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**The Youth Criminal Justice Act:
Context, Principles, Provisions & Implementation in British Columbia**

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The YOUTH CRIMINAL JUSTICE ACT: Context, Principles, Provisions & Implementation in British Columbia

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There have been profound changes in Canada's juvenile justice system during the century that it has been that it has been in existence, most recently as a result of the *Youth Criminal Justice Act*[*Y.C.J.A.*]¹ coming into force on April 1, 2003. This statute was intended to reduce Canada's high rate of custody for adolescent offenders, based on the belief that community-based responses are often more effective and more appropriate for dealing with most young offenders. The *Y.C.J.A.* has clearly had a significant impact on youth justice in Canada, resulting in a substantial increases in the number of cases diverted from the youth courts and a decrease in the number of adolescent offenders in custody.

This paper provides an introduction to the *Act*, discussing its principles and major provisions, the effects of its implementation and some of the controversies in the case law about its interpretation. To provide a context for a discussion of the *Y.C.J.A.*, the paper begins with a brief review of the history of juvenile justice in Canada, and then summarizes the principles and major provisions of the *Act*. The paper reviews some of the most important and controversial decisions interpreting the *Act*, and considers some of the issues of implementation of the *Act*, with a particular focus on British Columbia.

This paper only provides a survey of issues, and focusses on appellate jurisprudence and some of the leading trial decisions; it does not provide a review the hundreds of reported decisions under the *Act*. Interested readers should consult more detailed sources for fuller discussion of some of the complex issues raised.²

A Century of Change in Canada's Juvenile Justice System

Canada's first national juvenile justice law, the *Juvenile Delinquents Act*[*J.D.A.*]³

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This is a revised version of papers presented at previous conferences. Portions of this paper are more fully developed in a number of publications: N. Bala, *Youth Criminal Justice Law* (Toronto : Thompson Educational Publishing, 2003); S. Anand & N. Bala. "The Quebec Court of Appeal *Youth Justice Reference*: Striking Down the Toughest Part of the New Act" (2003), 10 C.R. (6th) 397; N.Bala. "Diversion, Conferencing and Extrajudicial Measures for Adolescent Offenders" (2003), 40 Alberta Law Rev. 991; J. Roberts & N. Bala. "Understanding Sentencing Under the Youth Criminal Justice Act" (2003), 41 Alberta Law Rev.395; and N. Bala & S. Anand, "The First Months Under the *Youth Criminal Justice Act*: A Survey of Caselaw"(2004), 46 Can. J. Crim. 251.

¹ *Youth Criminal Justice Act*, S.C. 2002, c. 1. Royal assent February 19, 2002, in force April 1, 2003

² Suggested Readings are set out at the end of this paper..

³ *Juvenile Delinquents Act*, first enacted as S.C. 1908, c. 40; subject to minor amendments over the years, finally as *Juvenile Delinquents Act*, R.S..C. 1970, c. J-3. Starting in the-mid nineteenth century provincial

of 1908 recognized that children and youths are different from adults and should not be held accountable for violations of the criminal law in the same fashion as adults. While there is now widespread recognition that children and adolescents — having special needs and limited capacities — should be treated differently and separately from adults, the nature of the special legal treatment for youth has dramatically evolved over the course of history and remains controversial today.

Historically, the rationale for establishing a juvenile justice system that was separate from the adult criminal justice system was the belief that youths are more vulnerable than adults, as well as more amenable to rehabilitation. It was believed that long-term social protection can best be achieved by concentrating resources on their rehabilitation and by protecting them from the glare of public accountability. At the very least, concerns about the corruption or abuse of youths placed in correctional facilities with adult offenders offered a justification for the separate confinement of youth.

The *J.D.A.* had a welfare oriented philosophy and stated that juveniles who violated the law were not to be treated as “criminal offenders,” but rather as “misdirected and misguided” children, “needing aid, encouragement, help and assistance.”⁴ Since the focus of the law was on the promotion of the welfare of the child, there was little concern for legal rights, and during much of the time that the *J.D.A.* was in force many Juvenile Court judges did not have legal training.

Concerns about the special needs and rehabilitation of youth did not always translate into more lenient treatment. Sentencing under the *J.D.A.* could result in light sanctions for some adolescents, particularly those from “good homes” with middle class parents, but could also produce an intrusive response to some youthful offenders, especially juveniles from marginalized backgrounds who were often placed in custody facilities for much longer periods than adults who committed the same offences. Adolescent girls were sometimes placed in custody for the vaguely worded delinquency of “sexual immorality.” Aboriginal juveniles were placed in juvenile correctional facilities in disproportionate numbers.

The *J.D.A.* provided for indefinite committals to youth custody facilities, based on the rationale that some juveniles needed the benefit of a significant period of time in a structured environment, away from a corrupting situation at home, and that the length of time needed to effect rehabilitation could not be determined by a court, but only by correctional officials after the youth spent time in custody. Despite the rehabilitative aspirations of the *J.D.A.*, juveniles inevitably felt that they were being punished, especially when placed in custody. Further, not only were many juveniles placed in custody facilities under the *J.D.A.* not rehabilitated, it is now clear that all too often these juveniles were subjected to physical abuse or sexual exploitation by staff, or intimidation by other inmates.⁵

In 1984, the *Juvenile Delinquents Act* was repealed and replaced by the *Young Offenders Act* [*Y.O.A.*].⁶ The introduction of the *Y.O.A.* represented a dramatic change in Canada’s response to youth offending, moving from a discretionary welfare-oriented

governments began to enact legislation that provided for the confinement of children separate from adults in prisons and the establishment of juvenile reformatories.

⁴ *J.D.A.*, s. 38.

⁵ See e.g. Ronda Bessner, *Institutional Abuse in Canada* (Ottawa: Law Commission of Canada, 1998).

⁶ *Young Offenders Act*, R.S.C 1985, c. Y-1, enacted as S.C. 1980–81–82–83, c. 110.

regime that, in theory at least, promoted the “best interests” of juvenile offenders, to a regime that was clearly criminal law. The *Y.O.A.* emphasized legal rights for young persons, and provided that young offenders were to be held accountable for their crimes, albeit not as accountable as adults.

The *Y.O.A.* was in turn replaced by the *Youth Criminal Justice Act* in 2003.⁷ While there are significant differences between these two most recent statutes, both statutes share some important characteristics, emphasizing respect for legal rights of youth and the accountability of young offenders. The *Y.C.J.A.* makes clear that youth court sentences are not to be a vehicle for imposing child welfare, mental health or other treatment services if this type of response is more intrusive than warranted by the offence and the record of the youth. While youth justice intervention may serve to rehabilitate a youth, if the primary purpose of social intervention is to achieve child welfare or mental health objectives, this should be done under provincial programs and statutes which focus on the best interests of children rather than under youth justice legislation is premised on offender accountability and the protection of the public. The *Y.C.J.A.* also explicitly provides that a youth should not receive a greater punishment than an adult convicted of the same offence in similar circumstances, and in most cases a concern with rehabilitation and the principle of limited accountability of adolescents will result in a less serious sanction than an adult would receive for the same offence. While some youthful offenders are resistant to rehabilitation, rehabilitative concerns are clearly more central to Canada’s youth justice system than in the criminal justice system for adults.

The Young Offenders Act (1984 – 2003)

The deficiencies of the *Juvenile Delinquents Act* were becoming apparent by the mid-1960s,⁸ but it was not until 1984 that the *Young Offenders Act* replaced the *J.D.A.* A strong impetus for legislative action was the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982. The informality and lack of legal rights for youths in the *J.D.A.* were inconsistent with the legal protections recognized in the *Charter*, while the interprovincial variation allowed by the *J.D.A.* for such issues as age jurisdiction was seen to violate the equal protection of the law guaranteed by section 15 of the *Charter*.⁹

While under the *J.D.A.* children as young as 7 were subject to prosecution, the *Y.O.A.* established a uniform national age jurisdiction of 12 through to the 18th birthday, and provided much greater recognition for the legal rights of youth, developments consistent with the emphasis in the *Charter* on due process of law and equal treatment under the law.¹⁰ Children under 12 years of age who commit criminal acts cannot be

⁷ *Youth Criminal Justice Act*, S.C. 2002, c. 1. Royal assent February 19, 2002, in force April 1, 2003

⁸ See e.g. Canada, Department of Justice, Report of the Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen’s Printer, 1965).

⁹ *Canadian Charter of Rights and Freedoms*, enacted as Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (subsequently referred to as the *Charter*).

¹⁰ Some critics have decried the increased emphasis on due process and legal rights. See, for example, J. Hackler, “An Impressionistic View of Canadian Juvenile Justice: 1965 to 1999” (2001) 20 Can J. Comm. Mental Health 17, who writes that the enactment of the *Y.O.A.* represented: “a basic change . . . a transfer of influence from social workers to lawyers. Juveniles got certain legal protections, but we did not foresee that the juveniles and their families would become victims of the legal process. . . . The vast increase in the

prosecuted and can only be dealt with informally or referred to the child welfare authorities if there are concerns about inadequate parental care.

The *Y.O.A.* abolished the indeterminate sentences of the *J.D.A.*, which were premised on providing involuntary treatment as long as this was consistent with the needs of a delinquent youth. The *Y.O.A.* used determinate (fixed) custodial dispositions, subject to judicially controlled early release, premised on the notion that holding a youth accountable was the dominant objective of the Act rather than rehabilitation. The *Y.O.A.* was a more detailed piece of legislation than the *J.D.A.*, regulating every stage of the youth justice process, including arrest and police questioning, diversion to alternatives to youth court, access to legal counsel, public disclosure of information, and the sentencing process. The *Y.O.A.* moved away from the child-welfare philosophy of the *J.D.A.*, abolishing the vague status offence of “sexual immorality” and focusing on federal criminal offences, though continuing to place greater emphasis on rehabilitation than the adult system.

Dissatisfaction with the Y.O.A.: Canadian Politics and Youth Crime Policies

By the early 1990s the *Y.O.A.* was subject to much public and political criticism. Concerns were being raised about the perceived inadequacy of the maximum sentences under that Act for serious violent young offenders, and about the difficulties encountered in transferring youths to adult court where they might face much longer sentences in adult prisons.

While the youth homicide rate in Canada has been quite stable over the past few decades, and the rate is much lower than in the USA,¹¹ the issue of youth violence, and especially youth homicide, received increased media attention in Canada in the 1990s, with conservative politicians demanding that the government “get tough” with youth crime. Increased fears about youth crime were fuelled by the ageing demographic make-up of the population, and by the insecurity felt by many Canadians in the face of accelerating social and economic change. Due to differences in birth rates and family size in various ethnic communities, Canada’s population has a relatively high proportion of youth from visible minority and Aboriginal backgrounds; some of the public fear about youth crime may reflect usually unarticulated elements of racism.

Police and court based statistics of youth offending in Canada increased significantly in the years after the *Y.O.A.* came into force in 1984.¹² The rise in police reports about youth crime in the late 1980s and early 1990s reflected, at least in part, changes in police charging patterns. For example, during this period “zero tolerance” policies were introduced in many school systems, requiring school officials to report to the police about minor assaults that previously would have been resolved informally. Certain key indicators of serious youthful criminality, however, such as the youth

number of judges, prosecutors, defence lawyers and closed-custody institutions is the result of one profession, law, expanding into an area previously dominated by another, social work . . . but it is too late to go back. Lawyers have replaced social workers as the main players in juvenile justice.” (at 17–21).

¹¹ See J. Hornick, J. Hudson & N. Bala, *American Responses to Juvenile Crime: A Canadian Perspective*, (Calgary: Canadian Research Institute for Law & Family, 1995). The youth homicide rate in Canada is one sixth to one tenth the rate in the USA; the lower rate in Canada is attributable to a number of factors; much stricter gun control in Canada is undoubtedly an important factor).

¹² Crime rates in a number of countries peaked in the early 1990s.

homicide rate and measures of youth offending based on self-reports by adolescents and have remained relatively stable in Canada for years.¹³ While the rate of youth crime reported by the police peaked in the early 1990s and was slowly falling for much of the 1990s, media reports of youth violence and public anxiety about the problem of youth crime continued to escalate during the 1990s.¹⁴

In Canada, an important element of political tension about youth justice issues relates to the division of responsibilities between the federal and provincial governments.¹⁵ Under the *Constitution Act, 1867*, the federal government has jurisdiction over the enactment of criminal laws, including juvenile justice laws, while the provinces are responsible for the implementation of these laws, as well as having full responsibility for such important related matters as education, health, and child welfare.

The federal government has a broad power to enact legislation dealing with young offenders, including regulation of youth corrections facilities and the establishment of non-court alternative programs.¹⁶ Provincial governments, however, are obliged to implement these laws, including paying for the legal, judicial, correctional, and social services required for youths. The federal government transfers some money to the provinces for the administration of juvenile justice, but it is not obliged to do so. After the *Y.O.A.* came into force in 1984, as a result of efforts to reduce the federal deficit, the level of federal financial support for such services declined. For both financial and philosophical reasons, some provincial governments disagreed with various provisions of the *Y.O.A.*

In a federal system it is understandable that some provincial politicians, like the former Ontario Progressive Conservative Premier Mike Harris, were inclined to criticize federal politicians for imposing costs and obligations on provincial governments. The federal government consults with provincial governments about law reform in the youth justice field; the provinces played a significant role in the development of the *Youth Criminal Justice Act*, and as a result the *Y.C.J.A.* gives the provinces significantly more flexibility to shape youth justice policies than they had under the *Y.O.A.* While increasing provincial control over juvenile justice policy has given the new law a degree of provincial support, it has also increased concerns that youths in different provinces may receive different treatment.

By the end of the 1990s the decline in the level of federal financial support for provincial spending on youth justice ended. The *Y.C.J.A.* is part of a federal youth justice “strategy” that includes some additional federal support for provincial spending on youth justice, although the federal government imposed conditions on how this increased

¹³ See discussion in A.N. Doob & C. Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004), chapter 6. The youth homicide rate in Canada generally declined in the 1995 to 2001 period; although there were increases in 2002 and 2003, the rate remains much lower than in the USA. See Statistics Canada, *Homicide in Canada, 2003*, Juristat vol. 24, no.8 (Sept. 2004)

¹⁴ J.B. Sprott, “Understanding Public Views of Youth Crime and the Youth Justice System” (1996) 38 *Can J. Crim.* 271.

¹⁵ Canada has 10 provinces and 3 sparsely populated northern territories. Territorial governments have essentially the same responsibilities as provincial governments with regard to youth justice. For the sake of simplicity, references in this text are only to provincial governments.

