

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

TOM TUAN LE

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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Interveners

**FACTUM OF THE INTERVENER
(JUSTICE FOR CHILDREN AND YOUTH, INTERVENER)
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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PART I – OVERVIEW

1. Teenagers and young people are particularly vulnerable in their interactions with police as a consequence of their age, development, and relative lack of maturity and sophistication. Police officers have a corresponding enhanced responsibility to ensure that young people understand their rights and have a meaningful opportunity to exercise them. The Appellant, at only 20 years old, was the oldest of the five young people involved in the case at bar. L.D.¹ was just 17.

2. A meaningful, purposive, and normative analysis of the *Charter*-protected interests at stake in this case requires a recognition, in light of well-accepted neurobiological and social science, that the unique features of adolescence, and attendant vulnerabilities, extend into young adulthood. The circumstances of teenagers and young people, and the correlative conduct of police officers, are critical to Court’s analysis of the lawfulness of a search under section 8 of the *Charter*, whether a young person has been psychologically detained under section 9, and whether any evidence obtained ought to be excluded under section 24(2).

PART II – INTERVENER’S POSITION ON THE QUESTIONS IN ISSUE

3. Justice for Children and Youth (“JFCY”) takes no position on the outcome of this appeal. JFCY submits that heightened and inherent vulnerability of young people – as a consequence of their neurological and psychological development and as matter of legal and scientific consensus – must inform this Court’s analysis of the *Charter*-protected interests at stake, and the exclusion of evidence under section 24(2).

PART III – STATEMENT OF ARGUMENT

A. YOUNG PEOPLE ARE INHERENTLY AND PARTICULARLY VULNERABLE AND ENTITLED TO ENHANCED PROCEDURAL PROTECTIONS

a. Young people are physiologically and psychologically unable to think like adults

4. Widely accepted research into adolescent brain development confirms that young people are physiologically unable to think, reason, judge consequences, or make decisions like adults.

¹ In our view, the resident L.D. is a young person dealt with under the *Youth Criminal Justice Act*, SC 2002, c 1 (“*YCJA*”) and is accordingly entitled to the privacy protections mandated by that Act (s. 110). We have accordingly initialized his name where it appears in our submissions.

5. While the law may define adulthood as beginning at age 18, the psychological and neurological development characteristic of adolescence in fact extends into a young person's twenties; research suggests that brain development continues long after the age of 18 and that the brain is not likely fully mature until age 25.² Young adults, 18-24, are developmentally more similar to 15-17 year olds.³ This age group, often referred to as "emerging adulthood", is increasingly recognized as developmentally distinct from older adults.⁴

6. Areas of the brain responsible for executive functioning, decision-making, impulse control, foresight, judgment, and evaluation of risk develop later than other areas of the brain.⁵ As a result, as compared to adults, adolescents and emerging adults are likely to be more impulsive, have a reduced capacity to weigh risk, consider alternatives, and understand consequences, are more present- rather than future-oriented, and are more likely to react than to think through options, particularly in emotionally-charged or stressful situations.⁶ Research also suggests that young people are more likely than adults to misinterpret facial expressions and to perceive anger or fear where an older adult would not.⁷

b. The vulnerability of young people entitles them to enhanced procedural protections

7. The legal effect of young people's evolving capacities is that they are vulnerable in their interactions with police in ways that older adults are not. They are therefore entitled to differential treatment within the legal system that properly accounts for their developmental vulnerabilities.⁸ Researchers unanimously agree that there are social risks to failing to do so.⁹

² Cesaroni, C and Peterson-Badali, M "Ashley Smith and Incarcerated Young Women: Marginalized at Any Age" (2017) *Can J Law & Society* 249 at 256-7; Willoughby, T et al "Examining the link between adolescent brain development and risk taking from a social-developmental perspective" (2013) *83 Brain & Cognition* 315 at 315

³ Cesaroni, C "Young adults: An overlooked population in Canadian correctional policy and legislation" (2015) *19:1 Can Crim L Rev* 115 at 117

