Zora, the *Charter*, and the *Youth Criminal Justice Act*: Defending the Rights of Youths is the Responsibility of all Court Participants

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ABSTRACT

In *R v Zora*, the Supreme Court of Canada underscored the responsibility of all participants—the defence, the Crown, and the presiding judge—to uphold section 11(e) of the *Charter*. While the discussion in *Zora* was within the context of the bail system, there is no reason that the notion that all court actors bear a responsibility to uphold the *Charter* does not apply more broadly throughout criminal law. This essay posits that, like in *Zora*, the same broad, multi-actor responsibility extends to all *Charter* rights and that these shared responsibilities are especially critical when dealing with the rights of youth.

For more than a century, Canada has dealt with youth criminal matters separately from adults. This is partly due to the inherent and heightened vulnerability of young people that come before the court. The enhanced procedural protections of the *Youth Criminal Justice Act* ("*YCJA*") and the careful attention to the *Charter* rights of young people are central to the proper functioning of youth court system in Canada.

The purpose of this essay is to embark on a broad exploration of common *Charter* considerations in the practice of youth criminal justice and to tie these *Charter* considerations to the SCC's message in *Zora*—that all court participants bear a responsibility to uphold the rights of youths. The topics covered herein represent a non-exhaustive list of *Charter* issues that arise within youth proceedings. The focus is on issues unique to youth criminal justice, to the extent that that is possible.

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While this essay primarily addresses sections 7, 9, 11, 12 and 15, it is important to note that youths regularly face the same issues as adults that fall under other sections of the *Charter*, particularly section 8. However, given that the focus of this work is on the unique rights or interpretations of rights afforded to youths, *Charter* issues that apply equally to all accused, regardless of age, are not covered in this essay. While section 8 concerns are routinely raised in youth criminal proceedings, their substance is not sufficiently distinct from adult matters to be addressed herein.

Ultimately, this essay seeks to convey the urgent message that the defence of the *Charter* rights of youth is crucial to the healthy functioning of a youth criminal justice system, and that all *participants* are obligated to work towards that purpose.

Keywords: *Youth Criminal Justice Act*; *Charter*; Rights; Procedural Protections; Section 7; Section 9; Section 11(b); Section 11(c); Section 11(d); Section 11(e); Section 12; Section 15; *United Nations Convention on the Rights of the Child*; Presumption of Diminished Moral Blameworthiness of Young Persons; Enhanced Protections for Rights of Youths.

I. INTRODUCTION

A. *R v Zora*: Who is responsible for upholding the Charter rights of a young accused?

In *R v Zora*, the Supreme Court of Canada ("SCC") underscored the responsibility of all participants—the defence, the Crown, and the presiding judge—to uphold section 11(e) of the *Charter*.[1] While the discussion in *Zora* was within the context of the bail system, the notion that all court participants bear a responsibility to uphold the *Charter* ought to apply more broadly.

This essay posits that, like in *Zora*, a multi-actor responsibility extends to all *Charter* rights and that these shared responsibilities are especially critical when dealing with the rights of youth. This essay presents a broad exploration of common *Charter* considerations in the practice of youth criminal justice and ties those considerations to the SCC's message in *Zora*—that all court participants should work together to build a court system that upholds the rights of accused persons.

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1 *R v Zora*, 2020 SCC 14 at paras 101-103 [*Zora*].

B. *Charter* Considerations Unique to Youth Criminal Justice Proceedings

In light of the unique position of young people in Canadian society, Parliament has enacted a separate mechanism for criminal proceedings for youth by way of the *Youth Criminal Justice Act*.[2] The SCC has attributed this separation as a recognition of "the heightened vulnerability and reduced maturity of young persons."[3]

Furthermore, by enacting a criminal justice for youth that is separate and apart from adults, Parliament has extended enhanced procedural protections to youth, in keeping with its international obligations, in particular the *United Nations Convention on the Rights of the Child*, 20 November 1989, Treaty Series 1577, 3 (entered into force 2 September 1990) [*UNCRC*], which is referenced in the Preamble of the *YCJA*.[4]

While the *Canadian Charter of Rights and Freedoms* ("*Charter*") is applicable in both adult and youth criminal proceedings, there are several areas in which the interpretation and/or implementation of the *Charter* differs.[5] Furthermore, many provisions within the *YCJA* provide enhanced procedural protections to young people. While these enhanced statutory protections do not always lead to greater *Charter* protections for young people, they are often significant in the interpretation of the *Charter* on a case-by-case basis.

In *R v KJM*, Justice Abella, writing for the dissent (the passage was later adopted on this point by the majority opinion in *R v CP* at paragraph 147), identifies several of the unique and wide-ranging procedural safeguards afforded to youth in the *YCJA*:

> Such enhanced procedural rights in the *YCJA* include: extrajudicial measures (ss. 4 to 12); notice to parents (s. 26); the possibility of compelling parents to attend court (s. 27); an enhanced right to counsel (ss. 10(2)(d), 25 and 32); specific obligations for youth justice court judges to ensure that young persons are treated fairly (s. 32); reducing the possibility of bail (s. 29); creating the option of releasing young persons who would otherwise be denied bail (s. 31); *de novo* bail reviews (s. 33); the right of young persons to be separated from adults in temporary detention (s. 30); enhanced procedural safeguards surrounding the admissibility of

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2 *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

3 *R v RC*, 2005 SCC 61 at para 41 [*RC*].