¹⁶ See e.g. *Québec (Ministrie de la Justice) v Canada (Ministrie de la Justice)* (2003), 10 C.R. (5th) 281 (Que. C.A.); *R. v. S.(S.)*, [1990] 2 S.C.R.254.,d *B.C. (A.G.) v. S.*, [1967] S.C.R. 702 .

funding was to be spent, with an emphasis on community-based programs and alternatives to custody. The decrease in federal financial support in the early 1990s caused considerable political tension. Although the increased federal funding that occurred about the time of enactment of the *Y.C.J.A.* may help to reduce such tensions, the provinces remain concerned about federal controls on their spending.

There is another political aspect to some of the provincial critiques of the youth justice system. Federal juvenile justice law may seem like an easy target for provincial politicians responsible for many of the expensive services that affect crime levels and public safety, such as policing and social services. The criticism of the *Y.O.A.* was especially pronounced in Ontario under the Progressive Conservatives in the late 1990s and early years of the new millennium, with some provincial politicians regularly blaming the federal law for not being “tough enough” on youth crime. There is no research support for the proposition that longer sentences for youth offenders result in less youth crime, and some research that suggests that longer sentences may actually lead to more crime. It is, however, easier for provincial politicians who are facing increasing public concerns about youth crime to attack the federal legislation for being “too soft” than to take responsibility for improving police services to increase community protection, or to make the changes to the health, education, and social service systems that may in the long term produce a less violent society.

Enacting the *Youth Criminal Justice Act: 1996-2003*

The political pressures to “get tough” with youth crime resulted in amendments to the *Y.O.A.* which were enacted in 1992 and 1995 to make it easier to transfer youths charged with murder and other very serious offences to adult court for trial and sentencing, though these amendments did not silence conservative critics of the law.¹⁷ At the same time as “get tough” demands for law reform were being made, there was an increasing awareness among governments of the high costs associated with the use of expensive custody facilities. In spite of the large increase in the numbers of youth in custody following the enactment of the *Y.O.A.*, more than three-quarters of youth receiving custodial sentences under that Act had not committed violent offences. Under the *Y.O.A.*, Canada had a significantly higher rate of use of youth custody than the U.S.A., Britain and European countries.¹⁸ Other countries were making much greater use of diversion and informal responses for less serious youth offenders, and greater use of community-based dispositions for youth sent to court.

It is interesting to note that while Canada as a whole had very high rates of youth custody, there was very significant variation within Canada. In British Columbia, the government was already concerned in the 1990’s about high rates of youth custody use, and various program and policy changes were made in the late 1990’s and early years of

¹⁷ See e.g N.Bala, “The 1995 *Young Offenders Act* Amendments: Compromise or confusion?” (1994), 26 *Ottawa Law Review* 643 : and K.Campbell, M.Dufresne & R. Maclure, “Amending Youth Justice Policy in Canada: Discourse, Mediation and Ambiguity” (2001) 40 *Howard Journal* 272.

¹⁸ See Canada, Department of Justice Canada, *A Strategy for Youth Justice Renewal*. (Ottawa: Ministry of Supply and Services, 1998). (online March 2004 <<http://canada.justice.gc.ca>>.); and N. Bala, J. Hornick, H. Snyder & J. Paetsch, *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Toronto: Thompson Educational Publishers, 2002).

the millennium, so that youth custody rates fell by more than one third between 1999 and 2003, with a further 25% decline in the first year that the *Y.C.J.A.* was in effect.

In response to the public dissatisfaction with the *Y.O.A.*, in the late 1990s the federal government embarked on a process of reform of youth justice laws and policies, including consultation with the provincial governments and Parliamentary Committee hearings.¹⁹ In 1998, the federal government released a document setting out the federal government a strategy for new approaches to youth crime, a strategy that included legislative reform, as well as funding changes and professional and public education.²⁰

The federal Liberal government introduced to Parliament *Youth Criminal Justice Act* in March 1999.²¹ The new law was the subject of lengthy Parliamentary Committee hearings, and some relatively minor amendments were made in the course of the Parliamentary hearings. During the hearings the new law was criticized by conservative politicians for being “too soft,” for example for not lowering the age of criminal responsibility from 12 to 10 years of age. The *Y.C.J.A.* was also criticized by politicians and service providers from Quebec, the province that has a more welfare-oriented approach to youth justice issues and the lowest custody rates in Canada.²² Critics in Quebec expressed concern that the new law placed too much emphasis on accountability and not enough on rehabilitation, and would result in more youths being treated as adult offenders.

The *Y.C.J.A.* was enacted by Parliament in February 2002, and came into force on April 1, 2003, with the provinces given a year to prepare for implementation.

The federal youth justice reform strategy was intended to respond to the belief that there had been a “disturbing decline in public confidence in the youth justice system” in Canada; the most prominently publicized aspect of the strategy was the stated intention “to respond more firmly and effectively to the small number of the most serious, violent young offenders.”²³ But there was also a very important recognition by the federal government that Canada had made too much use of expensive and often ineffective court-based responses and custody for the majority of young offenders who are not committing serious violent offences. The federal strategy has resulted in more use of community-based alternatives to court and custody, and for more resources for crime prevention. The strategy aimed to achieve these objectives by changing the law, and working with the provincial governments and various professional groups to change the way in which the youth justice and corrections systems operate.

The federal government also committed a further \$200 million to provincial governments to be spent over 5 years, principally to increase community-based alternatives and over \$30 million for initiatives to prevent youth crime, mainly directed to local groups.

¹⁹ Canada, House of Commons, *Thirteenth Report of the Standing Committee on Justice and Legal Affairs: Renewing Youth Justice* (Ottawa: Ministry of Supply and Services, 1997).

²⁰ Canada, Department of Justice Canada, *A Strategy for Youth Justice Renewal* (Ottawa: Ministry of Supply and Services, 1998). (online March 2004 <<http://canada.justice.gc.ca>>.)

²¹ Bill C-68, First Session, 36th Parliament, First Reading March 11, 1999.

²² J. Trépanier, “What Did Quebec Not Want? Opposition to the Adoption of the Youth Criminal Justice Act in Quebec” (2004), 46 Can. J. Crim 273

²³ Canada, Department of Justice, Press Release, May 12, 1999, remarks by (then) federal Justice Minister, Anne McLellan.

The Youth Criminal Justice Act: Preamble and Principles

Under the *Y.C.J.A.*, judges and other decision-makers are provided with a policy framework within which they must deal with juvenile offenders. The purposes of youth justice system and the *Y.C.J.A.* are set out in the Preamble to the *Act* and in its Declaration of Principle. The Preamble states that Canada should

have a youth criminal justice system that reserves its most serious interventions for the most serious cases and reduces the over-reliance on incarceration for non-violent young persons.

Custody is an expensive and often ineffective response to youth crime, while appropriate community-based responses often hold out a better prospect for rehabilitation. Although there is a place for the use of custody in the sentencing of adolescent offenders, Parliament was clearly of the view that under the *Y.O.A.* custody was being overused, especially for non-violent offenders. This statement in the Preamble makes clear that the intent of Parliament is that there should be less use of custody under the *Y.C.J.A.* and more use of community-based responses to youth crime. It also suggests that responses to youth crimes should be proportionate to the offence, though reflecting the limited accountability of youth in comparison to adults.

Section 3 of the *Y.C.J.A.* sets out a Declaration of Principle that is intended to guide decisions made under the *Act*. It provides that the youth justice system “must be separate from that of adults,” and governed by the principles and detailed provisions of the *Y.C.J.A.* The Declaration establishes the overall purpose of Canada’s youth justice system, with s. 3(1)(a) stating that:

the youth criminal justice system is intended to

- (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
- (ii) rehabilitate young persons who commit offences and reintegrate them into society, and
- (iii) ensure that a young person is subject to meaningful consequences for his or her offence

In order to promote the long-term protection of the public;

Thus rehabilitation is as important as preventing crime and imposing meaningful consequences. Further, the *long-term protection* of the public is seen as the *consequence* of rehabilitation and accountability, rather than as an independent objective of the youth justice system. This statement directs judges to focus their attention on sentences that facilitate the rehabilitation of young offenders, rather than on custodial sentences that would merely incapacitate them.

The Declaration also articulates a set of principles for responding to youthful offenders:

3(1)(c) within the limits of *fair and proportionate* accountability, the measures taken against young persons who commit offences should

- (i) reinforce respect for societal values,
- (ii) encourage the repair of harm done to victims and the community,
- (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
- (iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of *aboriginal* young persons and of young persons with special requirements

A dominant message of this provision is that the youth justice system must provide a response to youthful offending that is proportionate to offence. This provision also requires police, prosecutors and judges to consider a number of factors, when dealing with young offenders, including their Aboriginal status.

Section 3(1)(b) also specifies that

the criminal justice system for young persons must be separate from that of adults and emphasize the following:

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time.

There is usually relatively expeditious resolution of cases that are diverted from youth justice court and dealt with by extrajudicial measures. However, because of the complexity of the *Y.J.C.A.*, cases dealt with in youth court are likely to take at least as long to resolve as cases under the *Y.O.A.*, and delay remains a major concern in the youth justice system.²⁴ There have been a number of recent youth court cases in which judges

²⁴ See e.g. comments of Justice Peter Harris, in Harris et al, "Working in the Trenches with the YCJA" (2004), 46 Ca. J. Crim 367, at 368-69.

have cited s.3(1)(b)(iv) of the *Y.C.J.A.* in dealing with applications under the *Charter* s. 11(b). It has been held that the age of youth is a significant factor in deciding what is a “reasonable” time for having a trial and whether to stay proceedings due to delay, as “youth court matters should proceed to a conclusion more quickly than those in the adult justice system.”²⁵

Youth Justice Court

Except for murder and those very serious cases that may result in an adult length sentence, trials in youth justice court are resolved by a judge sitting without a jury. In British Columbia and most other provinces, the youth justice court judges also deal with adult criminal cases. In some jurisdictions, youth cases are dealt with by judges who are responsible for family law cases. Only in Quebec is there a court with specialist judges who deal only with cases involving children and adolescents, with jurisdiction over youth justice and child welfare cases.

The public has the right of access to youth justice courts, though a judge may exclude members of the public from the court if satisfied that their presence would be “seriously injurious” to the youth.²⁶ Several provisions of the *Y.C.J.A.* are intended to protect the privacy of young offenders.²⁷ These provisions reflect the limited accountability of youth and are intended to promote their rehabilitation.

While the media can report about proceedings in youth court, there is generally a prohibition on the publication or broadcast of any information that might identify a child or youth involved in the youth justice court process. There is a narrow judicial discretion to allow publication when a youth who is at large poses a serious risk to the public.²⁸ The media may also identify a young person if an adult sentence is imposed, but this can occur only after a finding of guilt.²⁹

²⁵ *R v N.D.Z.*, [2004] B.C.J. 952 (Prov. Ct.), per Werier Yth. Ct.J. , para 22. See also *R v T.N.R.* , [2004] O.J. 2728 (Ct. J), per Chisvin. The *Convention* places clearer emphasis on the need for timely responses to youth offending, with Art 37 stating:

(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.

²⁶ *Y.C.J.A.* s. 132

²⁷ One of the first cases to go to the Supreme Court of Canada involving the *Y.C.J.A.* will involve the privacy of youths and the taking of D.N.A. samples. In *R v R.C.*, [2004] N.S.J. 53 (N.S.C.A.), leave to appeal to SCC granted Oct. 7, 2004, the trial judge refused to order a D.N.A. sample from a 13 year old youth convicted of an "assault with a weapon" for stabbing his mother in the foot with a ball point pen after an altercation when she woke him for school. The Nova Scotia Court of Appeal reversed this decision, and ordered the D.N.A. sample to be taken. While observing that "any evidence about the potential impact of an order on the young offender must be evaluated taking into account his or her age and stage of development," the Court of Appeal concluded that there was not sufficient evidence before the trial judge to overcome the presumption in favour of the D.N.A. order for this type of offence.

²⁸ *Y.C.J.A.* ss. 110 & 112

²⁹ *Y.C.J.A.* s. 110(2)(a). Sections 110(2) and 75 also allow for publication of identifying information about youths found guilty of very serious offences even if an adult sentence is not imposed, but as discussed below, this provision has been found to be unconstitutional.

There are extensive provisions in the *Act* to restrict access to records and information about youths dealt with by the justice system, and to prevent subsequent use of a prior youth court record if the young person has had a crime-free period, with longer periods of records retention for more serious offences.³⁰

Protection of Legal Rights – Search, Police Questioning and Access to Lawyers

While youths have all of the protections of the *Charter of Rights* that are afforded to adults who are stopped by the police, it has been held that school officials, like a principal, are not generally bound by the *Charter* when searching a youth for drugs or a weapon. However, if school officials invite police to a school with a sniffer dog that is given access to the entire school, this may well be considered an infringement of the rights of a youth found in possession of drugs, and the drugs are likely to be ruled inadmissible in later proceedings.³¹

If the police arrest or detain a youth, the youth must be advised of his or her rights under the *Charter*. Further, s.146 of the *Y.C.J.A.* requires that the police must take special measures to protect the rights of young persons who are being questioned about offences which they are suspected of having committed, including advising the youth of the right to silence and of the right to consult with a parent and a lawyer before making a statement. Most youths who are being questioned by the police, however, are quite naïve and waive their rights to consultation with a lawyer or parent and make a statement. The legal rights afforded under the *Y.C.J.A.* are very similar to those under the old *Y.O.A.*, except that the courts are given new but limited authority under the *Y.C.J.A.* to admit statements made by a youth to police even if there has been a “technical irregularity” in the way in the police advised about rights.³²

As soon as a youth is arrested, the police³³ must inform the youth of the right to consult a lawyer.³⁴ There is a significant onus on police to offer youth a clear explanation of any rights that are to be waived, especially if there is waiver of the right to counsel: “Not only must the waiver be clear and unequivocal, but his or her understanding must also be full and complete.”³⁵ If a youth expresses a wish to contact a lawyer, police must cease questioning the youth and use reasonable efforts to assist the youth in contacting a lawyer.³⁶ In almost all places in Canada there are programs to allow a person who has been arrested and is being questioned by the police to have at least a telephone consultation to a lawyer without charge.

If the youth’s parents have the means to pay for a lawyer, they may decide to privately retain counsel for their child. If a youth appears in court without a lawyer, the

³⁰ *Y.C.J.A.* ss. 114 - 129.

³¹ *R v A.M.*, [2004] O.J. 2716 (Ont. Ct Just.), per Hornblower J.

³² *Y.C.J.A.* s.146. See *R v A.A.*, [2003] O.J. 5137 (Ct. Just.) per Flaherty J. for a case where the court refused to admit both a statement and physical evidence because of a violation of the rights of a youth, resulting in an acquittal for a charge of assault causing bodily harm.