⁴ Cesaroni, C and Peterson-Badali, M, *supra* at note 2, at 256-7

⁵ Steinberg, L, "Adolescent Development and Juvenile Justice" (2009) *5 Annu Rev Clin Psychol* 459 at 466-470; Shulman, EP, et al "The dual systems model: Review, reappraisal, and reaffirmation" (2016) *17: Developmental Cognitive Neuroscience* 103 at 104-5

⁶ Steinberg, L, *supra* at note 5, at 465-71; King, KJ, "Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children Unknowing, Unintelligent, and Involuntary Waiver of Miranda Rights" (2006) *Wis L Rev* 431 at 437-40; Tottenham, N & Galvan, A "Stress and the adolescent brain: Amygdala-prefrontal cortex circuitry and ventral striatum as developmental targets" (2016) *70 Neurosci & Behav Rev* 217 at 223

⁷ King, KJ, *supra* note 6, at 442

⁸ Cesaroni, C and Peterson-Badali, M, *supra* at note 2, at 256

8. The U.S. Supreme Court, in light of compelling neuroscientific and psychological research concerning adolescent brain development, has recognized the vulnerability of young people and the need for their enhanced protection in the criminal justice system.

9. In *Roper v Simmons*, the Court affirmed that young people, as a consequence of their age and their brain development, demonstrate a lack of maturity, impetuosity, and poor decision-making. They are more susceptible to outside pressures and have less control, and less experience with control, over their own environment.¹⁰ In *Graham v Florida*, the Court noted that “[d]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” and that “parts of the brain involved in behaviour control continue to mature through late adolescence”.¹¹ In *Miller v Alabama*, the Court held that “it is increasingly clear that adolescent brains are not yet fully mature in regions related to higher-order executive functions”, like impulse control and planning ahead.¹²

10. Similarly, in *JDB v North Carolina*, the Court noted that, far more than being just chronological fact, age “generates common-sense conclusions about behavior and perception” that apply broadly to young people as a class. They are “generally less mature and responsible than adults” and “lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” A teenager’s age affects how a “reasonable person” would perceive his or her freedom to leave: “[t]hat is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”¹³

11. Accordingly, the Court held that age is highly relevant to a determination of whether a teenager is psychologically detained and further imposed a duty on police to ensure that a young person was appropriately advised of his rights. To do otherwise would be to “ignore the very real differences between children and adults” and to “deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults”¹⁴.

⁹ Gaudet, S, *Emerging Adulthood: A New Stage in the Life Course Implications for Policy Development*, Government of Canada Policy Paper (2007), at 18-19; Rosado, LM “Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street” (1996) 71:3 NYU L Rev 762 at 764, 769

¹⁰ *Roper v Simmons*, 543 US 551 (2005) at IIIB

¹¹ *Graham v Florida*, 560 US 48 (2010) at IIIB

¹² *Miller v Alabama* 567 US 460 (2012) at n5

¹³ *JDB v North Carolina*, 564 US 261 (2011) at IIB

¹⁴ *JDB v North Carolina*, *supra* at note 13, at III

12. The U.S. Supreme Court has long recognized that young people are entitled to special protections when being questioned by police to “place him or her on equal footing with the police and to ensure that constitutional rights were real, and not mere abstractions”.¹⁵ Special care must be taken to ensure that any waiver of a young person’s rights is not “coerced or suggested” or “the product of ignorance of rights or of adolescent fantasy, fright or despair”¹⁶. Police officers must inquire into a young person’s age, experience, education, background, intelligence, and capacity to understand his rights and the consequences of waiving them.¹⁷

13. This Honourable Court has similarly recognized that “the inherent vulnerability of children has consistent and deep roots in Canadian law” resulting in enhanced legal protections for young people.¹⁸ This Court recognized that “while many adolescents may have the technical ability to make complex decisions, this does not always mean they will have the necessary maturity and independence of judgment to make truly autonomous decisions” as a consequence of their developing cognitive capacities.¹⁹ The Court has consequently recognized a legal obligation on the part of the state to protect young people from harm. Indeed, a recognition of the inherent vulnerability and diminished moral blameworthiness of young people underpins the *Youth Criminal Justice Act* and has been held to be principle of fundamental justice.²⁰