4 *Ibid; United Nations Convention on the Rights of the Child*, 20 November 1989, Treaty Series 1577, 3 (entered into force 2 September 1990) [*UNCRC*]; *YCJA*, *supra* note 2 Preamble.

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c 11 [*Charter*].

statements made by young persons to authorities (s. 146); and a distinct sentencing regime (ss. 38 to 82).[6]

C. Relevant Legislation: *Youth Criminal Justice Act, Canadian Charter of Rights and Freedoms* and the *United Nations Convention on the Rights of the Child*

When evaluating the *Charter* rights of young people, various pieces of legislation are relevant, primarily the *Charter*, the *YCJA*, and the *Criminal Code*.[7] However, as indicated above, the *YCJA* contains a reference to Canada's international obligations within the Preamble of the *YCJA*, the relevant portion stating:

> 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[8]

Although what appears in the Preamble of any legislation is not binding, Parliament's inclusion of both the *UNCRC* and the *Charter* within the Preamble of the *YCJA* provides guidance as to the rights-based approach that was intended for the *YCJA*. Beyond the *YCJA*'s Preamble, Parliament has included a robust Declaration of Principles outlining the various and, at times, competing principles that are balanced within the *YCJA*.[9]

D. Scope and Purpose of Essay: An Exploration of a Non-exhaustive List of *Charter* Considerations Common in Youth Criminal Justice System

Much of the practical aspects of *Charter* advocacy tend to fall on the shoulders of defence counsel, however, the aim of this essay is to show that all participants must play a role in upholding and defending the *Charter* rights of young people. Precedent for an 'all participant' approach can be found in *Zora*, where the SCC applies such an approach to the right to reasonable bail.[10] This approach is arguably applicable to any and all *Charter* rights, particularly those of young people, given the purposes and principles espoused by the *YCJA*.

Although this essay explores a broad array of *Charter* considerations unique to youth criminal proceedings, it is in no way an exhaustive list of

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6 *R v KJM*, 2019 SCC 55 at para 142 [*KJM*]; *R v CP*, 2021 SCC 19 at para 147 [*CP*].
7 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
8 *YCJA*, *supra* note 2.
9 *Ibid*, s 3.
10 *Zora*, *supra* note 1 at paras 101-103 [*Zora*].

all *Charter* concerns for young people. It is important to note that the jurisprudence referenced in this essay is not intended to be a comprehensive review of all pertinent case law but instead is intended to offer leading and/or illustrative cases within each respective heading.

II. *YCJA* PROTECTIONS AND COMMON *CHARTER* CONCERNS

A. SECTION 7: Life, Liberty and Security of the Person

"Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[11]

1. Constitutional Recognition of the Diminished Moral Blameworthiness of Young People

Upon the *YCJA*'s implementation in 2003 and prior to the significant amendments in 2012, the *YCJA* contained provisions that governed when a young person may be sentenced as an adult. These provisions applied where a young person (over the age of 14 in some provinces and 16 in others) was charged with an enumerated set of offences. These enumerated offences were referred to as 'presumptive offences', all of which were very serious offences (e.g. murder, manslaughter among others).[12]

If an accused was charged with a presumptive offence, that accused would be presumed to have adult moral culpability and would be sentenced as an adult, unless the accused could show why they should be sentenced as a youth—thereby creating a reverse onus.[13]

In *R v DB*, the SCC struck down the presumptive offence provisions and, in doing so, gave constitutional recognition to the diminished moral blameworthiness of young people.[14]

In *DB*, the SCC considered section 7 of the *Charter*, in particular, the accused's liberty interest in relation to the presumptive offences sentencing scheme of the *YCJA* at the time. Justice Abella put the question before the court as follows at para 45:

> "[…T]he approach to the sentencing of young persons is animated by the principle that there is a presumption of diminished moral culpability to which they are entitled. Like all presumptions, it is rebuttable. Under the presumptive offences sentencing scheme, it is the young person himself or herself who is required to prove that the presumption should not be rebutted, rather than the Crown who

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11 *Charter*, *supra* note 5, s 7.
12 *R v DB*, 2008 SCC 25 at paras 2, 5 [*DB*].
13 *Ibid.*
14 *Ibid* at para 95.

> is required to show why it should be. The constitutional implications of this reversal of the onus create the knot we are asked to untie."[15]

The SCC then considered the proper method of determining what constitutes a principle of fundamental justice, ultimately concluding that the presumption of diminished moral blameworthiness for young people is one such principle.[16] In doing so, the SCC came to the conclusion that the impugned provisions engaged the accused liberty interests (this was conceded by the Crown), and that that deprivation of liberty was not in accordance with the principles of fundamental justice. Therefore, the provisions were struck down.[17]

In their 2018 decision, the Alberta Court of Appeal (ABCA) commented on the presumption of diminished moral blameworthiness and its connection to an accused's Indigenous heritage in *R v AWB*.[18] This *AWB* decision built upon the framework for considering the intersection between moral blameworthiness and *Gladue* considerations set out by the Manitoba Court of Appeal (MBCA) in *R v Anderson*.[19]

Following the approach taken in *Zora*, the presumption of diminished moral blameworthiness of young people should be respected by all participants in youth criminal courts as it is a principle of fundamental justice and a central tenant of youth law. While *DB* dealt specifically with section 72 of the *YCJA*, the declaration by the court that the presumption of diminished moral blameworthiness of young people as a principle of fundamental justice had far- reaching effects in youth law, far beyond adult sentence applications alone. Much like the impugned presumptive offence provisions, should other provisions and/or future amendments to the *YCJA* run counter to the presumption of diminished moral blameworthiness of young people, the precedent set in *DB* should be embraced by all court participants and employed to bring a constitutional challenge pursuant to section 7 of the *Charter*.

