Are you familiar with the *Youth Criminal Justice Act*?

On January 28, 2010, the Minister of Justice and Attorney General of Canada, Rob Nicholson, issued a media release announcing his plan to strengthen the youth criminal justice system. The aim of Mr. Nicholson's proposals was to strengthen the system so that violent and repeat offenders would be dealt with more severely. He stated that the justice system is unable to keep youth in custody pending trial, even though they are a potential danger to society.

The minister added that the sentences given to youth who commit serious crimes, such as murder and aggravated sexual assault, do not live up to Canadians' expectations.

Mr. Nicholson proposed that courts be required to impose adult sentences on youth who commit serious crimes. He also pointed out that a young person convicted of a violent crime can currently be released anonymously.

This is what you should know about Canada's youth criminal justice system:

On April 1, 2003, the *Youth Criminal Justice Act* (YCJA) replaced the *Young Offenders Act*. The YCJA introduced sweeping changes to the youth criminal justice system. It was adopted specifically to reduce the overuse of custody and to clarify sentencing rules in order to standardize enforcement of the statute across the country. We remind you of the statement made by then Minister of Justice and Attorney General of Canada, Anne McLellan:

> *As we also know, the existing YOA has resulted in the highest youth incarceration rate in the western world, including our neighbours to the south, the United States. Young persons in Canada often receive harsher custodial sentences than adults receive for the same type of offence. Almost 80% of custodial sentences are for non-violent offences. Many non-violent first offenders found guilty of less serious offences such as minor theft are sentenced to custody.*
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> *The proposed youth criminal justice act is intended to reduce the unacceptably high level of youth incarceration that has occurred under the Young Offenders Act. The preamble to the new legislation states clearly that the youth justice system should reserve its most serious interventions for the most serious crimes and thereby reduce its over-reliance on incarceration.*
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> *In contrast to the YOA, the new legislation provides that custody is to be reserved primarily for violent offenders and serious repeat offenders.*[1]

The media release incorrectly stated that the system "is powerless to keep violent or repeat young offenders in custody while awaiting trial, even when they pose a danger to society." Bear in mind that the Act already states that violent or repeat young offenders can be held in custody pending trial. More or less the same rules apply to bail hearings for adult accused. A young offender will thus be detained if the protection or safety of the public warrants. In contrast to the adult system, there is a presumption that custody is not necessary to protect or ensure the safety of the public when the accused is a youth charged with a non-violent crime or is not a repeat offender. The objective of the Act, which is to reduce

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[1] House of Commons, *Debates*, February 14, 2001, p. 704.

the number of non-violent young offenders who are sent to prison, is thus met. It should be noted that this is a refutable presumption.

It is implied that youth court cannot currently impose an adult sentence on a young offender convicted of a serious crime. However, the YCJA allows a young offender to be sentenced as an adult in the following cases: murder, attempted murder, manslaughter, aggravated sexual assault and any other offence for which an adult would be liable to imprisonment for more than two years. The Director of Criminal Prosecutions must apply to the court for young offenders, and the judge must determine whether the offender's sentence is sufficiently long to hold the offender accountable for his or her actions. If it is not, the offender will have to be sentenced as an adult.

Are the proposed amendments compatible with the recent decision by the Supreme Court of Canada in *R.* v. *D.B.*,[2] which deemed certain provisions of the YCJA to be unconstitutional? The highest court in the land ruled that imposing on a young offender the burden of showing that he or she must not be sentenced as an adult is contrary to the presumption of diminished moral culpability in young persons. Young offenders are entitled to a presumption of diminished moral culpability because they are more vulnerable and immature. This right to be judged differently from adults has been considered a principle of fundamental justice protected by the *Canadian Charter of Rights and Freedoms*.

Regarding concerns about the anonymity of dangerous young offenders roaming our streets, we can never overstate the importance of young offenders' privacy. Privacy is protected not only in the YCJA, but also in the *Convention on the Rights of the Child* and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*. Protecting young offenders' privacy contributes to their rehabilitation, which in the long run protects society.

The YCJA states that imposing an adult sentence on a young offender will reveal the youth's identity. A young offender's identity can also be disclosed if the youth committed a serious crime considered under the Act to be a designated offence, even if the offender was given a youth sentence. In the same decision, the Supreme Court of Canada rendered inoperable the provisions of the Act which place on the offender the onus of showing that he or she must be granted the right to have his or her identity protected when he or she is convicted of a designated offence but the court imposes a youth sentence.

It is important to remember also that youth court hearings are public and that certain individuals have access to the information in a young offender's file irrespective of the seriousness of the charge. The victim of the crime has access to the young offender's file. Peace officers are authorized to communicate information about the young offender to school officials, for example, and other individuals responsible for monitoring the offender.

The *Youth Criminal Justice Act* addresses each of the concerns raised in the January 28 media release. These proposals are already incorporated and applied by youth courts. For more than 100 [presumably this should read "10" – Tr.] years, the Act has taken into account the evolution of the distinct nature of the youth criminal justice system. The Supreme Court wrote:

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[2] *R.* v. *D.B.*, 2008 SCC 25.

> Moreover, Parliament has recognized in enacting youth criminal justice legislation that "most young offenders are one-time offenders only and, the less harm brought upon them from their experience with the criminal justice system, the less likely they are to commit further criminal acts.[3]

We seriously question the rationale for changing a system that meets the needs of young offenders and contributes to their development and that ensures ongoing protection of the public.

Marie-Pierre Blouin and Catherine Pilo
Youth law counsel, Rive-Sud legal aid centre

[3] *R.* v. *R.C.*, [2005] 3 S.C.R. 99, para. 43.