following principles:

- The need for special safeguards and care for young people.
- A separate criminal justice system for young people.
- Restraint in the use of the criminal justice system with young people.
- Minimum use of pre-trial detention and custody.
- Acceptance of sound and enduring social science in the development of youth justice policy.
- Commitment to evidence-based crime prevention programs and social policy.

***Evidence Based Approach.*** DCI-Canada’s evidence based approach to youth justice policy includes the following principles:

- The utilization of research as a basis for an informed youth justice policy is an important mechanism for keeping practices abreast of advances in knowledge, and for the continuing development and improvement of the youth justice system.
- The burden of proof is on the government to justify any measure that involves the government or in the life of a young person in an intrusive manner (“intrusive measure”).
- At the level of policy development and legislation, the burden of proof on the government arises every time the government seeks to (1) create a new kind of intrusive measure; (2) create a new ground for the use of an existing measure; (3) increase the frequency with which an intrusive measure may be used; and (4) increase the duration or intensity of an intrusive measure.
- The requirement for evidence is on-going. Governments must establish programs of research and data collection to monitor the implementation and effects of youth justice policy.

## DCI-CANADA'S POSITION ON BILL C-25

***Comprehensive Review of the YCJA.*** When the Minister of Justice introduced Bill C-25 on November 19, 2007, he also announced the government's intent to conduct a "comprehensive review" of the *Youth Criminal Justice Act* (YCJA). A "comprehensive review" seems to presuppose a need for wide ranging reform of Canada's youth justice policy and legislation. There is no evidence that such reform is required. However, monitoring the implementation of the YCJA should continue.

In the event that the Department of Justice does proceed with its comprehensive review, DCI-Canada submits that this review must be evidence based, and must give appropriate consideration to international standards. Finally, the review must engage a broad range of experts and stakeholders beyond provincial governments. In accordance with article 12 of the *Convention on the Rights of the Child*, young people must have a voice in this process. Although DCI-Canada disagrees with the need for a comprehensive review, we wish to participate in the review, should it proceed.

***Subsection 29(2) – Creation of a New Ground for Pre-Trial Detention.*** The proposed amendment to section 29(2) of the YCJA creates a new ground for pre-trial detention, namely, when a young person is charged with an offence that "endangered the public by creating a substantial likelihood of serious bodily harm to another person."

DCI-Canada objects to this amendment because:

- It is an unnecessary expansion of the grounds for pre-trial detention
- It requires the youth justice court to engage in a fundamentally unfair and logically suspect inquiry into the young person's alleged past behaviour
- It violates the presumption of innocence

***Subsection 29(3) – Clarification of the Presumption Against Pre-Trial Detention.*** The proposed subsection 29(3) clarifies that the presumption against pre-trial detention in subsection 29(2) is rebuttable, and provides that this presumption will be rebuttable on either of two grounds:

- There is a substantial likelihood that the young person will, if released from custody, commit a violent offence
- There is a substantial likelihood that the young person will, if released from custody, commit an offence that otherwise endangers the public by creating a substantial likelihood of serious bodily harm to another person

DCI-Canada accepts that the first ground strikes a reasonable balance between the interests of the young person and the important interest of public safety. However, to ensure that this ground is only used in cases of legitimate risks to public safety, we recommend adding a requirement that the youth justice court be satisfied that the risk has been proved *based on compelling and credible evidence*.

DCI-Canada objects to the second ground. This ground permits detention where there is a risk that a young person will commit an offence that creates a risk of harm. In plain terms, it permits detention where there is a risk of a risk. This ground is too vague and remote to justify detention of a young person.

***Section 38(2) – Sentencing Principles.*** Clause 2 amends subsection 38(2) of the YCJA by adding two new objectives that a youth justice sentence may serve. These are: denunciation of unlawful conduct, and deterring the young person and other young persons from committing offences. DCI-Canada strongly objects to this measure on three grounds:

- These two sentencing objectives serve one purpose only: to increase the penalty that may be imposed on a young person. However, the YCJA already contains many provisions to ensure that youth justice sentences are adequate.
- The objectives of denunciation and deterrence do not serve the purposes of the youth justice system identified in Canadian law and in the international standards.
- There is no evidence that deterrence and denunciation work with respect to young people, and considerable evidence that they do not work.

***Presumptive Offences and Adult Sentences.*** In accordance with international standards, DCI-Canada supports a separate justice system for young people. We object to all adult sentences for young people. In particular, DCI-Canada objects to the presumptive offences provisions of the YCJA. These provisions require that a young person found guilty of certain offences, or a certain pattern of offences, will be sentenced as an adult unless the young person can show that a youth sentence will be adequate to hold him or her accountable.

The comprehensive study of youth justice policy by the House of Commons Standing Committee on Justice and Legal Affairs expressed ambivalence toward presumptive offences, two provincial courts of appeal have ruled that these provisions violate the *Canadian Charter of Rights and Freedoms*, and a previous Minister of Justice has announced that the YCJA would be amended to eliminate the presumption of an adult sentence. Therefore, legislation to eliminate presumptive offences is long overdue and should be a high priority for this Parliament.

***Crime Prevention and Social Policy.*** Canada's youth justice policy and legislation recognizes that protection of society is, first and foremost, achieved by preventing crime. The three primary objectives of Canada's youth justice system are: (1) crime prevention, (2) meaningful consequences for youth crime, and (3) rehabilitation and reintegration.

Considered in the context of the amendments to the YCJA proposed in Bill C-25—which if passed will increase the use of pre-trial detention and increase penalties for young people who are sentenced—DCI-Canada is disturbed by cuts to social programs relevant to youth crime prevention. The approach to youth justice policy adopted by the international community and by the Government of Canada calls for a balance between crime prevention, meaningful consequences for youth crime, and rehabilitation and reintegration. The present government now risks upsetting this careful balance.

## RECOMMENDATIONS

1. Amend clause 1 by striking out the following words in lines 13 to 16 on page 1: “or an offence that otherwise endangered the public by creating a substantial likelihood of serious bodily harm to another person.”
2. Amend clause 1 by striking out the following words in lines 9 to 12 on page 2: “or an offence that otherwise endangers the public by creating a substantial likelihood of serious bodily harm to another person.”
3. Amend clause 1 by adding the following words in line 4 on page 2 after the word “satisfied”: “based on compelling and credible evidence.”
4. Strike out clause 2 in its entirety.
5. Regardless of the Supreme Court of Canada’s decision in *R. v. D.B.*, amend the YCJA in accordance with the decisions of the Quebec Court of Appeal in the *Quebec Reference* and the Ontario Court of Appeal in *R. v. D.B.*
6. Strengthen Canada’s social policy and programs relevant to youth crime prevention by restoring and enhancing funding for effective programs, including the National Crime Prevention Centre, youth employment programs, and early childhood development programs.