2. Special Protections for Young People During Police Interrogations

The right to remain silent is a core tenant of criminal law. The right to remain silent is closely tied to sections 10, 11(c) and 13 of the *Charter* and is enshrined in section 7 of the *Charter* as a principle of fundamental justice.[20]

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15 *Ibid* at para 45.
16 *Ibid* at paras 46-69.
17 *Ibid* at paras 38, 70.
18 *R v AWB*, 2018 ABCA 159 at paras 31,32 [*AWB*].
19 *R v Anderson*, 2018 MBCA 42 at para 58 [*Anderson*].
20 See generally: *R v Hebert*, [1990] 2 SCR 151 [*Hebert*].

The right to remain silent, as a principle of fundamental justice, applies to adults and youth alike. However, Parliament has included enhanced protections within the *YCJA* for youth and, in doing so, has "underscored the generally accepted proposition that procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators."[21]

Section 3(b)(iii) of the *YCJA*'s declaration of principles states that the youth criminal justice system must emphasize, among other things, enhanced procedural protections to ensure that young persons are treated fairly and that their rights are protected.[22]

In relation to the right to remain silent, the enhanced and statutorily-derived procedural protections for young persons work in conjunction with section 7 of the *Charter* and are codified in section 146(2) of the *YCJA*.[23]

In 2008, the SCC considered a young person's right to remain silent and the admissibility of statements made by young persons to police in *R v LTH*. In *LTH,* the SCC found that for a young person's statement to be admitted into evidence, the Crown must prove beyond a reasonable doubt that the preconditions set out in section 146(2) have been met.[24]

In regards to *Charter* considerations, the dissent in *LTH* raised concerns that to require the Crown to prove the criteria in section 146(2) beyond a reasonable doubt created a higher threshold than other waivers of rights made under the *Charter*, which are proven on a balance of probabilities.[25] However, the majority's analysis of the requirement that the criteria for a young person's waiver of right to remain silent pursuant to section 146(2) be proven beyond a reasonable doubt is an example of a statutorily-derived right afforded to a young person that is higher than the general *Charter* protection afforded to adults in similar circumstances.

From a practical perspective, in order to properly uphold the rights of young persons, it is important for all actors within youth court proceedings to be aware of such statutorily enhanced protections, as opposed to the more general *Charter* standard that would apply in adult criminal proceedings. All participants, Crown and defence alike, should present their respective positions firmly within the *YCJA* framework.

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21 *R v LTH*, 2008 SCC 49 at para 3 [*LTH*].
22 *YCJA, supra* note 2, s 3(b)(iii).
23 *Ibid,* s 146(2); *LTH, supra* note 21 at para 18.
24 *YCJA, ibid* at s 146(2).
25 *LTH, supra* note 21 at 82.

3. Operation of Section 743.5(1) of Criminal Code: Unintended and Harsh Consequences

Section 743.5(1) of the *Criminal Code* is a little-known but incredibly important aspect of criminal law where subsequent adult criminal proceedings have a profound impact on the operation of a prior youth sentence.[26]

If a young adult, having attained the age of 18, is subsequently sentenced to a custodial disposition on an adult criminal offence while still serving the custodial (including the community supervision portion) youth sentence, section 743.5(1) requires that the remaining portion of the youth sentence "be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this act."[27]

The wording of section 743.5(1), specifically "[...] or any other Act of Parliament[..]" activates section 139(1) of the *Corrections and Conditional Release Act*.[28]

Section 139(1) of the *Corrections and Conditional Release Act* triggers a sentence recalculation of the initial youth sentence, thereby significantly altering the young adult's statutory release date. If an adult custodial sentence is imposed during the community supervision portion (the final 1/3rd of a custodial youth sentence served in the community on conditions set by corrections), the accused will be brought back into custody in an adult facility to serve their youth sentence until their new statutory release date.

The constitutionality of the provision was adjudicated by the Federal Court of Appeal (FCA) in *Erasmo v the Attorney General of Canada*. In *Erasmo*, the FCA outlined the reasoning behind Parliament's intentions in enacting the merging provisions and found that these provisions do not offend section 7 of the *Charter*.[29]

While appeals pursuant to section 743.5(1) of the *Criminal Code* are rarely adjudicated within a *Charter* framework (if not at all since the FCA's decision in *Erasmo*), a discussion of section 743.5(1) is still warranted as the somewhat unexpected lack of *Charter* protection in relation to this provision is important from a practical perspective.

In two reported cases, *R v LS* and *R v Fisher*, it was clear that the operation of section 743.5(1) and its unintended consequences were not known or understood by counsel or the courts. In both *LS* and *Fisher*, all participants in the hearings that triggered section 743.5(1), including the

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26 *Criminal Code*, *supra* note 7, s 743.5(1).

27 *Ibid.*

28 *Corrections and Conditional Release Act*, SC 1992, c 20, s 139(1).