14. In *R v LTH*, this Court specifically considered the ways in which young people are vulnerable in their interactions with police. The Court stated that young persons “even more than adults, are inclined to feel vulnerable when questioned by police officers who suspect them of crime and can influence their fate” and recognized that the procedural safeguards generally available to adults do not adequately protect young persons, who are more vulnerable than adults to suggestion, influence, and pressure as a result of their age and relative lack of sophistication.²¹ The Court found that “young persons do not understand their legal rights as well as adults” and

¹⁵ King, KJ, *supra* at note 6, at 445-50, citing *Haley v Ohio*, 332 US 596 (1948), 599-600 and *Gallegos v Colorado*, 370 US 49(1962), 54-55

¹⁶ *In re Gault*, 387 US 1 (1967), 55

¹⁷ *Fare v Michael C*, 442 US 707 (1979) at 725; *State v Nicholas S*, 444 A2d 373 (Me 1982), 377

¹⁸ *AB (Litigation Guardian of) v Bragg Communications Inc*, 2012 SCC 46 at para 17

¹⁹ *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 71

²⁰ *R v DB*, 2008 2 SCR 3 at para 41, 61-2; *YCJA, supra* at note 1. The *YCJA* provides that, in light of their inherent vulnerability, young persons are entitled to enhanced procedural protections at all stages of their contact with the criminal justice system (Preamble, s. 3).

²¹ *R v LTH*, 2008 SCC 49 at para 1, 3; Jones, B, Birdsell M, & Rhodes, E, “A Call For Enhanced Constitutional Protections for the Special Circumstances of Youth” (2013) 3 CR (7th) 350 at 351

“are less likely to assert those rights in the face of a confrontation with a person in authority.”²²

15. Accordingly, the Court held that young people are entitled to have their rights clearly explained to them in language appropriate to their age and understanding, and imposed on persons in authority an obligation to make reasonable efforts to ascertain the young person’s level of understanding. Any waiver of their rights must be premised on a true understanding of the rights involved and the consequences of giving them up.²³

16. International law also recognizes the inherent vulnerability of young people and mandates their special protection. The *United Nations Convention on the Rights of the Child* recognizes that young people, by reason of their physical and mental immaturity, are entitled to special safeguards and care, including legal protection.²⁴ Their best interests must be considered in all actions concerning them undertaken by public institutions and courts of law and they are entitled to access to legal and other assistance.²⁵ Young people should be informed about their legal rights and are not to be “considered as mere objects of socialization or control.”²⁶ They are guaranteed procedural safeguards to ensure that contacts between law enforcement and young people respect their legal status, promote their well-being, and avoid harm.²⁷ The *Beijing Rules* require that the principles expressed in the Rules be extended to young adults.²⁸

B. THE ANALYSIS OF THE IMPACT ON YOUNG PEOPLE’S CHARTER RIGHTS MUST INCLUDE CONSIDERATION OF THEIR AGE AND VULNERABILITY

17. An analysis of young people’s *Charter* rights that does not attend to their different level

²² *R v LTH*, *supra* at note 21, at para 24; see also *R v JTJ*, [1990] 2 SCR 755 at 766-7

²³ *R v LTH*, *supra* at note 21, at para 21-23, 40

²⁴ United Nations Convention on the Rights of the Child, Can TS 1992 No 3 (“UNCRC”), Preamble

²⁵ UNCRC, *supra* at note 24, at Articles 3, 37, 40

²⁶ United Nations General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”), A/RES/45/112, 14 December 1990 at 23, 3, 31

²⁷ United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), A/RES/40/33, 29 November 1985 at Rule 7.1