³³ The obligation to caution a youth about rights applies to any “person in authority” and may extend to a probation officer or youth worker, especially one who is the employee of a police service even if not a police officer: see *R v N.R.F.*, [2004] B.C.J. 1287 (Prov. Ct.), per Romilly Prov. J.

³⁴ See *Y.C.J.A.* s. 25.

³⁵ *R v O.K.*, [2004] B.C.J. 1458 (Prov. Ct.), per McKinnon Yth. Ct.J.

³⁶ *R v D.R.B.*, [2004] B.C.J. 1092 (Prov. Ct.)

presiding judge must advise the youth of the right to counsel. If the court is satisfied that a youth “wishes to obtain counsel but is unable to do so,” the judge shall initially refer the youth to legal aid, and if legal aid will not provide counsel, the judge shall direct that counsel is to be provided, paid by the government. This gives adolescents a significantly broader right than what is afforded an adult in the criminal justice system. While an adult always has the right to privately retain counsel, under the terms of legal aid plan regulations, adults facing criminal charges can only have a government paid lawyer if they have very limited income *and* are facing serious criminal charges. The provisions of the *Y.C.J.A.* that provide for greater access to counsel for youths reflect a desire to ensure that their rights are protected, and reflect the belief that youths may lack the capacity to meaningfully participate in the criminal justice process without legal representation.

In practice, however, the process for obtaining court appointed counsel can be quite cumbersome,³⁷ and often youths, especially those charged with less serious offences, plead guilty after only a brief consultation at the court with duty counsel.

A lawyer for a youth may provide assistance at the time of pre-trial questioning by the police, at a pre-trial bail hearing, at trial, and at a sentencing or review hearing. After counsel has obtained disclosure from the Crown prosecutor of information obtained by the police, counsel can advise the youth of how to plead, though it is ultimately for the youth to decide whether to plead guilty or have a trial. In practice, most youths decide to plead guilty, often as a result of a plea bargain arranged between their lawyer and the Crown prosecutor. Defence counsel can also have an important role in preparing for sentencing, obtaining information, and making recommendations to the court.

While lawyers can have a very important role in the youth court process, some lawyers may not give youth court cases the attention that they deserve. The lack of effective legal representation that some lawyers provide youths may in part be due to the limited fees paid by legal aid and the government, as well as the lack of familiarity of some lawyers with youth justice issues and resources, and the difficulties in dealing with adolescent clients. In some provinces, such as Alberta and Quebec, there are legal aid clinics where lawyers specialize in the representing youth, developing the expertise and skills needed to represent youths clients. Ontario Legal Aid is also establishing pilot programs to have staff lawyers provide representation for youth.

Role of Parents

The Declaration of Principle recognizes the importance of parents for their

³⁷ One of the controversies about obtaining counsel has to do with the extent of the inquiry that a judge must conduct before deciding a youth is “unable” to obtain counsel and hence requires a court direction that counsel is to be appointed. The Ontario Court of Appeal decision under the *Y.O.A.* in *R v M. (B.)* (1999), 28 C.R.(5th) 129 has been interpreted by some youth justice judges as requiring parents to co-operate in a financial assessment conducted by the legal aid plan: *R v B. (E.R.)*, [2003] O.J. 3738 (Ont. Prov. Ct.).

It is, however, clear that if parents have the means to pay for a lawyer but refuse to do so, no order can be made requiring them to pay, and that if parents are unwilling to pay for counsel, a youth court judge should direct that counsel is to be provided to their child unless the youth has sufficient resources to pay for counsel without parental aid. Court or legal aid inquiries into parental resources and willing to pay for counsel are intrusive and can be very frustrating for all involved: *R v B.L.A.*, [2002] O.J. 513 (Ont. Ct. J.), per Kurkurin J. It is submitted that youth court judges are only obliged to conduct a “summary” inquiry, and if it is established that parents are *either* financially unable *or* unwilling to pay, that a direction should be made for counsel to be provided. See Bala, “*R v. M. (B.): Trying to Make Parents Pay for Their Children’s Lawyers*” (1999), 28 C. R. (5th) 140- 148.

children, with specific provisions of the *Y.C.J.A* requiring that parents are to be notified of the detention of their children, and have the right to attend proceedings and make submissions prior to sentencing.³⁸ Parents are most likely to attend court if their child is younger and does not have a significant prior record.

Section 26 allows a youth court to order that parents are to attend court if their presence is considered “necessary or in the best interests” of a youth.³⁹ This provision reflects research which shows that parents relatively seldom attend youth court proceedings, especially if youths are older or have a history of offending. Research in Quebec has demonstrated that the absence of collaboration with parents of young offenders has a negative impact on the success rate of probation orders.⁴⁰ As well, when family members are involved in the treatment of young offenders, recidivism rates are significantly lower.⁴¹ Orders to compel parental attendance, however, are rarely made, as coercing parents to become involved in the court process is rarely likely to help their children.

Courts may make detention orders or sentences that require youths to reside with their parents, but there are no provisions to require parents to allow their child to reside with them or take part in counselling.⁴²

There are no provisions in the *Y.C.J.A.* to hold parents accountable for the crimes of their children, and at civil law a victim who suffered losses as a result of a youth’s crime can generally only recover monetary damages from a parent if it can be established that there was negligence in the supervision of the youth, which is usually difficult to do, and such suits are relatively rare.⁴³

Pre-Court Diversion: Extrajudicial Measures

The provisions of the *Y.C.J.A.* that are intended to divert cases from youth court before they are considered by the court are an important element of Canada’s youth justice strategy to increase use of community-based responses to youth crime.

Under the *Y.O.A.* there was great variation across Canada in the use of diversionary measures. In particular in Quebec, which has more of a welfare-oriented approach to youth offenders, there has long been more diversion. Under the *Y.O.A.*, the rate of bringing cases to court in Quebec was 19 per 1,000 youths in the population. In

³⁸ *Y.C.J.A* ss. 3(1)(d)(iv), 26 & 42(1)

³⁹ *Y.C.J.A* s. 27

⁴⁰ See J. Trepanier, *L’avenir des pratiques dans un nouveau cadre legal visant les jeunes contrevenants* (Montreal, Université de Montréal, 2002).

⁴¹ J. Latimer, “A meta-analytic examination of youth delinquency, family treatment and recidivism” (2001), 43 *Can. J. Crim.* 237-253.

⁴² A parent or other adult may agree to “take responsibility” for a youth who would otherwise be detained pending trial; an adult who “willfully fails” to comply with such an undertaking commits an offence; see *Y.C.J.A.* ss. 31 & 139. There is, however, no requirement for a parent to give such an undertaking.

⁴³ In British Columbia and Newfoundland, legislation imposes strict liability on parents whose children cause damage in school: see e.g. *Coquitlam School District No. 43 v Clement* (1999), 170 D.L.R. (4th) 107 (B.C.C.A.); and *Labrador School Board v P.(R.)* (2003), 229 Nfld. & P.E.I.R. 105 (Nfld. & Lab. S.C.) See also Ontario: *Parental Responsibility Act, 2000*, S.O. 2000, c.4 which allows for liability to be imposed; and *Shannon v. T.W.*, [2002] O.J. 2339 (Ont. Sm. Cl. Ct.), where the court found that the parents of a boy, aged 10, had discharged the burden of proving that adequate supervision was provided; a 14-year-old was hired to baby-sit the younger boy, and the two boys broke into a house while their parents were all at work.

British Columbia considerable use was made of diversion, with a charge rate 36 per thousand, somewhat under the national average of 42 per 1,000 youth, while in some jurisdictions this rate was as high as 94 per 1,000 youth.⁴⁴ The *Y.C.J.A.* aims to encourage greater use of diversion, especially in those jurisdictions within Canada that had high rates of use of court under the *Y.O.A.*

A number of statements in the Declaration of Principle and specific provisions in the *Act* are intended to encourage police and prosecutors to resolve youth cases without sending the youth to court through use of “extrajudicial measures” and “extrajudicial sanctions.”⁴⁵

“Extrajudicial sanctions” are more formal community-based responses and programs, that may, for example, result in restitution to a victim, a requirement or some form of restorative justice response to youth crime. The concept of “extrajudicial measures” is broader, including extrajudicial sanctions as well as police warnings (oral) and cautioning (written). In many communities in British Columbia, there is the possibility of a pre-charge police referral to a community accountability programs. If charges are laid, there is process for screening by a Crown prosecutor, that may result in a formal caution being sent by the prosecutor to the youth and parents rather than having the case processed through court. While there is no formal youth court record for cases where a caution is issued, in B.C. there is a province-wide tracking system for Crown prosecutor cautions to limit their use for repeat offenders.

Some extrajudicial sanctions programs may require a youth to participate in counseling or mentoring programs, but not all of them allow for such responses. In some communities in Canada, minor violent offences such as assaults in schools, are dealt with by extrajudicial sanctions programs that, for example, may involve victim-offender reconciliation or family group conferencing, and may result in an apology to the victim, personal service orders, restitution, community service or counseling for the offender. In many communities in British Columbia, extrajudicial sanctions programs are operated by community-based agencies that may, for example, have staff and volunteers involved in conferencing, though in Ontario it is still more common for probation officers to be responsible for extrajudicial sanctions.

Extrajudicial measures are aimed at reducing the number of young accuseds processed in youth court, with a particular emphasis on diversion of first offenders and juveniles accused of minor offences. Section 4 of the *Y.C.J.A.* affirms the importance extrajudicial measures, stating that “extrajudicial measures are often the most appropriate and effective way to address youth crime,” and further providing that:⁴⁶

Extrajudicial measures are *presumed* to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence.

⁴⁴ See A.Doob and J. Sprott , “Youth Justice in Canada” in M.Tonry and A. Doob (eds.), *Youth Crime and Youth Justice* (Chicago: University of Chicago Press, 2004.)

⁴⁵ See N.Bala. "Diversion, Conferencing and Extrajudicial Measures for Adolescent Offenders" (2003), 40 *Alberta Law Review* 991.

⁴⁶ *Y.C.J.A.*, s.4. Emphasis added.

There is also a statutory requirement that a police officer “shall” consider whether to invoke an extrajudicial measure prior to commencing judicial proceedings against a young person.⁴⁷

While there is a presumption that extrajudicial measures shall be used for non-violent first offenders, the *Act* also reminds police and prosecutors that “nothing... precludes their use in respect of a young person who (i) has previously been dealt with by the use of extrajudicial measures, or (ii) has previously been found guilty of an offence.”⁴⁸ This provision is intended to encourage police and prosecutors to avoid automatically escalating the degree of criminal justice intervention in response to any subsequent offending.

The emphasis on extra-judicial measures reflects the fact that under the *Y.O.A.* that adolescents usually complied with all of the conditions imposed.⁴⁹ Extrajudicial measures provide a relatively expeditious, inexpensive response to youth crime that is at least as effective, and perhaps more effective, than court for minor offences.

Section 10 of the *Y.C.J.A.* provides that extrajudicial sanctions may be used only if a youth “accepts responsibility” for the alleged offence that is alleged to have been committed and consents to the imposition of the sanction. A youth who denies responsibility for the offence or objects to a specific sanction should be referred to youth court for a trial. In an attempt to prevent the application of these interventions to cases in which the young person is not at risk of a judicial proceeding, s.10(2)(f) provides that an extrajudicial sanction may be used only if there is sufficient evidence to proceed with a prosecution.

If the young person complies with the conditions of the extrajudicial sanction, the case against the young person cannot proceed to youth court. The record of having received an extrajudicial sanction is not technically a finding of guilt, but if in the two years following the imposition of the sanction the youth is found guilty in youth court of an offence, the existence of the prior extrajudicial sanction may be used by the youth court and might result in a more severe sentence.⁵⁰

While the *Y.C.J.A.* encourages police and prosecutors to make greater use of diversionary programs, it also makes clear that the decision of police and prosecutors to lay charges and send a matter to youth court rather than divert a case is not subject to judicial review.⁵¹ Police and prosecutors are governed by provincial policies, and will consider the nature of the offence, any prior record, as well as the attitude of the victim. Although a judge may at an early stage of proceedings informally suggest that a case should be diverted, or may impose the very mild sentence of a reprimand for a case that should have been diverted, the success of the diversionary provisions of the *Y.C.J.A.* is not dependent on the courts. Rather it is the attitudes and policies of police and prosecutors, and the availability of community based alternatives that will determine the success of these programs.

⁴⁷ *Y.C.J.A.* s.6.

⁴⁸ *Y.C.J.A.*, s.4(d)

⁴⁹ Of the all cases that were diverted to non-court programs in 1997-98, fully 89% of the young offenders successfully completed all the requirements agreed to as a condition of the measure. See Statistics Canada, *Alternative Measures for Youth in Canada* (1999), Juristat, Vol. 19(8).

⁵⁰ *Y.C.J.A.*, s.119(2)(a).

⁵¹ *Y.C.J.A.* ss. 3(1)(d)(i) and 6(2).

There is substantial variation across Canada in provincial policies, and in local attitudes and community programs. The introduction of the *Y.C.J.A.* was accompanied by significant professional educational initiatives funded by the federal government, though there continue to be concerns about how police and prosecutors exercise their discretion in making “low visibility” decisions about diversion.⁵²

Significantly fewer cases are being sent to youth court under the new *Act*,⁵³ as police deal with more cases informally. In British Columbia, police referrals of youth to the Crown for prosecution in youth court fell by 29% in the first year that the *Y.C.J.A.* was in effect.

Conferences

The Declaration of Principle encourages the involvement of victims, parents, and members of the community in the youth justice process. While the *Y.C.J.A.* does not require conferencing, it has provisions that encourage police, prosecutors and judges to consider having “conferences,” which are very broadly defined as “a group of persons who are convened to give advice... for the purpose of making a decision required to be made under this Act,” or who are convened to make a decision about extrajudicial sanctions. Conferencing has real potential for engaging youth, victims, families and communities more effectively than court. However, conferencing requires that facilitators (whether probation officers, social workers or judges) have appropriate training and resources.

There are a range of different types of conferences that are being used in Canada, including

- Conferences that are part of extra-judicial measures program for less serious offenders where a youth is referred instead of court. This type of program may involve volunteer members of the community and have a restorative justice focus, allowing for the offender to hear from the victim. Parents of the offender will also usually attend. In British Columbia there are over 70 such community based programs.⁵⁴ For these less serious cases, the conference may develop a plan that might involve an apology, restitution, community services or counseling.
- In more serious cases, a judge may refer a case after a finding of guilt to a conference for a recommendation about detention, sentencing, or sentence review. This may be a restorative justice type conference, involving the offender or victim, or could be a meeting of professionals, youth and parents to help formulate a case plan and recommendation to the court. The youth can learn of the effects of the offence on the victim, and may apologize for the harm done. Parents often participate in these conferences, and other members of the offender’s family and community may participate; in Aboriginal communities, elders might be involved. In British Columbia, probation officers or trained

⁵² See e.g. comments of Justice David Cole, in Harris et al, “Working in the Trenches with the YCJA” (2004), 46 Can. J. Crim 367, at 376-380.