29 *Erasmo v the Attorney General of Canada*, 2015 FCA 129 at para 3 [*Erasmo*].

presiding judges, were unaware of the impact the imposition of custodial sentences would have on LS and Fisher's youth sentences.[30]

In *Fisher,* the accused, who was 20 years old but still bound by a youth sentence, was sentenced to a two-month custodial disposition for being unlawfully at large for a period of time during his incarceration at the Manitoba Youth Centre. Unbeknownst to the judge, Crown, and defence, this adult custodial sentence triggered section 743.5(1) of the *Criminal Code* as Fisher was still serving a youth sentence. It was clear from the sentencing transcripts that all parties involved expected that the accused would, upon sentencing, be able to return to the Manitoba Youth Centre and continue serving his sentence in that place. However, with the triggering of section 743.5(1), the accused's sentence was recalculated, resulting in a total sentence of four years, two months and two days custody going forward and a transfer to an adult penitentiary.[31]

On appeal, the Crown conceded that what took place was an unintended consequence, and that section 743.5(1) was not considered by the sentencing judge.[32] This being a material error, the MBCA was asked whether the operation of section 743.5(1) resulted in a sentence that was harsh and excessive in the circumstances. The MBCA concluded it was and re-sentenced the accused to a non-custodial disposition for the adult charges, thereby avoiding the effects of section 743.51(1) and returning Fisher to the Manitoba Youth Centre.

In *LS,* the ONCA dealt with a similar unintended engagement of section 743.5(1) of the *Criminal Code*. In that case, with the agreement of the Crown, LS asked the ONCA to re-sentence him to a non-custodial disposition "to give effect to the intention of the parties and overcome the effect of section 743.5(1) of the *Criminal Code* that was not within their contemplation." The ONCA agreed and varied LS's sentence.[33]

Given the FCA's finding in *Erasmo* that section 743.5(1) does *not* offend the *Charter*, it is incredibly important that judges, Crowns, and Defence Counsel be aware of its operation when imposing a sentence on an adult offender who is still bound by a custodial youth sentence.

B. SECTION 9: Arbitrary Detention

"Everyone has the right not to be arbitrarily detained or imprisoned."[34]

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30 *R v LS*, 2009 ONCA 762 at para 9 [*LS*]; *R v Fisher*, 2019 MBCA 82 at para 6 [*Fisher*].
31 *Fisher, ibid* at para 2.
32 *Ibid* at para 6.
33 *LS, supra* note 30 at para 8.
34 *Charter, supra* note 5, s 9.

1. The YCJA's Statutory Limitations on the use of Pre-trial Detention and Custodial Sentences: Potential for Arbitrary Detention when YCJA Misapplied

The *YCJA* places limits on when a young person may be denied judicial interim release and when they may be sentenced to custody.[35]

When such limitations are not adhered to in regard to judicial interim release, an accused young person may bring a bail review pursuant to section 520 of the *Criminal Code*. Similarly, when the limitations on the use of custody are not followed at sentencing (such sentences are generally referred to as an "illegal sentence"), a young person may appeal the custodial sentence to a higher court.

However, in the interim, the ongoing detention of that young person while counsel takes appropriate measures on their behalf, could be a violation of the young person's *Charter* right not to be arbitrarily detained. Should such a violation be found, a young person may seek a remedy pursuant to section 24(1) of the *Charter,* which could range from a stay of proceedings to an award of costs.[36]

Such an argument was raised (in the context of bail) by a young person in *R v NM*. Section 29 of the *YCJA* sets out parameters for the court's ability to detain a young person pending trial. The *YCJA* is clear that unless specific criteria are met, a young person may not be detained pre-trial. Determining whether such criteria have been met is a complex and fact-specific analysis governed by subsections 29(2)(a)-(c) of the *YCJA*, the full scope of which will not be explored here.[37]

In *NM*, the Ontario Court of Justice (ONCJ) ultimately held that *NM* was denied bail despite the fact that his particular set of circumstances made him ineligible for such a detention. Given that the law set out in section 29 of the *YCJA* was not properly applied, the detention was found to be arbitrary in nature. Not surprisingly, the ONCJ also found a violation of *NM*'s section 11(e) rights.[38]

The same reasoning in *NM* would likely apply in a situation where a young person was given an "illegal sentence" through the misapplication of *YCJA* sentencing provisions found in section 39(1).[39]

From a practical perspective, judges, Crowns, and defence attorneys must be intimately familiar with these provisions to ensure a young person is not committed to custody when such a sentence is not legally available.

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35 *YCJA*, *supra* note 2, ss 29, 39.
36 *Charter*, *supra* note 5, ss 9, 24(1).
37 See generally: *R v NM*, 2005 ONCJ 348 [*NM*]; *YCJA*, *supra* note 2, s 29.
38 *NM*, *ibid* at para 21.
39 *YCJA*, *supra* note 2, s 39(1).

Where a young person is illegally sentenced to custodial time going forward, it is imperative that defence counsel bring an application for bail pending appeal as soon as practicable and communicate that intention with the Crown. Rules regarding illegal sentences are very clear, and in the rare circumstance that an error is made by the court, the Crown may agree to release the accused pending appeal. This is an example of the potential for all court participants to show vigilance in upholding the rights of young people, as was called for in *Zora* in the context of the right to reasonable bail.

C. SECTION 11: Procedural Rights

1. Section 11(b): Trial Delay in Youth Courts

"Any person charged with an offence has the right to be tried within a reasonable time."