²⁸ Beijing Rules, *supra* at note 27, at Rule 3.3. The *UNCRC* and international legal instruments are recognized as an important source for interpreting rights domestically and the *Charter* is presumed to offer at least the same level of protection as the *UNCRC*: *R v Sharpe*, 2001 SCC 2 at para 175; *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 78-79

of cognitive and psychological development as compared to older adults fails to provide them the full scope of protection that the *Charter* is intended to provide.²⁹ A developmental approach that accounts for their age and associated vulnerability, as well as other aspects of their social realities – such as racialization, poverty, and over-policing, as other interveners will argue - is critical to an analysis that vindicates their rights and ensures, as above, that their constitutional rights are real, and not mere abstractions.

18. Such an approach requires recognition that, while teenagers and young people are entitled to the same protections of the *Charter* as older adults, their ability to defend their rights as against law enforcement – which involves significant decision-making and executive functioning capacity³⁰ - is diminished. It is therefore incumbent on the police to ensure that young people are informed of their rights and provided a meaningful opportunity to exercise them.

a. Section 8 protects young people’s privacy in their communities and homes

19. Teenagers and young people benefit from the protection of their privacy under section 8 to the same extent as older adults.³¹ The liberty and security interests and respect for personal autonomy at the heart of section 8 “apply equally if not more strongly in the case of young persons”.³² Young people enjoy a reasonable expectation of privacy, no less than older adults, in their homes,³³ but also – recognizing that their access to private spaces may be limited - in other places they frequent, including while at school³⁴ and while in the community.³⁵

20. In *R v Ferdinand* - a case which, like the one at bar, concerns the unlawful detention and search of young, black men in an impoverished neighbourhood – the Court held:

Young people have a right to “just hang out”, especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights and without their consent.”³⁶

²⁹ See *JDB*, *supra*, at note 13. See also analysis in American context in Rosado, L.M., *supra* at note 9

³⁰ See discussion in the context of *Miranda* rights King, KJ, *supra* at note 6, at 431-434

³¹ *R v AM*, 2008 SCC 19 at para 35

³² *Toronto Star Newspaper Ltd v Ontario*, 2012 ONCJ 27 at para 41, cited with approval in *AB v Bragg Communications*, *supra* at note 18, at para 18

³³ *R v DC*, 2010 SKPC 132 at para 39, 361 Sask R 163

³⁴ *R v AM*, 2008 SCC 19 at para 65

³⁵ *R v Ferdinand*, 2004 CanLII 5854 (ONSC) at para 54, 21 CR (6th) 65

³⁶ *R v Ferdinand*, *supra* at note 35, at para 54

21. This reasoning applies even more strongly with respect to a young person’s home and backyard, or the backyard of their friends, consistent with a normative understanding of privacy. Certainly a young person would expect to be free from state intrusion while “just hanging out” in the backyard of a friend. Moreover, a young person, like L.D., would have a reasonable expectation of privacy in his *own* backyard, one which, on a normative analysis, extends to his invited guests.³⁷

22. This Court must accordingly consider the impact on the privacy interests not only of the person ultimately charged with an offence, but the privacy interests of all the young people impacted by the search, consistent with the approach mandated in *R v AM*. The focus of the section 8 analysis must be on the “impact on the subject of the search or the seizure” – in that case all students at a school subjected to a sniffer dog search – “and not simply on its rationality in furthering some valid government objective”. The impact on innocent individuals – disruption, inconvenience, and potential embarrassment - of intrusive police attention is central to the analysis.³⁸

b. Young people must have a meaningful opportunity to exercise their *Charter* rights

23. This Court must consider whether the conduct of the police in this case provided a meaningful opportunity for the young people to exercise their section 8 and 9 rights, in light of their heightened vulnerability. On the facts as stated by the parties, the boys in the backyard were not advised of the reason for the police entry nor were they provided with an opportunity to consent to or resist the police intrusion;³⁹ the police entered the backyard without introduction or explanation, stood between the young people and the exit, asked for information and identification, and demanded that they keep their hands where the police could see them.⁴⁰

24. A young person is far more likely to experience a police interaction as coercive and to perceive that they have no choice but to comply with police demands than a similarly-situated adult. Indeed, given the tenor of the police conduct in this case, the young people would have perceived that their liberty was restrained from the moment the police entered the backyard and

³⁷ Appellant’s Factum, at para 21-26. We support the submissions of the Appellant in this regard.