⁵³ See e.g. T. Blackwell, “Fewer youths jailed under new law,” *National Post* July 18, 2003; and R. Daly “Kids who hurt can also heal,” *Toronto Star*, Mar. 28, 2004.
<http://www.calgarycommunityconferencing.com/index.asp>

⁵⁴ See D. Hillian, M. Reitsma Street & J. Hackler, “Conferencing in the Youth Criminal Justice Act of Canada: Policy Developments in British Columbia” (2004), 46 Can. J. Crim 343.

professionals are expected to facilitate these court-referred conferences. To date, judges in British Columbia have made few referrals to conferencing.

- Youth court judges may convene and personally preside at a conference, which may, for example, in an Aboriginal community involve the victim and community members in some form of “circle sentencing.” In non-Aboriginal communities judges may hold meetings, perhaps on a pre-plea basis, to discuss a case with the youth, family members and professionals. The practice of judicially supervised conferencing has real potential value, but it is time consuming for the courts. It is an evolving practice and clear rules have yet to be established; judges have to ensure that a fair process is followed.⁵⁵ Circle sentencing for youthful offenders has not occurred often in British Columbia, but it has, for example, been used in the Sto:Lo First Nation in the Fraser Valley.

Conferencing is used very extensively to respond to youth crime in countries like New Zealand. In Canada, some provinces, like Alberta have developed extensive programs of community-based conferencing.⁵⁶ Programs such as the Calgary Community Conferencing program have been positively received by young offenders, their parents and their victims.⁵⁷

Ontario has been relatively slow to adopt conferencing, but it is now being used in some communities such as Kingston for extrajudicial sanctions, and some judges are starting to refer cases to probation officers for pre-sentence conferencing or to preside over conferencing.⁵⁸ There remain, however, many issues for judges, lawyers, probation officers and others to resolve as youth conferencing evolves in Canada.

There is a growing body of research from around the world about the value of various diversionary and restorative justice based programs for youth offenders. Some Canadian research study on youth diversion did not find a reduction in recidivism from use of youth diversion as opposed to youth court.⁵⁹ However, a meta-analysis of research studies on restorative justice programs in a number of countries found that on average these programs reduce recidivism by 7% compared to non-restorative programs, but there is wide variation in effects.⁶⁰ It would seem that those youths who are most clearly engaged in conferencing and genuinely remorseful are most likely not to reoffend.⁶¹ While young offenders, parents and victims generally find conferencing preferable to court, many victims find neither experience satisfactory.

It seems safe to conclude that for a range serious youthful offenders, use of various forms of extrajudicial measures, including conferencing, has no worse effect than

⁵⁵ See e.g. comments of Justice Fern Weinper, in P. Harris et al, “Working in the Trenches with the YCJA” (2004), 46 Can. J. Crim 367, at 380-86.

⁵⁶ See D. Hillian, M. Reitsma-Street & J. Hackler, “Conferencing in the Youth Criminal Justice Act: Policy Developments in British Columbia” (2004), 46 Can J. Crim. 367.

⁵⁷ See <http://www.calgarycommunityconferencing.com/index.asp>. And R. Green and K. Healy, *Tough on Kids* (Saskatoon: Purich Publications, 2003), chapter 7.

⁵⁸ See <http://www.youthdiversion.org/>

⁵⁹ M. Morton & G. West, “An Experiment in Diversion by a Citizen Committee,” in R. Corrado, M. LeBlanc and J. Trepanier, *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983).

⁶⁰ J. Latimer, C. Dowden & D. Muise, *The Effectiveness of Restorative Justice Processes: A Meta-Analysis* (Ottawa, Department of Justice, 2001)

⁶¹ See H. Hayes & K. Daly, “Conferencing and Re-offending” (2004), 37 Aust & N.Z. J. Criminology 167-191.

sending a youth to court in terms of recidivism. Further, properly designed and resourced programs may better engage youths and may have the potential to contribute to somewhat lower rates of recidivism. Victims who are supported and willing to participate also tend to be better served by conferencing and a restorative justice approach. Some victims, however, will understandably be unwilling to participate, and among those who do, some victims will still leave the process feeling dissatisfied with the outcome, perhaps questioning the sincerity of expressions of remorse or feeling intimidated.

Pre-trial Detention

In more serious cases that are proceeding through the court system, the Crown prosecutor, in consultation with the police, may seek detention of the youth pending trial. The decision about whether to detain a youth is made by a judge at a pre-trial detention (bail) hearing. There were concerns that under the *Y.O.A.* many youths were being detained before trial in situations in which an adult would be released, for example in cases where a judge was concerned that a homeless youth might be at risk of harm by living “on the street.” In some cases judges may have been detaining youths to “send them a message” about their offending, even though legally this was only an appropriate response after a finding of guilt.

Concerns about pre-trial detention not only relate to the fact that this may be a violation of rights, but also reflect concerns about conditions in detention. While some pre-trial detention facilities have very good programming, many detention facilities have less in the way rehabilitative programming than is available in post-sentence custody facilities, and that there may be a greater potential for peer-on-peer abuse in these facilities due to the absence of programming.⁶² Further, the sudden removal from the community can be very disruptive to a youth’s social relationships and education, and makes any programming in detention difficult to arrange.⁶³

Section 28 of the *Y.C.J.A* makes clear that a youth should only be detained *before* sentencing in circumstances in which an adult could be detained. Section 29(1) specifies that pre-trial detention shall *not* be used as a “substitute for appropriate child protection, mental health or other social measures,” while s. 35 allows a judge with social concerns to refer a case to a child welfare agency for assessment and possible provision of services if the youth is in need of child welfare services.

Further, s. 29(2) creates a presumption that a youth will not be detained on the grounds set out in s. 515(10)(b) of the *Criminal Code* (concern about offending pending trial) if a custodial sentence could not be imposed if there is a finding of guilt. Subsection 29(2), however, only creates a rebuttable *presumption*, and there are cases in which detention will be justified under s. 515(10)(b) because there is a “substantial likelihood that the accused will, if released from custody, commit a criminal offence.” Further, there

⁶² See *R e E.T.F.*, [2002] O.J. 4497 (Ont. Ct.J.) for a disturbing description of peer-to-peer abuse and lack of staff protection of youths at the Toronto Youth Assessment Centre; while that facility is being closed, the concerns remain; see also *R v T.M.*, [1991] O.J. 1382 (Ont. Prov. Ct.).

⁶³ See e.g. *R v S.T.W.*, [2003] O.J. 4253 where the Ontario Court of Appeal affirmed a decision to release a 17 year-old youth charged with first degree murder, based in part on concern about the “conditions of detention,” including the distance of the detention facility from the youth’s home and lawyer (four hours drive), making visits with family and meetings with his lawyer very difficult.

are situations involving the most serious offences where the *Criminal Code* “reverse onus” provisions will apply and there will be an onus on the youth to justify release.⁶⁴

In the British Columbia case of *R v T.S.*⁶⁵ Auxier Prov. J. was dealing with a detention application for a 14 year old youth facing two property related charges, one of which was break and enter. The youth also faced a number of other property charges and one assault charge for which he had previously been released. Judge Auxier concluded that on the charges before the court for the pre-trial detention decision, at the time of sentencing there might not be a “history that indicates a pattern of findings of guilt,” so it was not clear that a custodial sentence “could” be imposed for those offences, and thus s. 29(2) created a presumption of release. However, the judge decided that the Crown had rebutted the presumption as this was a situation in which the youth seemed to be “spiraling out of control” and who demonstrated an inability to follow bail terms.⁶⁶

Even if detention is justified, s. 31 of the *Y.C.J.A.* requires that before ordering detention, a judge shall inquire as to whether there is a responsible adult, such as a parent, who is willing and able to supervise the youth in the community pending adjudication, and the judge may release that person into the care of that person. However, as Judge Auxier in *T.S.* noted, release under the supervision of a “responsible person” pursuant to s. 31 is only appropriate if there is an adult who is “willing and *able*” to exercise control and supervision over the youth. In that case the boy’s mother was willing to supervise, but as the youth already faced several charges arising while already under her supervision, the judge concluded: “I “cannot find her [the mother] able to exercise control over him.”

It is not for the courts alone to address the concerns about overuse of pre-trial detention. One of the most effective ways to address these concerns is through community-based programs that provide support and supervision for youths released on bail, and attempt to mobilize family resources or find other non-correctional placements for youths. These programs give the courts a much better set of options for dealing with youth, but they are only available in a few centers. Such programs have, for example, been established in Edmonton and Winnipeg, and have been especially important for youths from disadvantaged backgrounds, many of whom are aboriginal.⁶⁷ Where such programs have been established, judges are encouraged to release youths who might otherwise be detained.

If a youth is released pending trial, it is important that courts avoid imposing unnecessary or unrealistic conditions on the youth. Too often youth are released on very onerous conditions that are unrelated to a risk of reoffending but put the youth at risk of further charges that may be laid if the youth breaches the conditions of release.⁶⁸

The Sentencing Process

If there is a finding of guilt, the youth court judge imposes a sentence on the youth. In some cases, a sentence will be imposed immediately after the finding of guilt.

⁶⁴ Section 522 of the *Criminal Code*. See *R v E.W.*, [2004] S.J. 146 (Q.B.) for a case where a youth charged with second degree murder satisfied the onus to justify his release on strict terms of supervision.

⁶⁵ [2003] B.C.J. 1066 (Prov. Ct.), per Auxier J.

⁶⁶ See *R v A.S.D.*, [2003] B.C.J. 1831 (Prov. Ct.), per Cowling Yth. Ct..J.

⁶⁷ See www.operationspringboard.on.ca/

⁶⁸ See e.g. comments of Justice Brain Weagant, in Harris et al, “Working in the Trenches with the YCJA” (2004), 46 Ca. J. Crim 367, at 371-76.

In more serious situations, the case is likely to be adjourned so that a pre-sentence report may be prepared; sometimes a medical or psychological assessment may also be conducted before the sentencing hearing. The *Y.C.J.A.* gives judges a range of sentencing alternatives, from a verbal reprimand to three years in youth custody, except for a conviction of murder in youth justice court, the maximum sentence is ten years.

In a few cities, programs have been established to help defence counsel make submissions about community-based sentences. In one case in Toronto, *R v S.B.*,⁶⁹ the court had the advantage of having both a pre-sentence report prepared by a probation officer, which recommended a custodial sentence, and an “intensive plan” prepared by the Youth Court Action Planning Program of Operation Springboard. The alternative plan included recommendations to address the youth’s educational needs and learning disabilities, counseling and anger management. In adopting the alternative plan as the basis of the sentence, Justice King observed:

The plan that has been put forward by Springboard is, pursuant to subsection 38(1), comprehensive and structured so as to promote S.B.'s rehabilitation and reintegration, thereby contributing to the long-term protection of the public. S.B.'s education and learning difficulties are addressed. ...

As well, S.B. is attending Springboard's Cognitive Skills workshop that addresses decision-making, problem solving, anger management and social skills... Springboard indicates that, "[S.B.] recognizes the seriousness of these charges and has made efforts to address the associated concerns." As a final note, Springboard indicates that, "[S.B.] has fully participated in the development of this plan and is quite amenable to all its conditions. The plan is structured and makes effective use of [S.B.'s] time.

The Operation Springboard alternative sentencing program is a pilot project with federal funding, having the resources and mandate to attempt to find community resources that address the criminogenic factors in a youth’s life; its plans may include making use of school based programs, programs that Operation Springboard operates itself, or other programs.

While pre-sentence reports prepared by probation officers are and will remain a major source of information and recommendations for youth courts, and have a special legal mandate under s. 40, there is also considerable value in providing the court with other information from other sources. In some cases this may be procured through the efforts of the defense counsel acting without additional assistance, but a program like Operation Springboard clearly has value.

It may help a sentencing judge, especially when dealing with a serious or persistent offender, to have a better understanding of the youth’s background and circumstances, in order to impose an appropriate sentence, one that addresses rehabilitation concerns as well as holding the youth accountable. In some cases it will be valuable for the youth to have a psychological or psychiatric assessment prepared pursuant to s. 34.

⁶⁹ [2003]O.J. 2515 (Ont. Ct. Justice)

Sentence Review

A youth justice court may review a non-custodial sentence, such as a probation order, if a youth is having difficulty complying with the sentence, or if the circumstances of the youth or the available community resources have changed.⁷⁰ Unless the youth has willfully failed to comply with the terms of the original sentence, a youth court at a review hearing may *not* impose a more onerous sentence than the original sentence. If the youth refuses or willfully fails to comply with a non-custodial sentence, for example by refusing to pay a fine or breaching the terms of a probation order, the youth may be charged under s. 137 of the *Y.C.J.A.*, and if found guilty a new sentence may be imposed.

There is not a direct equivalent to parole for young offenders. However, if a youth justice court imposes a custodial sentence under the *Y.C.J.A.*, normally the last third of the total sentence is to be served under community supervision. The period of community supervision is intended to allow for the reintegration of the young offender into the community, while being supervised by probation services. There is a narrow discretion for a youth justice court to decide prior to the scheduled release date that the youth will not be released on supervision for a portion of the sentence, but such detention should only occur if the judge is satisfied that the youth will “likely to commit” a serious violent offence while on supervision.⁷¹

The youth justice court also retains jurisdiction to reduce the length of a custodial sentence. For example, a young offender may be released from custody by a youth justice court judge at a review hearing even before two-thirds of the sentence has been served, if there has been sufficient progress toward rehabilitation.⁷²

Unless a youth is in breach of a term of an original order, a more severe sentence cannot be imposed as part of the review process. A youth on supervision after release from custody may be returned to custody if any term of the release is breached, though this is subject to further judicial review to determine whether the completion of the sentence in custody is justified.⁷³

Sentencing Purposes – s. 38(1)

The *Youth Criminal Justice Act* sets out the *purpose* of sentencing in youth court in s. 38(1), and states specific *principles* to govern sentencing in s. 38(2) and (3), while s. 39 establishes detailed restrictions on the use of custody. The *Y.C.J.A.* give judges much more direction about sentencing than the *Y.O.A.*; the structuring of judicial discretion about sentencing in the *Y.C.J.A.* is intended to reduce the use of custody from levels under the *Y.O.A.* The *Y.C.J.A.* is also intended to reduce some of the wide disparities in youth court sentencing under the *Y.O.A.*⁷⁴

⁷⁰ *Y.C.J.A.* s 59.