Amid significant disagreement at the provincial level surrounding whether the presumptive ceiling as set out in *Jordan* should apply to youth criminal matters, the SCC took the opportunity in *R v KJM*, to resolve the differing approaches to section 11(b) rights for youth criminal proceedings.[40]

While the SCC ultimately held that the *Jordan* ceiling should apply in youth criminal proceedings, the Court took a slightly different approach where defence raises unreasonable delay that falls below the *Jordan* ceiling. A 'below-ceiling' *Charter* application is governed by a two steps test that requires defence to establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite proceedings, and (2) the case took markedly longer than it reasonably should have.[41] In *KJM*, the SCC indicates that in youth matters, the court must take into account the youthfulness of the accused in the second branch of that test.[42]

In reaching their conclusion in *KJM*, the SCC set out five reasons why section 11(b) requires special consideration for young persons. These reasons are that (1) young people experience and perceive time differently than adults, and that a young person's connection between action and consequence becomes more tenuous over time; (2) trial delay may cause greater stress and psychological harm to a young person; (3) the ability to recall events over time is not as strong in young people as in adults, which affects a young person's ability to make full answer and defence; (4) during adolescence, young people experience rapid cognitive and psychosocial

40 *KJM*, *supra* note 6.
41 *R v Jordan*, 2016 SCC 27 at paras 48, 87 [*Jordan*].
42 *KJM*, *supra* note 6 at paras 70,71.

development and, should they be subjected to a significant period of delay in criminal proceedings, they may be left with a sense that the system has operated unfairly as they may have matured and changed significantly since their offending behaviour; and that (5) society has an interest in intervening and assisting young offenders as swiftly as possible.[43]

Ultimately, the SCC found that these youth-specific considerations can be reconciled with the *Jordan* ceilings, and a separate constitutional standard is not required. The SCC's approach to trial delay in *Jordan* and *KJM* is an example of a *Charter* right being relatively uniform as between youths and adults, but where there will be added considerations for youth when adjudicating the *Charter* right in question.

Flowing naturally from the *KJM* decision is the reality that below-ceiling applications ought to be more common in youth court than in adult court. In addressing the added consideration of youthfulness in the second prong of the below-ceiling test, the SCC signaled that such applications may be more appropriate in youth court as a result of the *YCJA*'s emphasis on timeliness of proceedings and the youthfulness of an accused, although the weight youthfulness will ultimately be given "will vary depending on the circumstances."[44] This slightly modified approach to delay in youth court is something all participants should be aware of and uphold during the trial scheduling process.

2. Section 11(c): The Right of Non-Incrimination and the Charter Implications of Pre-Trial Interventions Available within YCJA

"Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence."

Section 11(c) of the *Charter* protects an accused's right of non-incrimination and is closely tied to sections 7 and 11(d) of the *Charter*. In the context of youth criminal proceedings, there are several provisions unique to the *YCJA* that allow the Court to take an active role in youth proceedings pre-trial, including the Court's ability to order psychological reports pursuant to section 34 or to convene conferences pursuant to section 19 of the *YCJA*.[45]

From a *Charter* perspective, sections19 and 34 of the *YCJA* pose a potential risk to a young person's right of non-incrimination, as both psychological reports and conference reports become part of the Court record. Should a young person be questioned about the specifics of the offences alleged against them during the preparation of a psychological

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43 *Ibid* at paras 51-55.

44 *Ibid* at para 72.

45 *YCJA*, *supra* note 2, ss 19, 34.

report or during a conference, there is a very real danger that their section 11(c) rights could be compromised.

It is imperative that if a young person's 11(c) rights have been compromised during the course of a pre-trial report or conference all parties uphold the accused's 11(c) rights by redacting the offending portions of the reports or documents before they are submitted to the court.

3. Section 11(d): Presumption of Innocence and Right to Fair Trial: Additional Statutory Protections for Young People who Plead Guilty to Charges

"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

For an accused to plead guilty to charges against them, several criteria must be met. These criteria are set out in section 606 of the *Criminal Code*. The court may only accept a guilty plea if the accused is making the plea voluntarily, if the accused understands that the plea is an admission of the essential elements of the offence, the nature, and consequences of the plea, and if the accused understands that the court is not bound by any agreements made between the accused and prosecutor.[46]

In the context of adult criminal proceedings, a plea is not invalidated if the inquiry is addressed in a cursory manner or if the court fails to fully inquire whether the criteria are actually met, especially when an accused is represented by counsel.[47] Significant trust is placed on defence counsel to ensure that guilty pleas are not offered when they ought not to be.

However, in youth court, section 36 of the *YCJA* dictates the opposite must occur. Should a youth court judge not explicitly satisfy themselves that the criteria of section 606 of the *Criminal Code* have been met, and should they not inquire into the details and facts of the allegations, a guilty plea may not be entered pursuant to section 36(2) of the *YCJA*.[48]

Despite being decided before the inception of the *YCJA*, the SCC's decision in *R v T(V)* remains the leading case regarding the additional protections afforded to young people who plead guilty to criminal charges. It is important to note that section 19 of the *Young Offenders Act* was identical to section 36 of the *YCJA* in its wording and operation.[49]

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46 *Criminal Code*, *supra* note 7, s 606.

47 *Ibid*, s 606(1.2).

48 *YCJA*, *supra* note, 2 s 36.