## CONTENTS

|   |    |
|---|----|
| Executive Summary .....   | i  |
| About Defence for Children International-Canada.....                                      | 1  |
| Introduction .....  | 2  |
| DCI-Canada’s Approach to Youth Justice Policy .....                                       | 3  |
| Child Rights Based Approach .....   | 3  |
| Evidence Based Approach.....  | 5  |
| DCI-Canada’s Position on Bill C-25 .....  | 7  |
| Comprehensive Review of the YCJA .....  | 7  |
| Clause 1 – Pre-Trial Detention .....  | 8  |
| Subsection 29(2) – Creation of a New Ground for Pre-Trial Detention.....                  | 9  |
| Subsection 29(3) – Clarification of Presumption Against Pre-Trial Detention.....          | 11 |
| Clause 2 – Sentencing Principles.....   | 13 |
| Presumptive Offences and Adult Sentences.....   | 16 |
| Crime Prevention and Social Policy .....  | 17 |
| Table of Authorities .....  | 19 |
| Appendix A - Convention on the Rights of the Child .....                                  | 21 |
| Appendix B - U.N. Standard Minimum Rules for the Administration of Juvenile Justice ..... | 24 |
| Appendix C - U.N. Guidelines for the Prevention of Juvenile Delinquency .....             | 25 |
| Appendix D - DCI-Canada's Response to the Nunn Commission of Inquiry.....                 | 26 |

## **ABOUT DEFENCE FOR CHILDREN INTERNATIONAL-CANADA**

Defence for Children International (DCI) is an independent, grassroots organization, founded in Geneva, Switzerland in 1979. Its mission is to promote and protect the rights of the child through international action. DCI has national sections in 45 countries and an international secretariat in Geneva. DCI has consultive status with the Economic and Social Council of the United Nations, the ILO, UNICEF, UNESCO and the Council of Europe.

Defence for Children International-Canada (DCI-Canada) was recognized as part of the Defence for Children International movement in June 1989 and incorporated in Canada as a non-profit organization and registered charity in 1990. DCI-Canada monitors governments' compliance with the United Nations *Convention on the Rights of the Child*, both in Canada and around the world. We also promote the full implementation of the Convention through research, advocacy, development and youth participation projects.

### **Defence for Children International-Canada**

20 Spadina Road  
Toronto, Ontario M5R 2S7

<http://www.dci-canada.org>  
E-mail: [contact@dci-canada.org](mailto:contact@dci-canada.org)

## INTRODUCTION

DCI-Canada welcomes the opportunity that Bill C-25 provides to discuss Canada's policy for young people in conflict with the law.

Our starting point in the development and analysis of youth justice policy is the recognition that Canada is part of a global consensus on children's right. This consensus is articulated in international human rights standards such as the United Nations *Convention on the Rights of the Child*,<sup>1</sup> the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,<sup>2</sup> the United Nations Guidelines for the Prevention of Juvenile Delinquency,<sup>3</sup> and related international instruments.

This paper is organized in two main parts. In the first part, we identify principles for youth justice policy, grouped in two categories: child rights based principles, and evidence based principles. In the second part, we set out DCI-Canada's position on the measures contained in Bill C-25, and other relevant legislative and policy measures. These include: the proposed amendments dealing with pre-trial detention in clause 1, the proposed amendments dealing with sentencing principles in clause 2, the proposed comprehensive review of youth justice legislation, presumptive offences and adult sentences, and crime prevention and social policy.

We have identified measures that we support because we believe that they are sound and with a child rights based and evidence based approach to youth justice policy. We have also identified a number of areas for improvement. DCI-Canada is committed to working with all parties in the House of Commons to ensure that Canada achieves sound youth justice policy and practice, and sound youth justice legislation.

---

<sup>1</sup> *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 [CRC].

<sup>2</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), UN GAOR, 40th Sess., UN Doc. A/RES/40/33 (1985), [*Beijing Rules*].

<sup>3</sup> *United Nations Guidelines for the Prevention of Juvenile Delinquency* ("The Riyadh Guidelines"), UN GAOR, 45th Sess., UN Doc. A/RES/45/112, (1990) [*Riyadh Guidelines*].

## DCI-CANADA'S APPROACH TO YOUTH JUSTICE POLICY

DCI-Canada embraces and advocates a two-fold approach to the development and implementation of youth justice policy: these must be (1) child rights based, and (2) evidence based.

### CHILD RIGHTS BASED APPROACH

We begin our discussion of the child rights based approach to youth justice policy with an acknowledgment that Canada is a member of a global community that recognizes the fundamental role of human rights in a civil society. The question of how national governments should approach youth justice policy is not a marginal human rights issue in the international community. On the contrary, youth justice policy is a topic of considerable research, debate and policy-making at the international level, and particularly within the United Nations system. Youth justice policy is directly addressed in numerous international human rights standards, including binding treaties and several sets of rules adopted by the United Nations General Assembly.

First, Canada is a party to the CRC. The CRC was adopted by the General Assembly of the United Nations on November 20, 1989, and ratified by Canada on December 13, 1991. The CRC has been ratified by 193 countries, making it the world's most widely ratified human rights treaty. This treaty represents a global consensus on children's rights. The CRC sets out specific obligations with respect to young people in conflict with the law.

Second, the United Nations has established a number of sets of rules dealing with criminal justice policy, standards for the treatment of incarcerated people, and the rights of young people in conflict with the law. These include the *Beijing Rules* and the *Riyadh Guidelines*.

Additionally, the child rights based approach draws on Canadian human rights standards, notably those set out in the *Canadian Charter of Rights and Freedoms*.<sup>4</sup>

The following list does not exhaust the principles of the child rights based approach to youth justice policy, but identifies six principles particularly relevant to the analysis of Bill C-25. These principles are:

---

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [*Charter*].

- The need for special safeguards and care for young people.<sup>5</sup>
- A separate criminal justice system for young people.<sup>6</sup>
- Restraint in the use of the criminal justice system with young people.<sup>7</sup>
- Minimum use of pre-trial detention and custody.<sup>8</sup>
- Acceptance of sound and enduring social science in the development of youth justice policy.<sup>9</sup>
- Commitment to evidence-based crime prevention programs and social policy.<sup>10</sup>

Finally, we wish to comment on the role that international standards should play in the development of Canada's youth justice policy. First, Canada played a lead role in the establishment of these standards. Hence, they cannot be viewed as an imposition of foreign values or standards on Canadian policy-making. Second, these principles ought not to be viewed as representing a particular interest—such as the young person's interest—to be balanced against other interests such as community safety. The international instruments that set out principles for the youth justice system are the product of a vigorous global dialogue that considered all interests relevant to youth justice. These standards do not represent only one interest in the youth justice system, but instead represent the global consensus on how a balance among all interests should be achieved.

---

<sup>5</sup> CRC, *supra* note 1, preamble; *Beijing Rules*, *supra* note 2, preamble.

<sup>6</sup> CRC, *supra* note 1, article 37(c); *Beijing Rules*, *supra* note 2, r. 2.3.

<sup>7</sup> *Beijing Rules*, *supra* note 2, commentary to r. 5 (Proportionality is one of the two most important objectives of the youth justice system; the social welfare needs of a young person cannot be used to justify an increase in punitive intervention with a young person); *Ibid.*, r. 11 (the youth justice system must consider diverting a young person from the formal justice system).