⁷¹ *Y.C.J.A.* ss. 98 & 104.

⁷² *Y.C.J.A.* ss. 94.

⁷³ For a case of a youth “forgotten in the system” after a return to custody and ultimately released on the basis of violation of the *Charter* right to review of detention within a reasonable time, see *R v G.M.* , [2004] O.J. 1988 (Ont. Ct. J.)

⁷⁴ See Statistics Canada, *Youth Custody and Community Services in Canada*, 2000/01 (Ottawa), Juristat, 22(8) reporting that the incarceration rate per 10,000 young persons in 2001 ranged from 9 in Quebec to as high as 36 per 100,000 in the Northwest Territories.

At the adult level, the purpose of sentencing as articulated in the *Criminal Code* s. 718 lists all of the conventional sentencing purposes including denunciation, deterrence, incapacitation, rehabilitation, restoration to victims and acknowledgment of harm. This non-prioritized statement has been criticized for failing to provide judges with clear guidance, leaving them free to pursue their own individual sentencing theories, with a predictable absence of effect on sentencing practices.⁷⁵ Section 50 of *Y.C.J.A.*, however, provides that the provisions of *Criminal Code* that govern sentencing of adults are *not* to apply to the sentencing of young offenders, suggesting that s. 718 should *not* be applied in youth court sentencing.

In contrast to the vagueness of s. 718 of the *Criminal Code*, setting out the objectives of adult sentencing, s. 38 of the *Y.C.J.A.* establishes the purpose of sentencing in youth court in a concise fashion:

s. 38(1). The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration.

Accountability and proportionality of sentences to offences are central themes of sentencing under the *Y.C.J.A.* It is also clear that rehabilitation is more important for the sentencing of youth than for adults, as youth court judges are always required to consider what sentence is most likely to rehabilitate a youth. This emphasis on rehabilitation requires a judge to carefully consider whether non-custodial alternatives would be adequate to hold a youth accountable. There is a significant body of criminology research that indicates that placing an adolescent in custody may actually increase the chances of recidivism, since a youth's education and employment prospects are undermined by removal from the community and the stigmatization that occurs.⁷⁶ A community-based sentence that addresses a youth's problems is generally more likely to be rehabilitative than a custodial sentence that removes a youth from his or her community. While some custody facilities have significant counseling and rehabilitative programming, many custody facilities in Canada do not have resources that directly address the criminogenic needs of youthful offenders, and these facilities generally have high recidivism rates.⁷⁷

While rehabilitation is a central theme of youth justice court sentencing, s. 39(5) of the *Y.C.J.A.* makes clear that a youth justice court cannot impose a custodial sentence as a substitute for "child protection, mental health or other social purposes."⁷⁸ This provision precludes imposing a custodial sentence for rehabilitative purposes if this would be a disproportionately intrusive response to the offence, even though this was not uncommon under the *Y.O.A.* and contributed to the high levels of use of custody under

⁷⁵ See e.g. Julian Roberts & Andrew von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing" (1995), 37 *Crim. L.Q.* 220.

⁷⁶ See e.g. J. Bernburg & M. Krohn, "Labeling, Life Chances and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime In early Adulthood" (2003), 41 *Criminology* 1287.

⁷⁷ See discussion in R. Green and K. Healy, *Tough on Kids* (Saskatoon: Purich Publishing, 2003).

⁷⁸ For a case where a court declined to have a youth remain in youth custody despite serious mental health concerns, see *R v G.M.*, [2004] O.J. 1988 (Ont. Ct. J.)

that *Act*.⁷⁹ Further, while s. 38(2)(e)(ii) provides that the sentence is to be the one that is “most likely to rehabilitate the young person,” the opening of s. 38(2)(e) states that this is “subject to” the proportionality principle of s. 38(2)(c). Thus the only provision that explicitly links rehabilitation and proportionality creates a hierarchy, with rehabilitation “subject to” proportionality considerations.

What does it mean then, if rehabilitation plays a greater role than in adult sentencing, and proportionality a lesser role, but that rehabilitative concerns are “subject to” the proportionality principle? It is submitted that a youth justice court sentence must be a proportionate response to the offence and the circumstances of the offender, but, when there are reasonable prospects that a particular sentence would be the one most likely to rehabilitate the youth and is adequate to hold the youth accountable, that rehabilitative sentence should be preferred to another more severe sentence that is also within the range of proportionate sentences. The *Y.C.J.A.* clearly expects that judges will make greater efforts at the youth justice level than in adult court to construct sanctions that have a rehabilitative effect, while still respecting the constraints of proportionality. Consideration of rehabilitative concerns and restraints on the use of custody (discussed below) may, for example, require greater consideration of such community based sentencing options as the new sentence of deferred custody and supervision, a sentence that may both constrain a youth in the community and allow for the imposition of rehabilitative conditions.

Ultimately, the decision about how to balance proportionality and rehabilitation must be made in the context of an individual offence and the circumstances of the youth, constrained by the resources that are available in the community where the youth resides or that are accessible through the youth correctional system. Further, as required by s.39(3), important factors in assessing the likelihood of a youth being rehabilitated by any youth justice court sentence are the attitude of the particular youth, and the availability of appropriate programs or resources; a pre-sentence report and the submissions of counsel should address these issues. It must also be appreciated that while research demonstrates that, in general, the provision of appropriate rehabilitative services that address criminogenic needs does reduce the incidence of reoffending, it is not possible to be certain at the time of sentencing which youth can be rehabilitated and who will reoffend.⁸⁰

One of the first reported decisions under the *Y.C.J.A.* was *R v D.L.C.*,⁸¹ rendered early in April 2003, offering a thoughtful discussion of the sentencing principles. Judge Gorman of Provincial Court of Newfoundland and Labrador began by observing:

The Act encourages judges to impose non-custodial sentences. This may be seen as its most dominating feature and primary purpose. However, it does not seek to prohibit the imposition of custodial sentences upon young persons. In fact, it explicitly recognizes the reality that such sentences will at times be necessary.

⁷⁹ See e.g., *R. v. J.J.M.*, [1993] 2 S.C.R. 421.

⁸⁰ See e.g. G.A. Bernfeld, D.P. Farrington & A.W. Leschied, *Offender Rehabilitation in Practice: Implementing and Evaluating Effective Programs* (Wiley, U.K., 2001).

⁸¹ [2003] N.J. 94 (Prov. Ct.), per Gorman Prov. Ct.J.

He went on to consider the effect of s. 3 and the general principles of the Act as well as s. 38, emphasizing the need to take an individualized approach to sentencing in youth justice court:

these words mandate a very individualistic judicial approach to sentencing. The circumstances of the young person must be the primary focus and the sentence must be fashioned with the personal circumstances of the specific young person in mind. The circumstances of the offence will normally be a secondary consideration, though not always so. Certainly it will play a lesser role than it does in the sentencing of adults... It is necessary to recognize that though the Act encourages judges to impose non-custodial sentences, it also recognizes the need for such sentences to be imposed in appropriate cases....

In *R v S.L.* the British Columbia Court of Appeal reversed a trial judge who had imposed a six month custodial sentence for an aggravated assault that occurred when a youth in a group angrily threw a rock in the direction of another youth, causing serious injury to the victim. The appellate court accepted that there was no evidence of pre-meditation to cause harm, but rather this was an act of “youthful bad judgment.” Although the youth had a significant prior record, in the period after the offence and before sentencing he had complied with strict terms of supervision in the community. In imposing a probation sentence that required the youth to address his drug abuse problems, the appellate court observed:⁸²

It is an error in principle...not to comply with the specific directions in the *Y.C.J.A.* that require a youth justice court to consider all available alternatives ...to meet the purpose set out in s. 38 of making the ...[youth] accountable for the offence and promote his rehabilitation...thereby contributing to the protection of the public...

The trial judge erred in law and in principle in failing to apply the purpose and principles of sentencing set out in ss. 38 and 39 of the *Y.C.J.A.* This is new legislation that places increased emphasis on non-custodial sentences for young persons.

Section 718(b) of the *Criminal Code* explicitly provides that it is an objective of the sentencing of adults “to deter the offender and other persons from committing offences,” the concepts of specific and general deterrence are not mentioned in the *Y.C.J.A.*, and s. 718 is not explicitly adopted by the *Y.C.J.A.* A number of judgments have emphasized the absence of explicit mention of deterrence in the *Y.C.J.A.* as a reason for imposing a non-custodial sentence. For example, Justice Lynch in *R. v K.D.* stated, “when I look at the *Youth Criminal Justice Act*, deterrence is not something that is given

⁸² *R v S.L.*, [2003] B.C.J. 2397 (C.A.), at paras 53 & 59.

high or any profile.”⁸³ Judge Swail came to the same conclusion, ruling that deterrence is a “principle ...not to be considered in a *Youth Criminal Justice Act* sentencing.”⁸⁴

Other judges, however, held that although not mentioned in the *Y.C.J.A.*, general and specific deterrence “have not been eliminated entirely” in youth justice court sentencing, though recognizing that they are of “lesser importance in youth justice court sentencing” than in adult court.⁸⁵ Justice Mackenzie of the British Columbia Court of Appeal in *R v B.V.N.* ruled that the *Y.C.J.A.* “implies a reduced emphasis on general deterrence ...compared to adult sentencing,” but it does not require “sentencing judges to completely disregard general deterrence in particular cases.” Justice Oppal concluded that :⁸⁶

...in spite of the recognition and acceptance of the general principle that young offenders are not generally possessed with the same degree of moral blameworthiness as adult offenders, the fact remains that not all young offenders are unaware of the sanctions imposed by the criminal justice system...It would be unrealistic and unwise to conclude that the principle of general deterrence has no application in dealing with young offenders.

While it is submitted that as a result of s. 50 of the *Y.C.J.A.* neither specific nor general deterrence are to be directly taken into account by a judge in sentencing a youth, it is important to appreciate that by holding a youth “accountable” and imposing a sentence that is “proportionate” to the circumstances of the offender and harm done to a victim (principles of sentencing that are explicitly recognized in ss.3 and 38 of the *Y.C.J.A.*), the youth justice system will have a deterrent effect on the behaviour of young persons. The significance of deterrence being an *indirect effect* of youth court sentencing rather than a *purpose* of sentencing is quite subtle. It does, for example, suggest that the prevalence of an offence in a particular community should *not* be an aggravating factor in youth justice court sentencing, though the court can consider the harm suffered by the victim in the case before the court. Such an approach was used by Judge Whelan when she sentenced a youth for participation in a robbery and breach of probation. While imposing a lengthy custodial sentence upon the youth, she indicated that:⁸⁷

I've been asked by the Crown to consider that this store clerk was twice before the victim of a robbery in this location. It's important not to use this information to inadvertently apply the principle of deterrence, which is significantly absent from the *Youth Criminal Justice Act*. Having said that this store clerk was a vulnerable victim among a group of vulnerable victims, i.e. convenience store employees working alone and at night and this is a relevant fact.

⁸³ *R v K.D.*, [2003] N.S.J.165, (N.S.S.C.) at para. 14

⁸⁴ *R v H.A.M.*, [2003] M.J. 147 (Man. Prov. Ct.), at para. 34.

⁸⁵ *R v. T.M.*, [2003] O.J. 4120 (Ont. Ct. J.), at para. 42; see also *R v B.N.*, [2003] B.C.J. 153 (Prov. Ct.)

⁸⁶ [2004]B.C.J. 974 (B.C.C.A.), at para. 23. The same conclusion was reached in *R v. T.M.D.*, [2003] N.S.J. 151 (N.S.C.A.), at para. 31.

⁸⁷ *R v. B.R.S.*, [2003] S.J. 357 (Sask. Prov. Ct.), para 24, per Whelan Prov. J..

The absence of explicit mention of deterrence as a factor in youth court sentencing reflects the large body of research on that reveals that *increasing the severity* of sentences imposed on adolescent offenders does *not* have an effect on offending behaviour.⁸⁸ While improving policing and increasing the likelihood of apprehension may reduce levels of youth offending, harsher penalties or increased use of adult sentencing does not have an effect on youth crime. Adolescence, especially for youth who are likely to engage in serious or repeat offending, is a period of life when many youth have a sense of invulnerability and a high likelihood of engaging in many types of high risk behaviour. The challenge for society and for adults is to help youth appreciate that there are consequences to their actions. The reality is that youth who are prone to committing offences are not thinking about the consequences of their acts for themselves or their victims, and so increasing the severity of the consequences will not have an effect on their behaviour.

Sentencing Principles: s. 38(2)

Section 38(2) articulates a number of youth court sentencing principles, of which the most important is set out in s. 38(2)(c), that any sentence must be “proportionate to the seriousness of the offence and the degree of responsibility of the young person for the offence.” This reinforces the statement in s. 38(1) that the purpose of youth sentencing is to hold young persons “accountable” for their criminal acts.

Section 3(1)(b)(ii) of the *Y.C.J.A* makes clear, however, that the accountability of young persons must take account of their “limited maturity,” and hence youth sentences will normally be less severe than sentences imposed on adults in similar circumstances. Section 38(2)(a) reinforces this limitation on the severity of sentencing in youth court: the sentence imposed on a youth “must not result in a punishment that is greater than the punishment that would be appropriate for an adult...convicted of the same offence committed in similar circumstances.”

The statement of sentencing principle in s. 38 also makes clear that the *Y.C.J.A* is intended to reduce the use of custody, with s. 38(2)(d) stating that “all available sanctions other than custody that are reasonable in the circumstances must be considered” before a sentence is imposed on a youth. Further, s. 38(2)(e) provides that “the sentence must be the least restrictive sentence that is capable of achieving the purpose [of sentencing].”

While these principles restrict the use of custody, in appropriate cases, especially those involving violence, a proportionate response may require a custodial sentence, especially where a youth has a prior record that suggests that community based response will not have a rehabilitative effect. Thus in *R. v. M.A.M.* the Manitoba Court of Appeal reversed a trial judge’s decision to impose a non-custodial sentence for several offences, including an assault and two robberies. Although there was no serious injury or use of weapons, the appeal court emphasized that the offences involved violence, and that the prior record of the youth and a risk assessment prepared by the probation officer for the pre-sentence report indicated that he was at high risk of re-offending and would be unlikely to comply with the terms of a community based sentence.⁸⁹

⁸⁸ See discussion in A.N. Doob & C. Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004), p. 241-253

⁸⁹ *R v M.A.M.*, [2003] M.J. 464 (C.A.).