49 *R v T(V)*, [1992] 1 SCR 749, at paras 5, 33, 34 [*T(V)*]; *Young Offenders Act*, SC 1985, c Y-1, s 19 [YOA]; *ibid.*

The impetus behind this added procedural protection is tied to the increased vulnerability of young people navigating the justice system. As stated in *T(V)* by the Honourable Supreme Court Justice L'Heureux-Dubé, "I am of the view that s.19 simply seeks to protect the young person against the consequences of an ill-informed plea of guilty. Section 19(1) requires that the court be satisfied that the facts support the charge before accepting a guilty plea."[50]

The *T(V)* decision has been applied since the inception of the *YCJA* and has consistently been viewed as an added safeguard given the vulnerability and diminished capacity of young people.[51] The value of these protections was best summarized by the Saskatchewan Court of Appeal (SKCA) in *R v TL:*

> Young persons, because of their age, maturity and limited life experience, are often vulnerable to pressure from their parents, defence and Crown counsel when it comes to how the legal system should be navigated and what plea should be entered to an alleged offence. It is for this reason the YCJA provides special safeguards for them—one of which is section 36(1) of the YCJA.[52]

The statutory protections of the *YCJA* are tied to the *Charter*'s procedural protections in section 11, including the right to a fair trial as well as the right to be presumed innocent. Failing to adhere to these special provisions may not only trigger a potential remedy pursuant to the *YCJA* (e.g., the guilty plea may be quashed) but may also trigger section 11(d) of the *Charter.*

4. Section 11(e): Right to Reasonable Bail: Antic, Zora and the Right to Reasonable Bail for Young People

"Any person charged with an offence has the right not to be denied reasonable bail without just cause."

While much of Part XVI of the *Criminal Code* is relevant for youth bail, the *YCJA* contains its own provisions for judicial interim release that modify and/or create additional considerations for youth bail matters. These provisions are primarily found in sections 28 through 29 of the *YCJA.*[53]

It is important to comment on the function of sections 28 and 140 of the *YCJA*, which address the application of *Criminal Code* provisions in youth matters. Both sections 28 and 140 set out that *Criminal Code*

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50 *T(V), ibid* at para 34.

51 *R v HJPN*, 2010 NBCA 31 at paras 8, 9, 12, 13, 14 [*HJPN*]; *R v TL*, 2016 SKCA 160 at paras 13, 14, 15, 20, 27, 36 [*TL*].

52 *TL, ibid* at para 20.

53 *YCJA, supra* note 2, ss 28-29.

provisions apply to youth matters, except to the extent that they are inconsistent with or excluded by the *YCJA*.[54]

Section 11(e) of the *Charter* provides that any person charged with an offence has the right not to be denied bail without just cause.[55] The SCC has adjudicated this right on many occasions in the context of adult bail court. While the SCC has not addressed the youth specific provisions of bail, their decisions in *R v Zora* and *R v Antic* are particularly helpful and equally applicable to youths.[56]

One area of particular concern in youth court from a *Charter* perspective is the potential that youths will be given overly stringent bail conditions that are disproportionate to the charges they face, as was contemplated in *Zora*.[57] In bail court, young people often present with a host of pressing social issues. While it is tempting for the youth court to use judicial interim release proceedings as a way to ameliorate the social situation of a young person, unless the court's interventions are tied directly to the alleged offending behaviour, section 28.1 of the *YCJA* cautions against the use of conditions to address the social circumstances of youth. Section 28.1 of the *YCJA* states that a youth court judge "shall not detain a young person in custody, or impose a condition in respect to a young person's release by including it in an undertaking or release order, as a substitute for appropriate child protection, mental health or other social measures."[58] This provision echoes much of the SCC's rulings in *Zora* and *Antic* on the principle of restraint.

In *Antic* and again in *Zora*, the SCC stated that in order to comply with section 11(e) of the *Charter*, terms of judicial interim release may only be imposed to the extent that they are necessary to address the statutory criteria for detention.[59] For young people, these statutory criteria are found in the modified primary, secondary, and tertiary grounds of section 29 of the *YCJA*. Like their adult counterparts, bail conditions must not be imposed on young people in an attempt to change their behaviour or serve as punishment.[60] Given young people's unique place in society and society's often paternalistic role in the lives of young people, this restraint is arguably the hardest to exercise in youth court.

In *Zora*, the SCC made it clear that the obligation to uphold the rights conferred on the accused through section 11(e) is on all

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54 *Ibid*, s 140.
55 *Charter*, *supra* note 5, s 11(e).
56 See generally: *Zora*, *supra* note 1; *R v Antic*, 2017 SCC 27 [*Antic*].
57 *Zora*, *ibid* at para 85.
58 *YCJA*, *supra* note 2, s 28.1.
59 *Antic*, *supra* note 56 at para 67.
60 *Ibid* at para 67.

participants in the bail system.[61] As part of upholding a young person's right to reasonable bail, it is imperative for defence counsel, the Crown, and the court to be aware of the unique nature of youth bail provisions found in section 29 of the *YCJA* apply these provisions properly and in accordance with section 11(e) of the *Charter*.

D. SECTION 12: Cruel and Unusual Treatment or Punishment

"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

1. Harmful Effects of Solitary Confinement on Young People

Section 12 of the *Charter* provides that everyone has the right not to be subjected to cruel and unusual treatment or punishment. The test for section 12 is whether the treatment or punishment is grossly disproportionate in the circumstances. To be grossly disproportionate, the SCC has indicated (on several occasions) that the treatment or punishment in question must be so excessive that it would outrage society's standards of decency and be disproportionate to the extent that Canadians would find the treatment or punishment abhorrent or intolerable.[62]

In *R v Morrisey*, the SCC stated that when considering section 12 of the *Charter*, the court must evaluate the entire context in which the violation of section 12 is said to have arisen.[63]

In the context of solitary confinement of young persons as a violation of the *Charter*, the courts have considered the individual facts of each case as well as expert evidence relating to adolescent development and the harms of solitary confinement on young people.