<sup>8</sup> *Beijing Rules*, *supra* note 2, r. 13.1 (Detention and custody are to be used only as a measure of last resort and for the shortest appropriate period of time); *General Comment No. 10: Children's rights in Juvenile Justice*, Committee on the Rights of the Child, 44th Sess., UN Doc. CRC/C/GC/10 (2007), at page 17 [*General Comment No. 10*]; *Beijing Rules*, *supra* note 2, r. 19 (The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period); Paulo Sérgio Pinheiro, *World Report on Violence Against Children* (Geneva: United Nations Secretary-General's Study on Violence Against Children, 2006), at pages 205-206 [*World Study on Violence Against Children*].

<sup>9</sup> *Beijing Rules*, *supra* note 2, r. 30 (The utilization of research as a basis for an informed juvenile justice policy is widely acknowledged as an important mechanism for keeping practices abreast of advances in knowledge and the continuing development and improvement of the juvenile justice system); *Riyadh Guidelines*, *supra* note 3, ¶ 48 (Programs to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings, and periodically monitored, evaluated and adjusted accordingly); see also: *Ibid.*, r. 8 (the protection of young people's privacy is justified by social science research demonstrating the negative effects of labeling); *Ibid.*, r. 19 (Placement of young people in institutions must be minimized because social science evidence demonstrates the negative effects of such placements).

<sup>10</sup> *Riyadh Guidelines*, *supra* note 3, ¶ 45 (Government agencies should give high priority to plans and programs for young persons and should provide sufficient funds and other resources for the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other relevant services, including drug and alcohol abuse prevention and treatment, ensuring that such resources reach and actually benefit young persons); *Ibid.*, ¶ 48 (Programs to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings, and periodically monitored, evaluated and adjusted accordingly).

## EVIDENCE BASED APPROACH

To a certain extent, the evidence based approach to youth justice policy flows from the principles of the child rights based approach. First, the requirement that intrusive state intervention must be limited to the minimum necessary implies a requirement that such intervention must at all times be justifiable. Second, the importance of an evidence based approach in the development of youth justice policy and practice is explicitly recognized in the international standards.<sup>11</sup>

However, it is important to recognize that the principle that state interference in the lives of individuals ought to be justified by evidence draws on a history and philosophy that includes, but extends far beyond, the child rights movement. The liberty of the individual as an organizing principle of society, and the corollary requirements that state interference in individual liberty must be justified and minimal, can be traced back to the Enlightenment. These principles are fundamental to democratic government, and are recognized in, among other things, the *Universal Declaration of Human Rights*<sup>12</sup> and the *Charter*.<sup>13</sup> The more intrusive the state intervention, the greater the burden will be on the state to justify the intervention. Hence, we find the demand for justification of state intervention arises frequently in circumstances where the state seeks to deprive someone of his or her liberty, such as in the criminal justice system. Examples include the presumption of innocence, the high burden of proof on the crown in criminal cases, the crown's requirement to "show cause" in a bail hearing, and *habeus corpus*.

Furthermore, Canadian *Charter* jurisprudence demonstrates that the demand for justification of state intrusion arises not only at the level of individual cases, but also at the level of legislation. Notably, in *R. v. Oakes*<sup>14</sup> the Supreme Court of Canada established the so-called *Oakes* test, which is the legal test used to determine when a law that infringes a *Charter* right can be justified under section 1 of the *Charter*. This test requires the crown to demonstrate that a law infringing a *Charter* right is justified by a pressing substantial objective, and that the infringement is proportionate to that objective.<sup>15</sup>

Drawing on the above sources, DCI-Canada adopts the following principles of an evidence based approach to youth justice policy:

---

<sup>11</sup> *Beijing Rules*, *supra* note 2, r. 30; *Riyadh Guidelines*, *supra* note 3, ¶ 48.

<sup>12</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948), art. 29(2).

<sup>13</sup> *Charter*, *supra* note 4, s. 1.

<sup>14</sup> *R. v. Oakes* (1986), 1 S.C.R. 103.

<sup>15</sup> *Ibid.*, at 69-70.

- The utilization of research as a basis for an informed youth justice policy is an important mechanism for keeping practices abreast of advances in knowledge, and for the continuing development and improvement of the youth justice system.
- The burden of proof is on the government to justify any measure that involves the government or in the life of a young person in an intrusive manner (“intrusive measure”).
- The government must be able to demonstrate that an intrusive measure is justified by a pressing and substantial objective, and that the intrusive measure is proportionate to that objective.
- At the level of policy development and legislation, the burden of proof on the government arises every time the government seeks to (1) create a new kind of intrusive measure; (2) create a new ground for the use of an existing measure; (3) increase the frequency with which an intrusive measure may be used; and (4) increase the duration or intensity of an intrusive measure.
- The requirement for evidence is on-going. Governments must establish programs of research and data collection to monitor the implementation and effects of youth justice policy. Governments bear a responsibility to ensure that youth justice policy is based on sound evidence rather than the contingent forces of public and ideological opinion, and to take leadership in providing credible information and sound evidence to the public in order to educate Canadians about what works in the youth justice system.

## DCI-CANADA'S POSITION ON BILL C-25

### COMPREHENSIVE REVIEW OF THE YCJA

The *Youth Criminal Justice Act*<sup>16</sup> has now been in force for close to five years. DCI-Canada submits that it is a matter of wide agreement among a range of experts, professionals and community members across Canada that the YCJA is working well in most respects, and for the vast majority of young people in conflict with the law.

When the Minister of Justice introduced Bill C-25 on November 19, 2007, he also announced the government's intent to conduct a "comprehensive review" of the YCJA.<sup>17</sup> Although the scope and activities of this review have not yet been announced, the Minister of Justice recently held a Federal-Provincial-Territorial meeting of Attorneys General to discuss the review.<sup>18</sup> A "comprehensive review" seems to presuppose a need for wide ranging reform of Canada's youth justice policy and legislation. However, there is no evidence that such reform is required. While there will always be some disagreement among experts about what is the best youth justice policy, and while there will always be members of the public who are unsatisfied with the youth justice system, the YCJA appears to be working well and enjoys significant public support across Canada.

We note that, historically, there has been a failure of some jurisdictions to fully implement the *Young Offenders Act*, and later the YCJA. It is obvious that when a law has not been implemented, it cannot be evaluated. Consequently, DCI-Canada submits that the first step in any review of Canada's youth justice policy must be a thorough documentation of the measures taken by all provinces and territories to implement of the YCJA.

A review of the YCJA is not required at this time. However, monitoring the implementation of the YCJA should continue. Department of Justice Canada has conducted a range of research, monitoring and evaluation activities to track the implementation of the YCJA. In keeping with the international standards,<sup>19</sup> a significant amount of the research and evaluation work has been

---

<sup>16</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1 [YCJA].