If the offence causes sufficient harm, then a custodial sentence may be appropriate based on accountability principles, even if there was not an intent to cause the specific harm that occurred. In *R v S.S.* the British Columbia Court of Appeal upheld a sentence of eight months in open custody, followed by four months community supervision for a youth found guilty on charges arising out of his street racing while impaired by alcohol and an accident that killed a passenger. The Appeal Court observed that only a custodial sentence would be sufficient to hold the youth “accountable for his offence....nothing short of imprisonment could induce [this]...young person to develop a sense of responsibility.”⁹⁰

Aboriginal youth in Canada are significantly over-represented in the youth justice system. The Declaration of Principle of the *Y.C.J.A.* makes references to the special social and legal status of Aboriginal youth, and the more specific sentencing principles (s.38(2)(d)) require a judge to pay “particular attention to the circumstances of aboriginal young persons” if considering a custodial sentence. The reason for this provision is that Aboriginal youth in Canada are significantly over-represented in the prison population. In 2000/01 Aboriginal youth accounted for 5% of the general population, but one quarter of admissions to youth custody.⁹¹

It has, however, been stressed by appeal courts that Aboriginal youth must also be held accountable and that judges need to be realistic about the prospects for rehabilitation of Aboriginal youth. In *R v B.L.M.* the Saskatchewan Court of Appeal refused to uphold a non-custodial sentence for an aboriginal youth who pled guilty to two armed robbery charges, a sentence that had been imposed by the trial judge after a lengthy judicially supervised conference. The youth had a significant prior record, was involved in an Aboriginal gang, and as a result of assessment in the sentencing process was found to be suffering from fetal alcohol effects. The appeal court emphasized that a non-custodial sentence was not proportional to the offences and the psychological harm of the victims, concluding “Public protection through rehabilitation ...must give way to public protection through a custodial sentence.”⁹²

Restrictions on the Imposition of a Custodial Sanction: s. 39(1)

Under the previous *Young Offenders Act*, a judge could not commit a young offender to custody unless “the court consider[ed] a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed, and having regards to the needs and circumstances of the young person” (s.24(1)). This vague provision left a great deal to judicial discretion, and offered little real guidance as to which youths should be imprisoned, even though it was accompanied by an injunction to exercise restraint, and there was very significant variation in the extent to which custodial sentences were imposed.

⁹⁰ [2004] B.C.J. 320 (B.C.C.A.), per Esson J.A. For other appellate decisions that imposed custodial sentences in response to serious offences, see also *R v N.A.C.*, [2004] B.C.J. 1346 (B.C.C.A.) (upheld sentence of two years of custody and supervision serious assault with a machete); and *R v R.J.E.*, [2004] S.J. 533 (Sask. C.A.) (reversed trial judge’s community based sentence, court found appropriate sentence was 18 months custody plus 8 months supervision for several offences, including armed robbery).

⁹⁰ J. Marinelli (2002) Youth Custody and community services in Canada, 2000/01. *Juristat*, 22(8).

⁹¹ J. Marinelli (2002) Youth Custody and community services in Canada, 2000/01. *Juristat*, 22(8).

⁹² *R v B.L.M.*, [2003] Sask.J. 870 (Sask.C.A.), at para. 66 per Jackson J.A.

Section 39 gives effect to the more general statements of principle, placing significant restraints on the use of custody for young offenders:

39(1) A youth justice court shall not commit a person to custody ... unless
(a) the young person has committed a violent offence; [or]
(b) the young person has failed to comply with non-custodial sentences; [or]
(c) the young person has committed 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 ... or
(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

These four circumstances are minimum threshold criteria, and even if one or more of the conditions of s. 39(1) are satisfied, a youth court judge may decide not to impose a custodial sentence. Indeed, as discussed below, s. 39(2) to (9) place further restrictions on the use of custody.

While it is difficult to determine precisely how much s.39(1) has reduced the use of custody, it is clear that under the *Y.O.A.* there were significant numbers of youth who were imprisoned but who could not receive a custodial sentence under the *Y.C.J.A.* It is, for example, noteworthy that s.39(1)(b) provides that a youth can only receive a custodial sentence for breach of probation if there has been a breach of at least one previous community based sentence. Under the *Y.O.A.* one charge in eight was for breach of probation, and over 40% of these charges resulted in a custodial sentence.⁹³

There is now a significant body of caselaw interpreting s. 39(1), with judges taking somewhat different approaches to this provision. Most of the appellate jurisprudence focuses on the question of what is a “violent offence.”

In *R v D.L.C.*⁹⁴ the court took a relatively expansive interpretation of s. 39(1)(b), focusing on the psychological harm done to the victims of two break-ins, and concluding that these were “violent offences.” Judge Gorman of the Newfoundland and Labrador Provincial Court wrote:

It is not necessary for the Court in this case to provide a definitive definition of what will and will not constitute a violent offence within the meaning of subsection 39(1)(a) of the Act. It is suffice to say that it does not require that the offence involve the application or attempted application of physical force. Such a definition would be overly narrow. For instance, uttering a threat to rape someone could constitute a violent offence

In this case, I conclude that the two break and entries ... violent offences. They infringe and violate a person’s sense of security to such an

⁹³ : Canadian Centre for Justice Statistics, *Youth Court Statistics 2001-02* (Ottawa: Statistics Canada, 2003), *Juristat*, vol. 23, no. 3.

⁹⁴ [2003] N.J. 94 (Prov. Ct.), per Gorman Prov. Ct.J. See also *R v S.F.S.* [2003] Y.J. 53 (Yk. Yth. Ct.); and *R v L.M.F.*[2003] A.J. 1171 (Prov. Ct.).

extent that any other characterization of them would be unreasonable and in my view untenable....

By way of contrast, the Court of Appeal in Prince Edward Island took a much narrower approach, ruling the property offences like break and enter of a dwelling and theft of an automobile did not constitute a “violent” offence. In *R. v. J.J.C.*, Webber J.A. stated:⁹⁵

While "violent offence" is not defined in the *Youth Criminal Justice Act*, "serious violent offence" is defined as "an offence in the commission of which a young person causes or attempts to cause serious bodily harm." A reasonable analogy can therefore be made that "violent offence" refers to one in which bodily harm has been caused to the victim albeit not serious bodily harm.

The Nova Scotia Court of Appeal adopted this narrow approach in *R. v T.M.D.*, ruling that a minor assault (a youth kicking his mother) and a vague threat were *not* “violent offences,” with Fichaud J.A. observing:⁹⁶

....a "violent offence" under s. 39(1)(a) would be an offence in the commission of which a young person causes or attempts to cause bodily harm, meaning a hurt or injury to a person that interferes with the person's health or comfort and that is more than merely transient or trifling.

....The *Y.C.J.A.* does not expressly associate "violent offence" with threats or property damage.

The more restricted interpretation under the YCJA is consistent with the context and purposes of the YCJA.

The Alberta Court of Appeal in *R. v C.D.* took an “intermediate approach,” ruling that a case of arson involving the deliberate destruction of a truck parked on a residential street to allow a fraudulent insurance claim to be made was a “violent offence,” and upheld a custodial sentence. Justice Ritter wrote:⁹⁷

I conclude that if an action causes bodily harm, is intended to cause bodily harm, or if it is reasonably foreseeable that the action may cause bodily harm, then it is violent. Section 38(3)(b) of the Act supports this definition as it requires sentencing courts to take into account "the harm done to victims and whether it was intentional or reasonably foreseeable" while "harm" may extend to economic harm, other sentencing goals mitigate against giving effect to this feature of s. 38(3)(b) in terms of

⁹⁵ [2003] P.E.I.J. 99, at para 21(P.E.I. A.D.)

⁹⁶ [2003] N.S.J. 488, at para 25-28 (N.S.C.A.); see also *R. v R.A.A.* [2003] B.C.J. 1386 (Prov. Ct.), where Gove Prov. J. held that, in the absence of evidence called by the Crown to establish the effect of the offence, he could not conclude that the offence of incest was a “violent offence.”

⁹⁷ [2004] A.J.179, at para 57-59 (C.A.); see also *R v C.D.K.* [2004] A.J. 237 (Alta C.A.) leave to appeal to Supreme Court of Canada granted Oct. 7, 2004.

defining "violence" for gate keeping purposes. More importantly, this provision makes it clear that foreseeability of harm is to be considered when a sentence is imposed.

The effect of this test is to eliminate pure property crimes from being capable of opening this gate to custodial sentences. However, if what might normally be regarded as a property offence includes an element of risk of such a degree that a reasonable person would foresee harm, then the offence is violent, whether or not harm actually ensues. Most property offences can go wrong such that bodily harm results to a victim, but in many instances that risk will not meet the reasonable foreseeability standard. Where such foreseeability does not exist, the offence is not violent. Where harm is reasonably foreseeable, the offence is violent.

.....the "mere possibility of harm" is not enough to render an offence violentAccordingly, there is a difference between a violent offence and serious violent offence beyond simply the degree of harm caused or attempted.

There has also been some uncertainty about the appropriate interpretation of s. 39(1)(c) and the meaning of "a history that indicates a pattern of findings of guilt." It is generally accepted that this means that there must have been at least three prior findings of guilt. It has, however, been held that if there have been at least three prior offences, it does not matter that all of them were dealt with at one time by the court; the determinative issue is whether there was a "pattern" of prior offences, not a pattern of court findings, which could all have occurred in the same proceedings.⁹⁸

Another contentious issue is what is an "exceptional case" in s.39(1)(d) that would merit the imposition of custodial sentence for a non-violent offence where there is not a previous history of offending or non-compliance with community-based sentences. A number of reported cases interpreting s. 39(1)(d) deal with drug trafficking.

In *R. v O.G.*⁹⁹ a 17 year old youth who two years earlier had come to Canada as a refugee from Somalia pled guilty to trafficking and possession of drugs for the purposes of trafficking. Although the youth had no prior record and only relatively small amounts of crack cocaine were involved, the court was satisfied that the youth was a "street level dealer" and a "relatively sophisticated trafficker" selling drugs in response to cell phone solicitations. The judge invoked s. 39(1)(d) and imposed a custodial sentence, commenting:

It is clear he is not a user of crack cocaine and committed these offences purely for larger financial gain available from this illegal activity as opposed to his legitimate employment. In aggravation as well is the fact that he is a young person and young persons are not normally known to the police to be crack dealers at this young person's level of sophistication. In addition, the young person was engaged in this activity on a number of separate occasions.

⁹⁸ *R v. S.B.*, [2003] M.J. 491 (Man. Prov. Ct.)

⁹⁹ [2003] O.J. No. 4323 (Ont. Court of Justice).

To the extent that Zabel J. considered the prevalence of this offence in the community to be an "exceptional" circumstance within the meaning of s.39(1)(d), it is submitted that this decision is problematic. Section 39(1)(d) of the *Y.C.J.A.* justifies the imposition of a custodial term in exceptional cases when the aggravating circumstances of the offence are such that a term of incarceration is warranted. Consequently aggravating facts surrounding the offence itself, such as, for example, the trafficking taking place near or on school property, and not such facts as the prevalence of the offence in the community, should be properly considered under this subsection.

In *R v N.S.O.*¹⁰⁰ Justice King held that trafficking in drugs (ecstasy) and possessions of drugs for the purposes of trafficking did not constitute "violent offences" even though they posed a risk to the community. She commented:

The Crown argues that this is a "violent offence" under paragraph 39(1)(a) in that some people may die as a result of ingesting ecstasy. ... I find it hard to imagine that the legislature meant the term "violent offence" to apply to drug trafficking and possession for the purpose of trafficking with nothing more. True, there may be cases where drug trafficking becomes a violent offence -- for example where guns or violence are used. This is not one of those. ... True, someone somewhere may have become ill or worse after ingesting one of these pills. So too could one become ill after ingesting cocaine. Does that mean that all possession for the purpose of trafficking in cocaine then must by definition be a violent offence? If an offence simply with a mere possibility of harm becomes a "violent offence", the limitation would be meaningless. Every act in life and every offence may at some point lead to harm. The examples are endless. Certainly if the legislature had wanted drug trafficking or possession for the purpose of trafficking, say over a certain amount, to be a factor in incarceration, it would have said so clearly. It did not.

It is submitted that the approach of King J. is preferable. Given the prevalence of drug offences and the silence of the *Y.C.J.A.* with respect to this type of offence, it would appear that Parliament did not intend that ordinarily trafficking in relatively small quantities of drugs would constitute "exceptional circumstances."

Additional restrictions regarding the use of custody: ss. 39(2) – (9)

If the case before a youth court satisfies one of the four conditions in s. 39(1), a number of other custody-related principles must still be considered before a court can imprison the young offender.

The first is a clear a reminder to judges in s. 39(2) of the principle of restraint in the use of custody, even if one of the conditions of s. 39(1) is satisfied: "if [one of the criteria for custody] apply, a youth justice court shall not impose a custodial sentence... unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable

¹⁰⁰ [2003] O.J. 2251 (Ont. Ct. J.), per King J. To a similar effect see *R v F.A.G.*, [2003] Y.J. 130 (Yk. Terr. Ct.), per Faulkner Terr.Ct.J.

alternative, or combination of alternatives, that is in accordance with the purpose and principles [of sentencing] at the youth court level.”

Subsection 39(4) is intended to discourage judges from automatically escalating the severity of a sentence in response to subsequent offending. Some judges may instinctively tend to apply a “step principle,” imposing a more serious sanction for repeat offending, reasoning that the first sentence was insufficient to discourage the offender. Section 39(4) addresses this situation, providing:

s. 39(4) The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.”

While s. 39(4) does not prohibit judges from following the “step principle” at sentencing, the provision makes it clear that the judges are not obliged to increase penalties for repeat youth offenders, and may impose the same sentence on separate occasions.

Section 39(5) explicitly provides that a youth court “shall *not*” use custody as a substitute for a child protection, mental health or other social measure. A common justification for the imposition of a term of custody in some cases under the previous law was that the judge could see no other way of providing necessary social intervention for an adolescent at risk. Under the new youth justice statute this justification for the imposition of custody is eliminated. While such services should be provided under provincial child welfare or mental health law, there may be situations in which homeless or mentally ill youth may simply not receive needed help due to the absence of appropriate resources or lack of mandate under provincial law;¹⁰¹ the *Y.C.J.A.* makes clear that limitations in provincial laws and resources should *not* be addressed by disproportionate responses to youth offending.

There are also procedural provisions that are intended to limit the use of custody. Section 39(6) provides that a youth court is generally obliged, prior to imposing custody, to consider a pre-sentence report as well as any sentencing proposal made by the youth or counsel on his or her behalf. Further s. 39(9) requires that youth court judges who impose a term of custody provide reasons why “it has determined that a non-custodial sentence is not adequate” to achieve the purpose of sentencing ascribed to the youth court system (s. 39(9)). This is another example of the way that the *Act* attempts to restrict the use of custody by reminding judges of the need to address why a non-custodial sentence is not appropriate.