In *R v CCN*, the young person brought an application for *Charter* relief for violations of his sections 7, 9, 10(b) and 12 rights. The Judge, upon reviewing corrections records, found that *CCN* had spent a period of just under two years in solitary confinement.[64] Significant expert evidence was proffered regarding the brain development of adolescents and the impact of solitary confinement on young people.[65]

The court in *CCN* considered the SCC decision in *R v Babos*, wherein the SCC stated that entering a stay of proceedings as a remedy for a *Charter*

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61 *Zora, supra* note 1 at para 101.

62 *R v Smith*, [1987] 1 SCR 1045 at 1072 [*Smith*]; *R v Morrisey*, 2000 SCC 39 at para 26 [*Morrisey*]; *R v Wiles*, 2005 SCC 84 at para 4 [*Wiles*].

63 *Morrisey, ibid* at para 27.

64 *R v CCN*, 2018 ABPC 148 at paras 48, 85 [*CCN*].

65 *Ibid* at paras 17-21.

violation should be rare. The court in *CCN* found that a stay of proceedings was appropriate.[66]

Unfortunately, the ultimate decision in *CCN* was limited to section 9 of the *Charter*. However, the court heard evidence and commented (in obiter) on the harsh social and psychological effects of solitary confinement on CCN.[67] Although the court in *CCN* did not rule on the issue of cruel and unusual treatment, it did find the following in paragraph 85:

> "[T]he solitary confinement of CCN for approximately two years contravened the principles and purposes of the YCJA by failing to focus on rehabilitation and reintegration, and to address CCN's underlying circumstances. Furthermore, the likely result of CCN's solitary confinement for just under a two-year period was to make him a greater risk to the public than if he not been subject to solitary confinement and programs had been intensively employed to address his underlying circumstances."[68]

Notably, Manitoba's use of solitary confinement in youth correctional facilities has come under significant scrutiny since the 2019 release of the Manitoba Advocate for Children and Youth (MACY) report "Learning from Nelson Mandela: a Report on the Use of Solitary Confinement and Pepper Spray in Manitoba Youth Custody Facilities" and the 2020 follow-up report "Breaking the Cycle: An Update on the Use of Segregation and Solitary Confinement in Manitoba Youth Custody Facilities."[69]

In the 2019 MACY Report, it was found that Manitoba had the highest rate of incarceration for youth in Canada as well as the highest use of solitary confinement in youth correctional facilities.[70]

On the issue of solitary confinement of youth in Manitoba, currently before the Manitoba Court of King's Bench is a class action matter, *Virgil Charles Gamblin and Hawa Yussuf as Litigation Guardian of AM v The Government of Manitoba*.

The Statement of Claim *Gamblin/AM* alleges that the Government of Manitoba has, among other claims, breached the sections 7, 12 and 15 rights of the Class Members. The Class Members in *Gamblin/AM* fall under two categories and two representative plaintiffs: *Virgil Charles Gamblin* and *AM*. For the purposes of this essay, the focus will be on the

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66 *R v Babos*, 2014 SCC 16 at para 31 [*Babos*]; *CCN*, *supra* note 64 at paras 92, 98.

67 *CCN*, *ibid* at paras 13, 17, 19, 20, 45, 46, 81, 84, 85.

68 *Ibid* at para 85.

69 Man, The Manitoba Advocate for Children and Youth, *Learning from Nelson Mandela: A Report on the Use of Solitary Confinement and Pepper Spray in Manitoba Youth Custody Facilities*, (Special Report, 2019) [*2019 MACY Report*]; Man, The Manitoba Advocate for Children and Youth, *Breaking the Cycle: An Update on the Use of Segregation and Solitary Confinement in Manitoba Youth Custody Facilities*, (Special Report, 2021) [*2020 MACY Report*].

70 *2019 MACY Report*, *ibid* at 14, 45.

experiences of AM, who represents a class of young people who were subjected to solitary confinement while detained at the Manitoba Youth Centre.

AM's experience in solitary confinement is outlined in the Statement of Claim in *Gamblin/AM*, filed May 21, 2021, in paragraphs 54 through 61. The Statement of Claim alleges that AM is a 17-year-old inmate at the Manitoba Youth Centre and was first placed in solitary confinement at age 15. Between July 1, 2020 and April 20, 2021, AM was placed in solitary confinement on at least nine different occasions, the longest of which was approximately 40 days. The small, windowless cell in which AM spent that time had only a mat on the floor.[71]

The Statement of Claim alleges that AM's experiences in solitary confinement have had "devastating emotional and psychological consequences, including strong feelings of depression and anxiety. He has been driven to suicidal thoughts while in solitary confinement. These experiences have cause[d] him permanent psychological damages."[72]

Although the *Gamblin/AM* matter is in the early stages of proceedings as a Class Action, it will very likely build upon the momentum of the 2019 and 2020 MACY reports in bringing the issue of the solitary confinement of youths in Manitoba to the fore.