<sup>17</sup> Department of Justice Canada, Background, "Proposed Amendments to the Youth Criminal Justice Act" (19 November 2007). On-line: [http://www.canada.justice.gc.ca/en/news/nr/2007/doc\\_32173.html](http://www.canada.justice.gc.ca/en/news/nr/2007/doc_32173.html) [Bill C-25 Background].

<sup>18</sup> Department of Justice Canada, News Release, "Federal-Provincial-Territorial Attorneys General Meet to Discuss the Review of the Youth Criminal Justice Act" (15 February 2008). On-line: [http://www.canada.justice.gc.ca/en/news/nr/2008/doc\\_32208.html](http://www.canada.justice.gc.ca/en/news/nr/2008/doc_32208.html)

<sup>19</sup> *Beijing Rules*, *supra* note 2, commentary to r. 30; *Riyadh Guidelines*, *supra* note 3, ¶ 63-64; *General Comment No. 10*, *supra* note 8, at page 21.

conducted by independent researchers, and some results have been made public. These activities should continue, and should be expanded to bring an even larger number of researchers, professionals, community members and affected young people into the process.

In the event that the Department of Justice does proceed with its comprehensive review, DCI-Canada submits that this review must be evidence based, and must give appropriate consideration to international standards. Finally, the review must engage a broad range of experts and stakeholders beyond provincial governments. In accordance with article 12 of the CRC,<sup>20</sup> young people must have a voice in this process. Although DCI-Canada disagrees with the need for a comprehensive review, we wish to participate in the review, should it proceed.

### **CLAUSE 1 – PRE-TRIAL DETENTION**

Clause 1 makes two changes to the YCJA. First, it amends subsection 29(2) of the YCJA by creating a new ground for pre-trial detention. Second, it creates a new subsection 29(3), which clarifies that the presumption against pre-trial detention is rebuttable, and states when this presumption can be rebutted.

By way of background, we make two observations regarding the amendments dealing with pre-trial detention. First, the grounds for holding an accused person in pre-trial detention are set out in subsection 515(10) of the *Criminal Code*, and are the same for adults and young persons. Subsection 515(10) provides that an accused person may be held in pre-trial detention when it is:

- necessary to ensure his or her attendance in court
- necessary for the protection or safety of the public
- necessary in order to maintain confidence in the administration of justice<sup>21</sup>

All three of the above grounds for pre-trial detention apply to young persons dealt with under the YCJA. However, subsection 29(2) of the YCJA places limits on the circumstances that will permit a young to be detained for the second reason—protection of the public. Subsection 29(2) provides that pre-trial detention for the purposes of protecting the public is presumed to be unnecessary unless certain criteria are met. However, the YCJA does not place any additional limits on the circumstances that will permit a young person to be detained for the purpose of

---

<sup>20</sup> CRC, *supra* note 1, art. 12.1: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

<sup>21</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 515(10) [*Criminal Code*].

ensuring his or her attendance in court, or for the purpose of maintaining confidence in the administration of justice. Subsection 29(2) of the YCJA is discussed in further detail below.

Second, the proposed amendments dealing with pre-trial detention are to a large extent driven by the Nunn Commission of Inquiry (Nunn Commission), a public inquiry established in Nova Scotia in 2005 to examine the circumstances leading to the death of Theresa McEvoy.<sup>22</sup> Ms. McEvoy died in a car accident caused by a young person driving a stolen car at high speed. The Nunn Commission made six recommendations for changes to the YCJA.<sup>23</sup> DCI-Canada disagrees with most of the Nunn Commission's recommendations for changes to the YCJA. Moreover, it is our position that the Nunn Commission was in no position to consider or make recommendations to change the YCJA, and strayed beyond its capacity and proper scope in doing so. DCI-Canada's response to the Nunn Commission is provided in *Appendix D*.

### ***Subsection 29(2) – Creation of a New Ground for Pre-Trial Detention***

Subsection 29(2) sets out the presumption against pre-trial detention of young persons for the purpose of protecting the public. At present, subsection 29(2) provides that pre-trial detention of a young person for the purpose of protecting the public is presumed to be unnecessary unless one of three criteria are satisfied:

- The young person is charged with a violent offence. “Violent offence” is defined as an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm.<sup>24</sup>
- The young person has been found guilty of failing to comply with non-custodial sentences or conditions of release.
- The young person is charged with an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt.

The effect of the proposed amendment to subsection 29(2) of the Act is two-fold. First, in what can be described as a “housekeeping” measure, the amendment takes grounds for pre-trial detention that are currently referred to by cross-reference, and re-states these grounds within the text of subsection 29(2). This has no effect on the substance of the law, but may help to clarify

---

<sup>22</sup> Bill C-25 Backgrounder, *supra* note 17.

<sup>23</sup> Nova Scotia, Nunn Commission of Inquiry, *Spiralling Out of Control: Lessons Learned From a Boy In Trouble: Final Report of the Nunn Commission of Inquiry* (Halifax: Nunn Commission of Inquiry, 2006), at pages 289-290 [*Nunn Commission*].

<sup>24</sup> *R. v. C.D.*; *R. v. C.D.K.*, [2005] 3 S.C.R. 668, 2005 SCC 78, ¶ 87.

the law by making the section dealing with pre-trial detention more self-contained and readable. DCI-Canada supports this measure.

The second effect of the proposed amendment to subsection 29(2) of the Act is to create a new ground for pre-trial detention, namely, when a young person is charged with an offence that “endangered the public by creating a substantial likelihood of serious bodily harm to another person.” This ground for pre-trial detention does not exist in the adult system. DCI-Canada objects to this measure on three grounds.

First, it is an unnecessary expansion of the grounds for pre-trial detention. The addition of a new ground for pre-trial detention will inevitably lead to an increase in the use of pre-trial detention. Indeed, the Department of Justice Canada backgrounder on Bill C-25 makes clear that this is the purpose of the provision: “The proposed amendment to the YCJA, in the area of pre-trial detention, would make it easier to detain before trials a broader range of young persons ...”<sup>25</sup> There is no evidence that such an increase is necessary. On the contrary, the Department of Justice Canada consultation paper on pre-trial detention describes evidence that use of pre-trial detention is too high. The paper reports that the rate of pre-trial detention is unchanged from the last year that the *Young Offenders Act*<sup>26</sup> was in force, and that senior officials from across Canada responsible for the administration of detention facilities are concerned with the high use of pre-trial detention.<sup>27</sup> The paper also reports that a majority of young people (73%) held in pre-trial detention are charged with non-violent offences, and that a significant share are charged with administrative offences, such as breach of a bail or probation condition.<sup>28</sup>

Second, this provision requires the youth justice court to engage in an unfair and logically suspect inquiry into the young person’s alleged past behaviour. To ask whether an alleged offence “endangered the public by creating a substantial likelihood of serious bodily harm to another person” invites speculation about possible alternative outcomes of alleged past behaviour. In plain terms, this inquiry asks: “In spite of the fact that serious bodily harm to another person did not occur, did the alleged behaviour create a significant risk that it might have occurred?” This kind of inquiry is fundamentally unfair. It defies any notion of responsibility to deprive a young person of his or her liberty because of harm that he or she *did not* cause, and that did not occur. Adding to the unfairness, this kind of inquiry has no logical boundaries. Although every action has only one outcome, there is an infinite range of possible alternative outcomes.