³⁸ *R v AM*, *supra* at note 34, at para 36

³⁹ This distinguishes the present case from a case like *Edwards*, where the police sought and obtained the occupier’s consent to enter her apartment: *R v Edwards*, [1996] 1 SCR 128

⁴⁰ Appellant’s Factum at para 15; Reasons of the Court of Appeal, Lauwers JA (dissent) at para 90-91

that they had no choice but to comply with police demands; their behaviour indicates just that.

25. To suggest, as the courts below did⁴¹, that L.D.’s failure to exclude the police officers from the backyard is relevant to the analysis of the lawfulness of the police entry, or the question of psychological detention, profoundly misapprehends the vulnerable position of young people and their relative ability to assert their rights in the circumstances.

26. Teenagers and young people simply do not have the capacity to appreciate and assess alternatives, weigh the risk of non-compliance with an officer’s demands, and waive or invoke their rights in a confrontation with an officer, a highly stressful and emotionally-charged encounter. Young people are furthermore likely to experience anxiety and persistent trauma as a result of repeated police interactions – as these boys experienced - and perceive an interaction with an officer as threatening and adversarial.⁴²

27. An analysis that appreciates the inherent vulnerability of young people would naturally find that despite intuiting that the police entry was unlawful and unfair⁴³, the boys simply acquiesced to their demands. This cannot be equated to consent or a knowing and autonomous waiver of their rights. Indeed, this Court has found that even a sophisticated adult would be inclined to comply when faced with a police demand, even an unlawful one.⁴⁴ Consistent with a meaningful appreciation of their developmental and social reality, this Court must carefully attend to whether the boys’ compliance was the result of coercion, ignorance, and fear, rather than a true understanding of the rights involved and the consequences of giving them up,⁴⁵

28. This Court should furthermore exercise caution in treating casual statements, such as the Appellant’s that he “didn’t think he needed to stay around”,⁴⁶ as determinative of the question of psychological detention. Such statements fall short of demonstrating that a young person understood with certainty his constitutional rights or that he had the capacity or practical ability

⁴¹ Ruling on *Charter* Application at para 78-80, Appellant’s Record (“AR”), Vol I, Tab 1; Reasons of the Court of Appeal, Doherty, JA at para 16, 17, AR, Vol I, Tab 2

⁴² Geller, A, et al (2014) “Aggressive policing and the mental health of young urban men” *Am J Pub. Health*, 104:12, 2321 at 2324; Gau, JM & Brunson, RK (2015) “Procedural injustice, lost legitimacy, and self-help: Young males’ adaptations to perceived unfairness in urban policing tactics” *31:2 J Contemp Crim Jus* 132 at 144-6; Affidavits of L.D., Ibsa Abdulatif, Sheldon Lewis, and Ramadan Aden AR, Vol I, Tab 4 137-51

⁴³ Ruling on *Charter* Application at para 20

⁴⁴ *R v Grant*, 2009 SCC 32 at para 30

⁴⁵ *R v LTH*, *supra* at note 21, at para 21-23, 40

⁴⁶ Appellant’s Factum at para 95

to exercise them. This Court has found that regardless of a young person’s “bravado”, it is unlikely that they will appreciate their legal rights.⁴⁷ Moreover, the test remains an objective one that must be assessed from the position of a reasonable young person, taking into account how that particular young person might perceive the situation by reason of his developmental capacity, experience of racialization and poverty, and experience with police.⁴⁸