While the scope of this essay addresses the interplay between the *Charter* and *YCJA*, it is vitally important for all court participants to be aware of civil litigation, such as *Gamblin/AM*; governmental reports, such as the 2019 and 2020 MACY reports; as well as relevant international human rights instruments. These external documents and proceedings may have profound impacts on the youth criminal court's future interpretation of section 12 rights vis-a-vis solitary confinement. It is important to bear in mind that the Preamble of the *YCJA* itself incorporates the *United Nations Convention on the Right of the Child (UNCRC)*.[73] While the *UNCRC* is not binding in youth court proceedings, as it is not incorporated within the body of the legislation, it is nonetheless important as an interpretive tool for all matters falling within the purview of the *YCJA*.[74]

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71 *Virgil Charles Gamblin and Hawa Yussuf as Litigation Guardian of AM v The Government of Manitoba and John Doe and Jane Doe* (April 29, 2022), Winnipeg, MB QB CI 21-01-31242 (Certification Motion: Granted), Statement of Claim, at paras 54-59 [*Gamblin/AM*].

72 *Ibid* at para 60.

73 *YCJA*, *supra* note 2, Preamble; *UNCRC*, *supra* note 4.

74 *CCN*, *supra* note 64 at para 79.

E. SECTION 15: Equality Rights - Age

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

1. Statutory Inequity between Youths and Adults vis-a-vis their Ability to Appeal Matters to the Supreme Court of Canada

In *R v CP*, the SCC addressed the constitutionality of section 37(10) of the *YCJA*. Where adults have a codified path to the SCC by way of section 691(1) of the *Criminal Code*, its counterpart in section 37(10) of the *YCJA* expressly excludes such a mechanism for young persons. Pursuant to the rules in section 140 of the *YCJA* (discussed in earlier sections of this essay), section 691(1) of the *Criminal Code* is not applicable in youth matters as it is contradictory to the related *YCJA* provision. Therefore, section 37(10) of the *YCJA* represented a distinct approach from the *Criminal Code* and faced *Charter* scrutiny for seemingly creating inequality based on the age of an accused.

The majority in *CP* articulated the criteria for a violation of section 15 of the *Charter*: (1) if the provision created a distinction based on an enumerated or analogous ground, and (2) if the provision imposed a burden or denied a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage.[75]

All parties in *CP* agreed that the first step of the section 15 analysis was met, but the Court ultimately concluded that the second step of the analysis had not been made out. In reaching their conclusion, the majority in *CP* commented that age-based distinctions are common and necessary in society and are not always a discriminatory or arbitrary denial of rights.[76]

The majority in *CP* engaged in an in-depth analysis of the potential burdens of section 37(10) on an accused but also drew attention to the fact that not only does section 37(10) affect the accused's right to appeal as of right, it also shields a young person from the Crown's same path to the SCC. The automatic right to appeal available to adults is granted equally to the Crown where a dissenting opinion on a question of law is made supporting the Crown's argument. Such Crown appeals could significantly prolong litigation in youth matters, which runs contrary to aspects of the *YCJA*'s declaration of principles found in section 3, namely that youth matters must be dealt with in a timely fashion.[77]

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75 *CP*, *supra* note 6 at para 141.
76 *Ibid* at para 142.
77 *YCJA*, *supra* note 2, s 3.

Aside from the section 15 analysis, *CP* also raised section 7 of the *Charter*. The SCC considered whether the enhanced procedural protections afforded to young people should be considered a principle of fundamental justice pursuant to section 7. The majority in *CP* commented that the SCC has already established such a principle of fundamental justice in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, but that this principle mandates that all accused be accorded adequate procedural safeguards against wrongful convictions or other miscarriages of justice in the criminal process.[78]

The SCC commented that when considering what constitutes adequate procedural protections, the analysis will vary according to the context in which the principle is invoked. For youth matters, the "adequacy of procedural protections will necessarily be sensitive to the unique circumstances of young persons that have been identified by this Court, including their diminished moral culpability and their need for enhanced procedural protection in the criminal justice system."[79]

When considering the entirety of the *CP* decision, both majority and minority opinions illustrate the interesting interplay between general *Charter* protections that apply to all accused and the enhanced statutory protections of the *YCJA* that apply only to young people. From a practical perspective, it is not always clear when one or both are triggered. The divided nature of the SCC's decision in *CP*, which dealt with the potential inequity based solely on age contained in section 37(10), illustrated this point. In *CP*, 4 of 8 SCC Justices held that section 37(10) did not violate section 15 of the *Charter*; 3 of 8 Justices were of the opinion that the section violated section 15 and was not saved by section 1; and the final Justice found that section 37(10) constituted a limit on the equality rights of young persons but was justified under section 1 of the *Charter*. Ultimately, section 37(10) of the *YCJA* was upheld.[80]

III. Conclusion

The SCC in *Zora* underscored the responsibility of all participants to uphold section 11(e) of the *Charter*. This responsibility arguably applies to the obligation of the justice system as a whole to uphold all rights enshrined in the *Charter*. This must be particularly so in the case of youths, as they come before the courts with significant disadvantages and vulnerabilities as

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78 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, at para 5; *CP, supra* note 6 at para 132.

79 *CP, ibid* at para 132; *DB, supra* note 12 para 41.

80 *CP, ibid* at paras 4, 163, 165, 167.

a result of their age. Careful consideration must be given to the defence of the rights of children. Ultimately, this is the responsibility of all court participants. This approach is evident, not only from the SCC's comments on the rights of young people as explored in this essay, but also from the enhanced procedural protections that have been enacted by Parliament throughout the *YCJA*.

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