---

<sup>25</sup> Bill C-25 Backgrounder, *supra* note 17.

<sup>26</sup> *Young Offenders Act*, R.S.C. 1985, c. Y-1 [repealed].

<sup>27</sup> Department of Justice Canada, *Pre-Trial Detention Under the Youth Criminal Justice Act: A Consultation Paper* (Ottawa: Department of Justice Canada, 2007), at page 4 [*Pre-Trial Detention*].

<sup>28</sup> *Ibid.*, at pages 20-21.

Hence, there is no logical limit to the hypothetical harms that can be attributed to any alleged offence. Even the most minor offence *might* have resulted in serious bodily harm to another person. This kind of bizarre and logically suspect inquiry has no place in the youth justice court, and no place in the Canadian legal system.

Third, this provision violates the presumption of innocence. To ask whether a young person is charged with an offence that “endangered the public by creating a substantial likelihood of serious bodily harm to another person” requires the youth justice court to decide whether a young person has committed a dangerous offence. This decision takes place before a trial, before the young person has the opportunity to contest the charge against him or her, and before the court has heard evidence and made findings of fact. Such a conclusion will be extremely prejudicial to any young person, and will violate the young person’s right to be presumed innocent until proven guilty. The presumption of innocence is a fundamental principle in the youth justice system, and in the criminal justice system. This principle is entrenched in the CRC,<sup>29</sup> the *Beijing Rules*,<sup>30</sup> the *Criminal Code*<sup>31</sup> and the *Charter*.<sup>32</sup>

## RECOMMENDATION 1

**Amend clause 1 by striking out the following words in lines 13 to 16 on page 1: “or an offence that otherwise endangered the public by creating a substantial likelihood of serious bodily harm to another person.”**

### *Subsection 29(3) – Clarification of Presumption Against Pre-Trial Detention*

The proposed subsection 29(3) clarifies the presumption against pre-trial detention in subsection 29(2). Subsection 29(3) provides that where a young person cannot be detained under subsection 29(2), the presumption is rebuttable. Subsection 29(3) further provides that the presumption is rebuttable if there is a substantial likelihood that the young person will, if released from custody, commit a violent offence, or an offence that otherwise endangers the public by creating a substantial likelihood of serious bodily harm to another person. DCI-Canada supports the general thrust of this provision, and submits that two aspects of the provision require amendment.

There is evidence of conflicting views about the nature of subsection 29(2) of the YCJA, and particularly conflicting views about whether this provision creates a prohibition against pre-trial

---

<sup>29</sup> CRC, *supra* note 1, art. 40.2(b)(i).

<sup>30</sup> *Beijing Rules*, *supra* note 2, r. 6.1.

<sup>31</sup> *Criminal Code*, *supra* note 21, s. 6(1).

<sup>32</sup> *Charter*, *supra* note 4, s. 11(d).

detention, or a presumption.<sup>33</sup> Consequently, a legislative amendment to clarify the presumption in subsection 29(2) appears to be in order.

At present, the YCJA does not specify under what conditions the presumption against pre-trial detention will be rebutted. The proposed amendment circumscribes the conditions that will rebut the presumption against pre-trial detention. There is a vast disparity in the use of pre-trial detention across Canada,<sup>34</sup> which suggests that in some provinces detention is over-used. The proposed subsection 29(3) may help to curb the apparent over-use of pre-trial detention, and particularly the use of pre-trial detention for purposes contrary to the aims of the YCJA.

The proposed amendment establishes two grounds on which the presumption against pre-trial detention will be rebutted:

- There is a substantial likelihood that the young person will, if released from custody, commit a violent offence
- There is a substantial likelihood that the young person will, if released from custody, commit an offence that otherwise endangers the public by creating a substantial likelihood of serious bodily harm to another person

The first ground permits the use of pre-trial detention in conditions of risk that are clearly defined and obviously connected to the goal of protecting the public. Although the “substantial likelihood” test may be applied inconsistently,<sup>35</sup> and although there are weaknesses inherent in any attempt to predict future risk,<sup>36</sup> this ground nevertheless strikes a reasonable balance between public safety and the liberty interest of the young person. To ensure that this ground is only used in cases of legitimate risks to public safety, we recommend adding a requirement that the youth justice court be satisfied that the risk has been proved *based on compelling and credible evidence*. Also, as with any other youth justice measure, on-going data collection and monitoring will be required to ensure that this measure is implemented in a manner consistent with the aims of the YCJA.

The second ground, however, permits the use of pre-trial detention in conditions that are vaguely defined and that appear to be very remote from a *bona fide* danger to community safety. Given the definition of “violent offence,” the first ground permits pre-trial detention if there is a substantial likelihood that the young person will commit any offence in which he or she causes,

---

<sup>33</sup> *Pre-Trial Detention*, *supra* note 27, at page 32.

<sup>34</sup> *Ibid.*, at page 18.

<sup>35</sup> *Ibid.*, at pages 26-27.

<sup>36</sup> *Ibid.*, at pages 24-25.

attempts to cause or threatens to cause bodily harm. In short, the first ground permits detention when there is a risk of bodily harm. By contrast, the second ground permits pre-trial detention if there is substantial likelihood that the young person will commit any offence that creates a substantial likelihood of serious bodily harm. In short, the second ground permits detention when there is a risk of an offence that creates a risk of bodily harm. In plain terms, the second ground permits pre-trial detention when there is a risk of a risk.

A risk of a risk of serious bodily harm to another person is too broad and too remote to justify the pre-trial detention of a young person, particularly in light of the international standards requiring that pre-trial detention of young people be limited to the minimum necessary. Any young person who poses a genuine threat to community safety will fall within the scope of the first ground.

## **RECOMMENDATION 2**

**Amend clause 1 by striking out the following words in lines 9 to 12 on page 2:  
“or an offence that otherwise endangers the public by creating a substantial  
likelihood of serious bodily harm to another person.”**

## **RECOMMENDATION 3**

**Amend clause 1 by adding the following words in line 4 on page 2 after the  
word “satisfied”: “based on compelling and credible evidence.”**

## **CLAUSE 2 – SENTENCING PRINCIPLES**

Clause 2 amends subsection 38(2) of the YCJA by adding two new objectives that a youth justice sentence may serve. These are: denunciation of unlawful conduct, and deterring the young person and other young persons from committing offences. DCI-Canada strongly objects to this measure on three grounds.