Creation of New Community-based Sentences

All of the community dispositions that were available under the *Y.O.A.* can be imposed under the *Y.C.J.A.*; these traditional juvenile sentences include: the absolute discharge; fines (relatively rarely used for youth); restitution to victims and community service; and probation (the most commonly used disposition under the *Y.O.A.*) At the very low end, the *Y.C.J.A.* adds the “reprimand,” which might be used where a judge considers the case very minor or that the case should have been diverted by the prosecution.

¹⁰¹ See e.g. “The wild, sick, lost children of Ontario: New federal law, lack of provincial services leave mentally ill children in limbo,” *National Post*, April 13, 2004.

The *Y.C.J.A* also adds two rehabilitative community-based sentences: the attendance centre order, and the intensive support and supervision order. These two sentencing options, however, require resources for staffing and programming, and are only available where the provincial governments chose to provide them. In some provinces, such as Ontario, these are many places where these sentencing options have *not* been implemented, but in British Columbia there have been significant government efforts to implement these community-based sentencing provisions.

One of the new sentences in the *YCJA* that is intended to be an alternative to custody is deferred custody and community supervision. This sentence is intended to allow a youth *who would otherwise be sentenced to custody* to remain in the community, but under relatively strict supervision and with the prospect of immediate apprehension if there is a breach or apprehended breach of a term of the supervision without the need to first return to court and lay a new charge, as it is with a breach of probation.¹⁰² This sentence is similar to the adult conditional sentence, and youth court judges are citing adult cases dealing with conditional sentences in considering whether to impose this new type of youth sentence. There are differences from the adult sentence, however; the maximum deferred custody sentence, for example, is only six months, and there is a specific statutory prohibition in s. 42(5)(a) on the use of this sentence in any case that is a “serious violent offence.”

Some youth justice court judges have made considerable use of this new type of sentence, though it remains to be seen how effective it is in terms of diverting youth from custody and promoting rehabilitation, as well as whether there will be sufficient resources to provide community services and effectively supervise in the community youth who receive this sentence.

In *R v H.G.W.*, Whelan Prov Ct.J. imposed a deferred custody and supervision sentence on a 15 year old youth without a prior record who pled guilty to a number of offences, the most serious of which was an armed robbery of a convenience store carried out as part of an initiation for entering a gang. The youth expressed remorse and had strong family support. The judge emphasized that accountability required a custodial sentence, but expressed concern about the negative effects that actual placement in a custody facility would have on this youth, as well as on the low risk of the youth re-offending. The judge concluded:¹⁰³

In considering alternatives to custody I find that it's highly likely that this young person would comply with a non-custodial sentence.... I believe that he is likely to be successful in addressing the underlying causes of his criminal behaviour and that the long term protection of the public is likely through his rehabilitation.

¹⁰² If a youth is arrested for breach or apprehended breach of the terms of release on a D.C.S.O., the youth has the right to seek release on bail pending a full court review: *R v K.R.C.*, [2004] B.C.J. 1093 (Yth. Ct.), per Alexander Yth. Ct. J.

¹⁰³ [2003] S.J. 559(Sask. Prov Ct.), at para. 52 -55).

.....I am concerned that the progress that has been achieved since he has extricated himself from gang influences may be lost if he were exposed to such influences in the open custody setting. This form of sanction is not necessary, in my view, for the purpose of proportionality and is best avoided for the sake of his rehabilitation. It will best be achieved in the community and in the bosom of his family ...

The principles ...concerning proportionate accountability having regard to the nature and seriousness of the offence of robbery, have lead me to conclude that for this young person in these circumstances a deferred custody and supervision sentence is most appropriate. There is a greater degree of protection for the public in the deferred custody and supervision sentence, having regard to the possible consequences should the young person re-offend or fail to comply with the conditions of supervision

Some reports from probation staff suggest that a significant number of youths who are on deferred custody and supervision in the community may not appreciate just how “short their leash” is, and are breaching their conditions and being apprehended. It may be that in some cases judges are unduly optimistic about the likelihood of compliance by youths with significant prior records of offending and non-compliance with community sentences. The use of deferred custody and supervision orders will require careful monitoring; prosecutors and judges should get feedback on cases where it has worked and where it has not worked so that they can make the best use of this sentence. In cases where custody is otherwise appropriate, a deferred custody and supervision should only be used where there is a significant likelihood that the youth will comply with the terms of community supervision.

New blended form of custody and community supervision

Under the *Y.O.A* juveniles serving time in custody generally remained in an institution until the end of the sentence. Unlike with adults, there were no statutory remission or parole provisions for youths, although correctional authorities could release a youth from custody on a temporary absence pass. In practice, judicial review under the *Y.O.A.* was cumbersome to arrange, and even when a review hearing occurred, many judges were reluctant to modify a previously imposed sanction. Under the *Y.O.A.*, most youths served out their entire sentences in custody.

Under the *Y.C.J.A.* all custodial sentences are composed of custodial and community phases; for most offences the first two-thirds of the sentence is served in custody and the last third under supervision in the community. For the most serious offences, there is judicial discretion about how to divide the sentence between custody and community supervision, and for all custodial sentences there is the possibility of judicial review to allow early release or detention after the presumptive release date.

This reform is intended to ensure that youth have support and supervision during the period following release from custody when they are most vulnerable and most likely to reoffend. The introduction of this new form of custody will not in itself reduce the

number of young offenders committed to custody, but it has reduced the average number of young persons in custody on any given day.

Youth justice court judges are to specify the level of custody – open or secure – but the provincial director has the authority to determine which facility within that level the youth will be placed.¹⁰⁴ There is a great deal of variation in the nature and quality of youth custody facilities in Canada. Some “youth facilities” are literally just separate sections of an adult jail, have limited rehabilitative resources and significant problems of peer-on-peer abuse. Others, especially open custody facilities, have more programming and rehabilitative services. There are a number of wilderness camp custody facilities. Canada has a few “boot camp” style facilities for young offenders, though Ontario is shutting its only boot camp.

For the most serious offences, the *Y.C.J.A.* adds the new sentence of the intensive rehabilitative custody and supervision order (I.R.C.S.). The I.R.C.S. sentence allows a judge to order that a juvenile will serve a portion of the sentence in a mental health facility or some other place where treatment will be provided. It can only be imposed if a youth is suffering from a mental illness or psychological disorder, and further requires that the provincial director has agreed that a suitable treatment oriented plan is available for the youth.¹⁰⁵

Under the *Y.C.J.A.* (unless an adult sentence is imposed) for most offences, the maximum period of custody and supervision is two years, for the most serious offences it is three years, and for murder it is a maximum of 10 years.

Designation as “serious violent offence”: s. 42(9)

As a part of the sentencing process, the Crown may make an application under s.42(9) for a determination that an offence is a “serious violent offence.” This determination can be significant in that if there is a finding of guilt for a *third* serious violent offence, the court may impose an intensive rehabilitative custody and supervision order that would not otherwise be available.

However, the significance of the “serious violent offender” determination is now less than when the *Y.C.J.A.* was enacted. Although a third serious violent offence would raise a presumption of an adult sentence for a youth 14 years of age or older, as discussed below, due to the Quebec Court of Appeal decision in *Reference re Bill C-7*, the concept of “presumptive offence” is effectively abolished and the onus is always on the Crown to justify an adult sentence. The determination may, however, still be significant, as a sentence of deferred custody and supervision may *not* be imposed for a “serious violent offence.”

The British Columbia case of *R v T.B.W.*¹⁰⁶ discusses the process and standard of proof for a s. 42(9) application. Judge Dhillon wrote:

¹⁰⁴ Provinces could chose to allow the provincial director to determine the level of custody, but every province has opted under s. 88 of the *Y.C.J.A.* to have judges determine the level of custody.

¹⁰⁵ For a case in which the judge criticized the narrow approach of the provincial director to cases in which an I.R.C.S. order is appropriate, see *R v J.C.*, [2004] O.J. 281 (Ct. J.), per Wong J.

¹⁰⁶ [2003] B.C.J. 1731 (B.C. Prov Ct.), per Dhillon

Section 2 of the YCJA defines SVO to mean:

"an offence in the commission of which a young person causes or attempts to cause serious bodily harm."

The words "serious bodily harm" have been defined by the Supreme Court of Canada in *R. v. McGraw* (1991) as "any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well being of the complainant". ...

A youth court judge must determine whether the young person, in committing the offence of which he or she has been found guilty, caused or attempted to cause serious bodily harm....

It is my respectful view that a section 42(9) SVO determination is analogous to determining an aggravating fact or circumstance for sentencing purposes. The SVO finding will have the potential for an adverse impact on the young person should there be further convictions in future. ...

Accordingly... the burden of proof rests with the Crown to establish a SVO to the criminal standard, and to prove any disputed facts beyond a reasonable doubt. Even where the facts are not in dispute, those facts must satisfy the court beyond a reasonable doubt that the facts support a finding that the offence is a SVO.

Judge Dhillon in *T.B.W.* was considering a s. 42(9) application where a youth was found guilty of an assault and the attempted extortion of a CD player from another adolescent. The judge concluded that that this was *not* a "serious violent offence."

In *R v. L.M.*, where the offence involved threatening and slightly cutting another youth with a hatchet, Justice Beatty concluded that it was not a "serious violent offence," observing:¹⁰⁷

Although the defendant's actions described in the fact submission were dangerous, frightening and intimidating, I am not satisfied that the defendant caused or attempted to cause serious bodily harm. He intended to intimidate the victim and no facts or evidence were tendered which would indicate that the physical injury was more than trivial or that there was psychological damage which could qualify as serious bodily harm.

Adult Senencing

While many provisions and principles in the *Y.C.J.A.* are clearly intended to reduce the use of youth custody, especially for those who commit non-violent offences, as the *Y.C.J.A.* was being considered by Parliament, government press releases highlighted the provisions in the Act intended to facilitate the imposition of an adult sentence for those youth who commit "serious violent offences." However, as a result of

¹⁰⁷ [2003] O.J. 2212 (Ont. Ct.J.), per Beatty. See also *R v. E.C.*, [2004] O.J. 3395 (Ont. Ct.J.), per Forsyth J. where the court pointed out that a youth does not have to actually cause serious physical harm for an offence to be a "serious violent offence." The threat to do serious bodily harm, as occurred in an armed robbery, was sufficient even though there was no actual bodily harm.

the decision of the Quebec Court of Appeal in *Reference Re Bill C-7*¹⁰⁸ and the federal government's response to it, there is not likely to be a significant change in the relatively small number of youth receiving adult sentences.

Under the old *Y.O.A.* an adult sentence could only be imposed after a usually protracted pre-trial "transfer hearing" and a judicial transfer order, with a subsequent trial and possible sentence in adult court. Only the most serious cases, usually homicides, were even considered for this process and under the *Y.O.A.* fewer than one-tenth of one per cent of all cases were transferred to adult court.¹⁰⁹

The *Y.C.J.A.* significantly increased the range of situations for which an onus was on the youth to satisfy the court that a youth sentence should be imposed. Under the former *Y.O.A.*, in most situations the onus was on the prosecutor to justify transfer; a "reverse onus" was created with respect to transfer only for 16 and 17-year old youths charged with one of the most serious offences (murder; attempted murder; manslaughter and aggravated sexual assault); these older youths had to establish why they should *not* be transferred to adult criminal court.

The *Y.C.J.A.* facilitates the *process* for imposing adult sentences, by permitting a youth court to impose an "adult" sentence on youths 14 or older at the time of the offence without the need for a time-consuming pre-adjudication transfer application. An adult sentence, however, may only be imposed under the *Y.C.J.A.* if the youth has pre-trial notice that such a sentence may be sought and is offered the opportunity for a jury trial, albeit still under the provisions of the *Y.C.J.A.*, such as those prohibiting the publication of identifying information. In those cases where a pre-trial notice is given and the youth has an opportunity for a jury trial, if there is a finding of guilt, there is a hearing to determine whether an adult sentence is to be imposed. The sentencing judge is to determine whether the maximum youth sentence of three years (and ten years for murder) is sufficient to hold the youth "accountable."¹¹⁰ If the youth sentence is not considered adequate to hold the youth "accountable," an adult length sentence is to be imposed, though the youth will usually be placed by the court in a youth custody facility until reaching the age of eighteen, and for youths who receive a sentence of life imprisonment for murder, there is earlier parole eligibility than for an adult serving the same sentence.¹¹¹

Under the *Y.C.J.A.*, as drafted, for youths 14 to 17 years and found guilty of one of these enumerated very serious offences, there was a *presumption* that an adult sentence was to be imposed, and *an onus* upon the youth to satisfy the court that a youth sentence was more appropriate.¹¹² Moreover, an additional "three strikes" element was added to the list; young offenders 14 years and older convicted of a third "serious violent offence" also faced a presumption that an adult sentence would be imposed. In other cases, an adult sentence can also be imposed, but only if pre-trial notice is given and the youth upon afforded the opportunity for a jury trial, and the prosecutor satisfies the onus of

¹⁰⁸[2003] Q.J. 2850 (C.A.).

¹⁰⁹ Canadian Centre for Justice Statistics, *Youth Court Statistics 2001-02* (Ottawa: Statistics Canada, 2003), *Juristat*, vol. 23, no. 3.

¹¹⁰ *Y.C.J.A.* s. 72

¹¹¹ *Criminal Code* s. 745.1 & 745.3

¹¹² The *Y.C.J.A.* allowed for provinces to select a higher age than 14 for the presumptive offences; Quebec and Newfoundland selected 16 years of age.

establishing the need for an adult sentence. Further, s. 75 of the *Y.C.J.A.* provides that if a youth 14 years of age or older has been found guilty of a presumptive offence but the court decides not to impose an adult sentence, an application must still be made to the court to have a ban on identifying publicity.

Taken together, these measures of the *Y.C.J.A.* would almost certainly have resulted in an increase in the number of adolescent offenders who would receive an adult sentence. When the *Y.C.J.A.* was being debated in Parliament, politicians and youth justice professionals from Quebec expressed concerns that the Act's focus on accountability would undermine the more welfare oriented approach to youth justice in that province. Prior to the Act coming into force the Quebec government launched a reference case before the Court of Appeal in that province, challenging the constitutional validity of many of the provisions of the *Y.C.J.A.* The federal government was involved in the case, arguing in support of the validity of the new law.

In *Reference Re Bill C-7*¹¹³ the Quebec Court of Appeal rejected most of the arguments of the Quebec government, but it did rule unconstitutional some of the provisions of the *Y.C.J.A.* that deal with young persons aged 14 and older found guilty of the most serious violent offences. The Court held that it is a violation of the *Charter of Rights* to place an onus on youths found guilty of the most serious offences to justify the imposition of a youth sentence rather than an adult sentence. And it is a violation of the *Charter* to require youths convicted of these offences to have to justify a publication ban.