29. In this case, as in *R v AK*, a case involving a street-level investigation of six young black males, the Court recognized that it is unlikely that the average citizen, much less a young, racialized, vulnerable person, would have the “the fortitude to stand up to a police officer who is illegally detaining them, because the situation could escalate and the citizen could get hurt.” An individual might reasonably surmise that “standing on their right to leave this encounter would almost certainly have been characterized as suspicious”, placing the individual in an impossible situation.⁴⁹ In *AK*, the Court found that their *Charter* rights were suspended from the moment the group – rather than any one of them - became a target of investigation.⁵⁰

30. Given the vulnerabilities occasioned by his age, and compounded by intersecting grounds of disadvantage, the Court held that *AK* was entitled to special protection of his rights and that the police officers had a “commensurate heightened duty to jealously guard the young person’s rights”⁵¹, which at a minimum included the right to be informed of the reason for their detention.

31. Meaningful protection and enforcement of the rights of young people accordingly requires the police to take purposeful steps to ensure at the very least that the youthful citizen understands his rights and has an adequate opportunity to exercise them, lest the protections of the *Charter* be reserved only to the most sophisticated and assertive.

32. Requiring law enforcement to take overt measures to ensure young people understand and have an opportunity to exercise their rights does not impose upon the police an impracticable or onerous burden, particularly given that their youthfulness is objectively discernible.⁵² It does not require police officers to undertake an individualized inquiry into their special circumstances in every interaction; such special circumstances can be presumed.

⁴⁷ *R v JTJ*, *supra* at note 22 at para 82

⁴⁸ *R v Grant*, *supra* at note 44 at para 44; see discussion in Rosado, LM, *supra*, at note 9 at 791

⁴⁹ *R v. AK*, 2014 ONCJ 374 at para 73

⁵⁰ *R v AK*, *supra* at note 49 at para 56

⁵¹ *R v AK*, *supra* at note 49 at para 74, 76-77

⁵² *Roper v Simmons*, *supra* at note 10; King, KJ, *supra* at note 6 at 476-8

33. It is not difficult to imagine what reasonable steps the police could take, and that the citizenry should reasonably expect. For example, in this case, rather than simply entering the backyard uninvited, the officers could have spoken to the boys in the backyard from beyond the fence, could have stated clearly the reason for approaching the group, could have asked permission to enter and made clear that the boys had an option to say no, could have advised the young men that none of them were under suspicion or investigation. Such minimal steps would ensure that the rights of the young people involved are appropriately and meaningfully respected in an interaction that might otherwise be coercive, intimidating, and oppressive, and which risks undermining their safety and security.⁵³

c. The vulnerabilities of the young people involved are relevant to the s. 24(2) analysis

34. JFCY urges this Court to take seriously the impact on the rights not only of the boys in the backyard, but of young people generally. The inherent vulnerability of young people, compounded by their social realities, should not be underestimated, nor should their privacy and security interests be discounted. It is appropriate that this Court recognize a correlative duty on law enforcement to take steps to appropriately and meaningfully protect those interests. A failure to do so risks the creation of perverse incentives for police to disregard the rights of the vulnerable and fails to treat young people's rights as worthy of protection and concern.

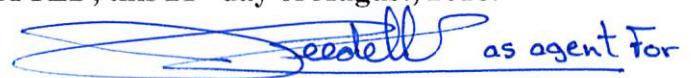
35. As this Court stated in *AM*, learning respect for rights is essential to our democratic society and should be part of the education of all young people. Those values are best taught by example and may be undermined if young people's rights are ignored by those in authority.⁵⁴

PARTS IV AND V– COSTS AND ORDER REQUESTED

36. JFCY seeks no costs and requests that none be awarded against it.

37. JFCY takes no position regarding the specific outcome of the appeal. Further to the Order granting leave to intervene, JFCY respectfully requests the opportunity to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 21st day of August, 2018.

 as agent for

Jane Stewart & Mary Birdsell, Counsel for JFCY

⁵³ See Gau, JM, *supra* at note 42

⁵⁴ *R v AM*, *supra* at note 34 at para 44

PART VI – AUTHORITIES

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