First, these two sentencing objectives serve one purpose only: to increase the penalty that may be imposed on a young person. It is self-evident that such principles would only be invoked to justify a relative increase in the severity of a youth justice sentence. However, the YCJA already contains many provisions to ensure that youth justice sentences are adequate. The sentencing principles contained in section 38 of the YCJA provide that youth justice sentences must “hold a

young person accountable”<sup>37</sup> by imposing “just sanctions that have meaningful consequences,”<sup>38</sup> must ensure that sentences are “proportionate to the seriousness of the offence,”<sup>39</sup> “promote a sense of responsibility in the young person”<sup>40</sup> and “an acknowledgement of the harm done to victims and the community,”<sup>41</sup> and that the youth justice court must consider “the harm done to victims”<sup>42</sup> and whether the young person is a repeat offender.<sup>43</sup>

Second, the objectives of denunciation and deterrence do not serve the purposes of the youth justice system identified in Canadian law and in the international standards. As discussed above, the function of these provisions is to increase the penalties imposed on young people—it is a strictly punitive function. This punitive approach is inconsistent with the purpose of the youth justice system identified in the YCJA, which include: preventing crime by addressing the circumstances underlying a young person’s behaviour, rehabilitating young people who commit offences and reintegrating them into society, and ensuring that young people are subject to meaningful consequences for offences.<sup>44</sup> The YCJA states that these three purposes serve the fundamental goal of protecting the public.<sup>45</sup> The YCJA identifies a number of considerations that help to inform the concept of “meaningful consequences,” including fair and proportionate accountability, timely intervention that reinforces the link between the offending behaviour and its consequences, reinforcing respect for societal values, encouraging repair of the harm done to victims and communities, the young person’s level of development, and respect for gender, ethnic, cultural and linguistic differences.<sup>46</sup> Strictly punitive purposes such as denunciation and deterrent are not identified anywhere in the YCJA. Likewise, this strictly punitive measure is inconsistent with the purposes of the youth justice system identified in the international standards. In its recent comment on juvenile justice, the United Nations Committee on the Rights of the Child observed that “a strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40(1)” of the CRC.<sup>47</sup>

Third, there is no evidence that deterrence and denunciation work, and considerable evidence that they do not work. With respect to the effectiveness of specific deterrents, a recent meta-analysis of 111 studies on the effects of criminal justice sanctions on more than 442,000

---

<sup>37</sup> YCJA, *supra* note 16, s. 38(1).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, s. 38(2)(b).

<sup>40</sup> *Ibid.*, 38(2)(e)(iii).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, s. 38(3)(b).

<sup>43</sup> *Ibid.*, s. 38(3)(e).

<sup>44</sup> *Ibid.*, s. 3(1)(a).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, s. 3(1)(b)-(c).

<sup>47</sup> *General Comment No. 10, supra* note 8, at page 16.

offenders prepared for the Solicitor General of Canada found that harsher penalties did not reduce recidivism, and in fact contributed to an increase in recidivism.<sup>48</sup> With respect to general deterrence and denunciation, studies of young people's perceptions of the youth justice system have found that young people are ignorant of many aspects of the youth justice system and tend to under-estimate the penalties that will be imposed on youth offenders.<sup>49</sup> Thus, the message that is intended to be conveyed by instances of general deterrence and denunciation is unlikely to reach the audience. Finally, it is normal and developmentally appropriate for young people to engage in impulsive risk-taking behaviour, and not to consider the consequences of their behaviour. This is a point of wide agreement, and is one of the premises of a separate justice system for young people.<sup>50</sup> Consequently, neither specific nor general deterrence are likely to have substantial influence when young people commit offences. This evidence regarding the ineffectiveness of deterrence and denunciation in reducing youth crime is neither novel nor controversial within social science. Rather, it is consistent with many years of social science research conducted in Canada and around the world.

This amendment does not serve the goals of the youth justice system, nor does it have any reasonable prospect of reducing offending behaviour. What this amendment achieves is the addition of two grounds upon which a youth justice court may increase the penalty against a young person. Considering the available evidence, this amounts to nothing more than a thoughtless “get-tough” approach that is doomed to fail Canada's communities and young people.

#### **RECOMMENDATION 4**

**Strike out clause 2 in its entirety.**

---

<sup>48</sup> Paula Smith, Claire Goggin & Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Ottawa: Public Works and Government Services Canada, 2002), at page ii; see also: *World Study on Violence Against Children*, *supra* note 8, at page 200.

<sup>49</sup> Peterson-Badali, Michele & Christopher J. Koegl. “Young people's knowledge of the Young Offenders Act and the youth justice system” (1998) 40 *Canadian Journal of Criminology* 127, at page 135; Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Renewing Youth Justice; Thirteenth Report of the Standing Committee on Justice and Legal Affairs* (Ottawa: House of Commons, April 1997), at page 23 [*Renewing Youth Justice*].

<sup>50</sup> *Renewing Youth Justice*, *supra* note 49, at 25.

## PRESUMPTIVE OFFENCES AND ADULT SENTENCES

DCI-Canada supports a separate system for youth offenders. In accordance with the principles set out in the CRC<sup>51</sup> and the *Beijing Rules*,<sup>52</sup> and consistent with the recent comment on juvenile justice issued by the United Nations Committee on the Rights of the Child,<sup>53</sup> DCI-Canada submits that Canada must maintain a separate youth justice system. We oppose all adult sentences for young people. In particular, DCI-Canada objects to the presumptive offences provisions of the YCJA. These provisions require that a young person found guilty of certain offences, or a certain pattern of offences, will be sentenced as an adult unless the young person can show that a youth sentence will be adequate to hold him or her accountable.

The House of Commons Standing Committee on Justice And Legal Affairs examined presumptive offences in its comprehensive study of the youth justice system that preceded the introduction of the YCJA. The Committee's view of presumptive offences was, at best, ambivalent: The Committee recommended that the Department of Justice Canada study presumptive offences for three years and then report back on the results.<sup>54</sup>

The presumptive offences provisions of the YCJA were opposed by the Government of Quebec, which referred the provisions to the Quebec Court of Appeal.<sup>55</sup> This reference asked the Quebec Court of Appeal to consider, among other things, whether the presumptive offences provisions of the YCJA violate the *Charter*. Less than one month after the YCJA came into force, the Quebec Court of Appeal ruled in a declaratory judgment that these provisions violate the *Charter*.<sup>56</sup>

On May 1, 2003, the Minister of Justice announced that the Government of Canada would not appeal the decision of the Quebec Court of Appeal.<sup>57</sup> On May 12, 2003, the Minister of Justice announced the government's intention to amend the YCJA in accordance with the *Quebec Reference* decision. The Minister of Justice stated:

...the [Quebec Court of Appeal] decided that the two presumptions were against the charter. We decided not to appeal because we believe there is a way to meet

---

<sup>51</sup> CRC, *supra* note 1, art. 37(c).

<sup>52</sup> *Beijing Rules*, *supra* note 2, r. 2.3.

<sup>53</sup> *General Comment No. 10*, *supra* note 8, at pages 4, 20.

<sup>54</sup> *Renewing Youth Justice*, *supra* note 49, at page 65.

<sup>55</sup> *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] R.J.Q. 1118, 228 D.L.R. (4th) 63 [*Quebec Reference*].

<sup>56</sup> *Ibid.*

<sup>57</sup> *House of Commons Debates*, Vol. 138, No. 093 (1 May 2003) at 5710 (Hon. Martin Cauchon).

the objective of the legislation without appealing. As I have said, this fall we will proceed with amendments to the act in order to clarify the situation.<sup>58</sup>

More recently, the same presumptive offences provisions dealt with by the Quebec Court of Appeal in the *Quebec Reference* have been struck down by the Ontario Court of Appeal in *R. v. D.B.*<sup>59</sup> An appeal to the Supreme Court of Canada was granted, and the appeal was heard on October 10, 2007. The Court reserved judgment.

Considering that a comprehensive study by a House of Commons committee expressed ambivalence toward presumptive offences, that two provincial courts of appeal have ruled that these provisions violate the *Charter*, and that a previous Minister of Justice has announced that the YCJA would be amended to eliminate the presumption of an adult sentence, legislation to eliminate presumptive offences is long overdue and should be a high priority for this Parliament.

## RECOMMENDATION 5

**Regardless of the Supreme Court of Canada's decision in *R. v. D.B.*, amend the YCJA in accordance with the decisions of the Quebec Court of Appeal in the *Quebec Reference* and the Ontario Court of Appeal in *R. v. D.B.***

## CRIME PREVENTION AND SOCIAL POLICY

Canada's youth justice system has three primary objectives, which are described in both the Department of Justice Canada's policy document, *A Strategy for the Renewal of Youth Justice*, and in the YCJA itself. These objectives are:

- Crime Prevention
- Meaningful consequences for youth crime
- Rehabilitation and reintegration<sup>60</sup>

In *A Strategy for the Renewal of Youth Justice*, the Department of Justice Canada recognized the fundamental role of crime prevention in youth justice policy: "Protection of society is, first and foremost, achieved by preventing crime."<sup>61</sup> Crime prevention measures identified in Canada's

---

<sup>58</sup> *House of Commons Debates*, Vol. 138, No. 100 (12 May 2003) at 6089 (Hon. Martin Cauchon).

<sup>59</sup> *R. v. D.B.* (2006), 79 O.R. (3d) 698, 206 C.C.C. (3d) 289 (C.A) [*R. v. D.B.*].

<sup>60</sup> YCJA, *supra* note 16, s. 3(1)(a); Department of Justice Canada, *A Strategy for the Renewal of Youth Justice* (Ottawa: Department of Justice Canada, 1998), at pages 13-14 [*A Strategy for the Renewal of Youth Justice*].

<sup>61</sup> *Ibid.*, at page 2.

youth justice strategy include funding for community-based crime prevention programs through the National Crime Prevention Centre, funding for programs to support early childhood development, and funding for youth employment programs.<sup>62</sup>

This approach is consistent with the international standards. In its recent comment on juvenile justice, the United Nations Committee on the Rights of the Child identified crime prevention as one of four “core elements” of youth justice policy.<sup>63</sup> The General Assembly of the United Nations has recognized the importance of crime prevention in youth justice policy by adopting guidelines dealing specifically with youth crime prevention (the *Riyadh Guidelines*). In particular, the *Riyadh Guidelines* require governments to give high priority to social programs aimed at youth crime prevention, and to provide sufficient funding for these programs.<sup>64</sup>

In light of the above, DCI-Canada is concerned that the Government of Canada has cut funding to social programs relevant to the prevention of youth crime. In September 2006 the Government of Canada announced funding cuts over two years to youth employment programs in the amount of \$55.6M, and cuts to the National Crime Prevention Centre in the amount of \$14.1M.<sup>65</sup> The Government of Canada also terminated the national child care program.<sup>66</sup> Considered in the context of the amendments to the YCJA proposed in Bill C-25—which if passed will increase the use of pre-trial detention and increase penalties for young people who are sentenced—cuts to social programs relevant to youth crime prevention are particularly disturbing. The approach to youth justice policy adopted by the international community and by the Government of Canada calls for a balance between crime prevention, meaningful consequences for youth crime, and rehabilitation and reintegration. The present government now risks upsetting this careful balance.

## RECOMMENDATION 6

**Strengthen Canada’s social policy and programs relevant to youth crime prevention by restoring and enhancing funding for effective programs, including the National Crime Prevention Centre, youth employment programs, and early childhood development programs.**

---

<sup>62</sup> *Ibid.*, at 14-16.

<sup>63</sup> *General Comment No. 10*, *supra* note 8, at page 4.

<sup>64</sup> *Riyadh Guidelines*, *supra* note 3, ¶ 45.

<sup>65</sup> Treasury Board of Canada Secretariat, Background, “Effective Spending” (25 September 2006). On-line: [http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925\\_e.asp](http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp).

<sup>66</sup> *House of Commons Debates*, Vol. 138, No. 2 (4 April 2006) at 12 (Mr. Pierre Lemieux).

## TABLE OF AUTHORITIES

### LEGISLATION

- Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.
- Criminal Code*, R.S.C. 1985, c. C-46.
- Young Offenders Act*, R.S.C. 1985, c. Y-1 [repealed].
- Youth Criminal Justice Act*, S.C. 2002, c. 1.

### JURISPRUDENCE

- Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] R.J.Q. 1118, 228 D.L.R. (4th) 63.
- R. v. C.D.*; *R. v. C.D.K.*, [2005] 3 S.C.R. 668, 2005 SCC 78.
- R. v. D.B.* (2006), 79 O.R. (3d) 698, 206 C.C.C. (3d) 289 (C.A.).
- R. v. Oakes* (1986), 1 S.C.R. 103.

### GOVERNMENT DOCUMENTS

- Canada. Parliament. House of Commons. Standing Committee on Justice and Legal Affairs. *Renewing Youth Justice; Thirteenth Report of the Standing Committee on Justice and Legal Affairs* (Ottawa: House of Commons, April 1997).
- Department of Justice Canada. *Pre-Trial Detention Under the Youth Criminal Justice Act: A Consultation Paper*. (Ottawa: Department of Justice Canada, 2007).
- Department of Justice Canada. *A Strategy for the Renewal of Youth Justice*. (Ottawa: Department of Justice Canada, 1998).
- House of Commons Debates*, Vol. 138, No. 2 (4 April 2006) at 12 (Mr. Pierre Lemieux).
- House of Commons Debates*, Vol. 138, No. 093 (1 May 2003) at 5710 (Hon. Martin Cauchon).
- House of Commons Debates*, Vol. 138, No. 100 (12 May 2003) at 6089 (Hon. Martin Cauchon).
- Nova Scotia. Nunn Commission of Inquiry. *Spiralling Out of Control: Lessons Learned From a Boy in Trouble: Final Report of the Nunn Commission of Inquiry*. (Halifax: Nunn Commission of Inquiry, 2006).

## INTERNATIONAL MATERIALS

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

*General Comment No. 10: Children's rights in Juvenile Justice*, UN CRC, 44th Sess., UN Doc. CRC/C/GC/10 (2007).

*United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"), UN GAOR, 40th Sess., UN Doc. A/RES/40/33 (1985).

*United Nations Guidelines for the Prevention of Juvenile Delinquency* ("The Riyadh Guidelines"), UN GAOR, 45th Sess., UN Doc. A/RES/45/112, (1990).

*Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948).

## SECONDARY MATERIALS

Department of Justice Canada. Backgrounder. "Proposed Amendments to the Youth Criminal Justice Act" (19 November 2007). On-line:

[http://www.canada.justice.gc.ca/en/news/nr/2007/doc\\_32173.html](http://www.canada.justice.gc.ca/en/news/nr/2007/doc_32173.html).

Department of Justice Canada. News Release. "Federal-Provincial-Territorial Attorneys General Meet to Discuss the Review of the Youth Criminal Justice Act" (15 February 2008). On-line: [http://www.canada.justice.gc.ca/en/news/nr/2008/doc\\_32208.html](http://www.canada.justice.gc.ca/en/news/nr/2008/doc_32208.html) "

Treasury Board of Canada Secretariat. Backgrounder. "Effective Spending" (25 September 2006). On-line: [http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925\\_e.asp](http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp).

Peterson-Badali, Michele & Christopher J. Koegl. "Young people's knowledge of the Young Offenders Act and the youth justice system" (1998) 40 *Canadian Journal of Criminology* 127.

Pinheiro, Paulo Sérgio. *World Report on Violence Against Children* (Geneva: United Nations Secretary-General's Study on Violence Against Children, 2006).

Smith, Paula, Claire Goggin & Paul Gendreau. *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Ottawa: Public Works and Government Services Canada, 2002).

## APPENDIX A

### Convention on the Rights of the Child

#### 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.

## APPENDIX B

### United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)

#### 13. Detention pending trial

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

. . . . .

#### 19. Least possible use of institutionalization

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

#### Commentary

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

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

## APPENDIX C

### **United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”)**

#### V. Social Policy

45. Government agencies should give high priority to plans and programmes for young persons and should provide sufficient funds and other resources for the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other relevant services, including drug and alcohol abuse prevention and treatment, ensuring that such resources reach and actually benefit young persons.

.....

48. Programmes to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings, and periodically monitored, evaluated and adjusted accordingly.

## APPENDIX D

### DCI-Canada's Response to the Nunn Commission of Inquiry

Theresa McEvoy died on October 14, 2004 in a motor vehicle collision caused by a 16-year-old who ran through a stop sign while driving a stolen car at high speed. The young person, "AB," had been released from pre-trial detention two days before the accident. AB had committed a number of car thefts beginning in January 2004, and owing to delays and mistakes in the handling of his case, had still not been found guilty or sentenced for any of his charges nine months later when he caused the collision that killed Theresa McEvoy.

The death of Theresa McEvoy was a senseless and tragic loss. DCI-Canada expresses our deepest sympathies to the family of Theresa McEvoy. The Nunn Commission of Inquiry was a response to a community that was understandably shocked by this tragedy, and that demanded answers as to how it occurred.

The Inquiry made a number of findings of fact and recommendations in its report issued on December 5, 2006, including a thorough description of AB's escalating criminal behaviour and the events leading to the death of Ms. McEvoy. The Inquiry also made findings and recommendations regarding the *Youth Criminal Justice Act* (YCJA). It is the position of DCI-Canada that the Inquiry reached far beyond its capacity and proper scope in making recommendations to change the YCJA.

Public inquiries perform multiple functions. As Madam Justice Bellamy stated in the final report of the Toronto Computer Leasing Inquiry: "Inquiries are investigations, and in that sense they are informative and educational. They are also preventive, in that they seek to ensure that any mistakes uncovered will not be repeated."<sup>1</sup> The preventive function of an inquiry may be limited to recommendations about matters local or immediate to the events under investigation, or the inquiry may consider broader systemic issues. The latter approach is only possible when an inquiry has assembled the parties, evidence and research necessary to support broader systemic analysis and recommendations.

The Nunn Commission of Inquiry was in no position to engage in broader systemic analysis and recommendations. Only nine parties were granted standing in the Inquiry, all but one of which

---

<sup>1</sup> Toronto, Ontario, Toronto Computer Leasing Inquiry / Toronto External Contracts Inquiry, *Report, Vol. 3, Inquiry Process* (Toronto: Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry, 2005), at page 19.

had direct involvement in the events under examination. The other party, the Canadian Bar Association – Nova Scotia Branch (CBA), was granted standing to represent the interests of the Nova Scotia bar. As a practical matter, the CBA appears to have taken on the role of representing Nova Scotia's defence bar, which was otherwise unrepresented. Organizations with an interest and expertise in youth justice policy, such as John Howard Societies, Elizabeth Fry Societies, youth service agencies, restorative justice organizations and children's rights groups could have assisted the Inquiry in understanding broader systemic issues. So could have groups representing the perspectives of affected young people. None of these organizations had the ability to view the evidence, cross-examine witnesses, or make final submissions. Finally, the Government of Canada, which is responsible for the *Youth Criminal Justice Act*, did not have standing in the Inquiry.

The Inquiry also lacked a sufficient base of evidence to support broader systemic analysis and recommendations. The Inquiry heard evidence from 47 witnesses over 30 days of hearings. This is a relatively brief public inquiry. It does not compare with numerous recent public inquiries that thoroughly considered broader systemic issues. Further, the limited time and witnesses were not evenly divided between investigating facts and considering broader systemic issues. On the contrary: Almost all of the witnesses were called to give direct evidence in regard to the events surrounding the release of AB from detention and the death of Theresa McEvoy. Likewise, the list of exhibits indicates that virtually all of the documentary evidence before the Inquiry addressed the events in question. Unlike other recent public inquiries, the Nunn Commission of Inquiry did not organize its work into an investigative stage and a systemic stage, nor did it signal in any other way a focus on gathering evidence related to broader systemic issues. To the extent that the Inquiry heard evidence on broader systemic issues, this must be viewed as a minor appendix to an inquiry that was largely investigative in nature.

The Inquiry also lacked a research program. Although the Inquiry called three individuals to give expert evidence on the youth justice system, it did not commission papers or take any other steps to conduct or review academic research concerning the issues before the Inquiry.

Finally, even the facts of the single case before the Nunn Commission of Inquiry do not support some of the recommendations for changes to the YCJA. The Inquiry concluded that under the YCJA it is too difficult to detain young people. Yet it is clear from the evidence that AB was released from detention for a variety of reasons, notably that a crown prosecutor consented to AB's release. The Inquiry concluded that under the YCJA it is too difficult to sentence young people to custody. Yet it is clear from the evidence that AB was in fact sentenced to custody for

some of his offences. Even the single case thoroughly examined by the Inquiry does not support the recommendations for changes to the YCJA.

The Nunn Commission of Inquiry appears to have examined the circumstances leading to the death of Theresa McEvoy very carefully, and produced a highly informative public report. It was a thorough investigative inquiry that responded to the public's demand for answers in the wake of a tragedy. However, this Inquiry simply did not dedicate the resources or attention necessary to engage in broad systemic analysis and recommendations. The Inquiry's recommendations for changes to the YCJA are not grounded in sufficient evidence and should be given little weight.