Many individuals, including the Justice Ministers from Alberta and Ontario, expected the federal government to appeal the Court's ruling that certain sections of the *Y.C.J.A.* violate the *Charter*. Instead of appealing the Court's judgment to the Supreme Court of Canada, however, on May 1, 2003 the federal Minister of Justice announced that the federal government accepted the Court of Appeal decision and would be introducing legislation to have amendments consistent with the ruling.

The Court of Appeal indicated that it is constitutionally acceptable for Parliament to permit judges to impose adult sentences and to allow for the publication of identifying information in regard to adolescents found guilty of the most serious offences, such as murder, provided that each case is individually assessed *and* the Crown satisfies the onus of justifying this response to a young person's criminal behaviour. It was the provisions that the *Y.C.J.A.* that created a class of offences for which there is a *presumption* that there will be an adult sentence and publication of identifying information that the Court ruled unconstitutional. It should not be complicated for Parliament to enact amendments to the *Y.C.J.A.* that are consistent with the Court of Appeal decision, and the federal government has indicated that it plans to do so. While the government has indicated that it will enact such a law, it has been more than a year since the Court of Appeal decision, and given the political turmoil in Ottawa, it may be many months before a new law is in place.

There are relatively few cases arise involving the very serious offences that raise these issues, and the courts will only have to face them when there is a finding of guilt for a youth who committed an offence after April 1, 2003, as for cases where offences occurred before that date, adult sentencing issues will continue to be dealt with under the

¹¹³*Québec (Ministrie de la Justice) v Canada (Ministre de la Justice)* (2003), 10 C.R. (5th) 281, [2003] Q.J. 2850 (C.A.), referred to here as *Reference Re Bill C-7*.

*Y.O.A.*¹¹⁴ There will, however, be some uncertainty in the courts until amendments are enacted. Prior to the enactment of the amending legislation, it is conceivable that a court will rule that all of the sections of the *Y.C.J.A.* which allow for the imposition of adult sentence on youths, whether on a presumptive basis or not, should be regarded as unconstitutional. Outside of Quebec, prosecutors can still argue that the Quebec Court of Appeal was wrong, and all of the provisions of the *Y.C.J.A.* are constitutionally valid; even though the federal government has announced that it will not appeal the Court of Appeal decision, it is technically not binding outside of Quebec. Although the uncertainty will only be resolved by Parliamentary action, prior to the enactment of amendments, it is submitted that the courts should not refuse to impose adult sentences on any youths who have committed the most serious offences. In those cases involving the most brutal circumstances and where the youth seems likely to pose a risk to society at the end of a youth sentence, the courts should interpret the *Reference* decision and the *Y.C.J.A.* in such a way as to permit the imposition of an adult length sentence. But the courts should require the Crown to establish that adult sanctions are necessary to hold the young person accountable and to prove any disputed facts beyond a reasonable doubt.¹¹⁵

The Quebec Court of Appeal decision rested on its interpretation of s. 7 of the *Charter*, and its articulation of previously unrecognized “principles of fundamental justice” that are applicable to cases involving adolescents who are being prosecuted for violations of the criminal law. The Court based its approach to s. 7 of the *Charter* on the fact that for nearly one hundred years the Canadian justice system has accepted the need to protect one of the most vulnerable groups in society, adolescents, and to treat them separately and differently from adults in the criminal justice system. The Court accepted that the principles of fundamental include the requirement that:¹¹⁶

- (1) Young offenders in the criminal justice system must be kept separate and treated different from the treatment;
- (2) Rehabilitation, not repression and deterrence, must be the basis of legislative and judicial intervention involving young offenders;
- (3) The youth justice system must restrict disclosure of the identity of minors in order to prevent stigmatization, which could limit rehabilitation; and
- (4) The youth justice system must consider the best interests of the child.

These principles seem very broad, though the Court limited their effect by also performing an internal balancing exercise within s. 7 when applying these principles of fundamental justice, stating that these principles must be applied so as to strike a “certain balance” between on the one hand the public’s right to be informed and protected and on the other hand the right of young people to be treated differently from adults and their right to have rehabilitation and their “best interests” as the main focus of decisions taken concerning them. Despite this “balancing,” the Court of Appeal's decision would constraint certain types of legislative reform. For example, the first principle could be

¹¹⁴ Other than for adult sentencing, all sentencing decisions made after April 1, 2003, when the *Y.C.J.A.* came into effect, are made under the *Y.C.J.A.*, even if the offence occurred before April 1, 2003: see *Y.C.J.A.* ss. 159-161.

¹¹⁵ This argument is more fully developed in S. Anand & N. Bala. "The Quebec Court of Appeal *Youth Justice Reference*: Striking Down the Toughest Part of the New Act" (2003), 10 *Crim. Rep.* (6th) 397.

¹¹⁶ [2003] Q.J. 2850 (C.A.), at para 215 & 231.

used to attack a proposal to abolish a separate criminal justice system for youths. Establishing a young offender sentencing structure that is completely determined and not simply limited by proportionality could be argued to infringe the second and fourth principles. The principles recognized by the Court would invalidate legislation removing all restrictions on the publication of identifying information and that protect the privacy of young offenders. Although the outcomes mandated by these constitutional imperatives may be welcomed by many advocates for youth, they may constrain how future, more “law and order” oriented governments may chose to “reform” youth justice legislation.

The Quebec Court of Appeal also considered whether the provisions of the *Y.C.J.A.* are consistent with international law. The Court noted that it is an established principle of statutory interpretation that, in the *case of ambiguity*, “domestic legislation,” like the *Y.C.J.A.*, is expected to comply with international law, including Canada’s obligations under international treaties. The Court examined the provisions of the *Y.C.J.A.* which the Quebec government argued were inconsistent with international law; the Court found an interpretation of each section that is consistent with international law, and concluded that these were the interpretations that should be applied by youth justice court judges. In doing so, however, the Court of Appeal may have interpreted the *Y.C.J.A.* in a manner that places less emphasis on the principles of proportionality and accountability than Parliament intended.

An important central issue in the *Reference* decision was how to interpret s. 38 of the *Y.C.J.A.*, which establishes the principles that are to govern sentencing. The generally accepted view of politicians and academic commentators before the *Act* came into force was that s. 38 establishes proportionality as the central sentencing principle of the *Y.C.J.A.*, though also requiring youth courts to consider rehabilitative concerns in fashioning an appropriate sentence. During debate on the *Act* in the House of Commons, Anne McLellan, then the Minister of Justice, stated: “The principle of proportionate accountability sets the limit of a measure taken under criminal law. Within that limit, every effort will be made to meet the needs of young people.”¹¹⁷

The Court of Appeal considered the *United Nations Convention on the Rights of the Child*, which requires that state actions in regard to those under the age of eighteen are to be guided by a concern with the “best interests of the child.” The Court further observed that the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* provides that State reactions to youth crime should always be in proportion not only to the circumstances and gravity of the offence but also to the needs of young people, and that the wellbeing of the young person must be the guiding factor. Consequently, the Court concluded:¹¹⁸

The Attorney General of Québec sees in that provision [s. 38] the legislator's intention to make proportionality *the primary objective* of the sentencing regime. He believes that, by thus subjecting one of the main purposes ... pursued by the Y.O.A. to the achievement of the other, the

¹¹⁷ Canada, House of Commons *Hansard*, 30 January 2002: 8492.

¹¹⁸ *Reference*, para. 146-147. Emphasis added

legislator fundamentally upsets the delicate balance previously sought [under the *Y.O.A.*] between *the protection of the public and the needs of young persons*.

The Court does not share that point of view. Section 38 [of the *Y.C.J.A.*] must not be considered in isolation from the other provisions of the Act; a proper reading of the Act suggests that *neither guiding principle must take precedence over the other*. A court to which the case of a young person is referred *must necessarily seek a balance between the two* in imposing a youth sentence.

In taking this “balancing” approach, the Quebec Court of Appeal allows youth justice courts to impose custodial sentences that may be disproportionately long, if considered necessary to promote the “best interests” of an adolescent. While this approach to juvenile sentencing is consistent with the words of international treaties, it seems inconsistent with the intent of the politicians who enacted the new law, and with the explicit words of the *Y.C.J.A.*, which make proportionality the dominant principle, and which appear to preclude a disproportionate response that is intended to meet the needs of a youth.

The day that the *Y.C.J.A.* was first tabled in the House of Commons, the federal Department of Justice issued a media release stating:¹¹⁹

A key principle of sentencing under the new legislation is that the sentence a youth receives should be in proportion to the seriousness of the offence. This represents a fundamental shift to a new sentencing model for youth justice.

It is submitted that the statements in the *Reference* decision about the balancing of proportionality and rehabilitative concerns, and the rejection of proportionality as *the* dominant sentencing principle are not consistent with the words of the *Y.J.C.A.* or the intent of Parliament, and are not likely to be followed outside of Quebec. The approach of the Court of Appeal, however, reflects the concerns of the Quebec-based opponents of the *Y.C.J.A.* who wanted to be able to continue to take the more welfare-oriented approach to youth justice that prevailed in that province under the *Y.O.A.*, one that allows youth courts to impose sentences that were disproportionate to the offence in the hope of achieving welfare or rehabilitative objectives.¹²⁰ If this approach to the broad interpretation of the *Y.C.J.A.* is followed in Quebec, which seems likely, there will likely continue to be very significant interprovincial disparities in how the new youth justice statute is interpreted.

Thus, while the federal government originally intended that under the *Y.C.J.A.* more youth who commit very serious offences would receive adult sentences, it seems likely that as a result of the Quebec Court of Appeal decision, there is likely to be little change in the relatively small number of adolescents receiving adult sentences.

¹¹⁹ Canada, Department of Justice, 11 March 1999.

¹²⁰ J. Trépanier, “What Did Quebec Not Want? Opposition to the Adoption of the Youth Criminal Justice Act in Quebec” (2004), 46 Can. J. Crim 273

Charging & Sentencing under the Y.C.J.A.

The *Youth Criminal Justice Act* came into force April 1, 2003 and nationwide data on sentencing will only be available in June 2005, but it is already clear that the Act has substantially changed Canada's youth justice system. As intended by its drafters, the Act has resulted in a substantial increase in community-based responses to youth crime. While there continues to be significant variation across the country in custody rates, populations in youth custody facilities declined by up to 50% in the first months that the Act was in force, and a number of youth custody facilities have been closed¹²¹ This decline in the number of youths in custody is a result of several factors:

- More use by police and prosecutors of diversion of youth from the courts by increasing the use of warnings, conferencing and extrajudicial measures. In Ontario in the first year that the *Y.C.J.A* was in effect, police charges for youth down 13% (vs 1% decline for adults).¹²² In British Columbia, there was a 29% decline in police referrals of youth cases to the Crown for possible prosecution (vs a 3% decline for adults).¹²³
- A decrease in the use of pre-trial detention due to Crown prosecutors and police seeking detention less frequently, as well as judges and justices of the peace releasing more youth on supervision. In Ontario in the first year that the *Y.C.J.A* was in effect, pre-trial detention populations were down 11%, while in British Columbia the decline was 10%.
- Judges making less use of custodial sentences and greater use of community-based sentences, and the last third of almost all custodial sentences are to be served in the community under supervision. In Ontario in the first year that the *Y.C.J.A* was in effect, the secure custody population was down 37% and the open custody population down 40%. In British Columbia, the average youth custody population declined from 330 in 1999-00 to 219 in 2002-03 and 152 in 2003-04, representing a decline of more than one third over 4 years, and a decline of more than 25% in the first year that the *Y.C.J.A.* was in effect.

Although there have been differences in how the courts have interpreted some of the provisions of *Y.C.J.A*, in general the police, prosecutors and judges in Canada have responded to the admonition in the Preamble that the Act is intended to “reduce the over-reliance on the incarceration of...young persons.”¹²⁴ Youth court judges have generally accepted the principle that a youth sentence must be a “fair and proportionate” response

¹²¹ See e.g. “Fewer Youths Jailed Under New Law,” *National Post*, July 18, 2003, p. A1, reporting on the first 3 months of implementation, with a 24% decline in use of custody in Alberta and a 20% -25% decline in Ontario.

¹²² In Ontario, data for April 1, 2003 to March 31, 2004 provided by Glen Semple, Ontario Ministry of Children and Youth Services.

¹²³ For British Columbia, information supplied by Alan Markwart, B.C. Ministry of Children and Family Development.

¹²⁴ *Y.C.J.A.* ss. 3(1)(c) & 3(1)(b)(ii).

to youth crime, and are not using pre-trial detention or custodial sentencing to achieve child welfare objectives. Further, in fashioning a proportionate response, youth courts have generally recognized the limited accountability of youth in comparison to adults and focused on the need to impose community-based sentences that “promote...rehabilitation and reintegration into society.”¹²⁵ In cases involving more serious offences or youths with lengthy records who clearly are not responding to community-based options, youth courts have generally continued to impose custodial sentences.

The Limited Role of the Youth Justice System in Responding to Youth Crime

It is understandable that youth court judges want to ensure that appropriate rehabilitative services are provided to the offenders with whom they deal. The statements in the Preamble and the Declaration of Principle of the *Y.C.J.A.* about the importance of crime prevention and rehabilitation require a youth court judge to consider the rehabilitative value of different sentences that might be imposed in accordance with principles of “fair and proportionate accountability.” Rehabilitative concerns might, for example, result in a youth court judge deciding that a term of probation should be imposed rather than a custodial sentence that would be warranted on purely accountability-based principles. This could be justifiable in light of the rehabilitative potential of an *available* community-based treatment program that could help reduce the likelihood of a young offender committing further offences.

The Saskatchewan and Alberta Courts of Appeal, however, have made clear that it is not for youth court judges to decide what types of rehabilitative services a provincial government will provide for a young offender.¹²⁶ While a youth court judge may make recommendations for the provision of specific services, and in some cases the failure of the government to provide these services might be the ground for the review of the original sentence, this will not result in the provision of services needed by the youth.

Judges are important decision makers in the youth criminal justice system. Their attitudes, demeanour, and decisions profoundly affect the treatment of individual youth. However, judges cannot effect rehabilitation or prevent crime. Rehabilitation and crime prevention are missions of the entire youth justice and corrections systems. Judges can make orders that may *allow* various professionals and agencies to *work towards* the objectives of rehabilitation and reintegration, but judges must also appreciate that their role is limited.

Under the *Y.O.A.* there was very significant variation both within and between jurisdictions in the types of programs and facilities available for young offenders, and this had a significant effect on youth court sentencing.¹²⁷ Under the *Y.C.J.A.* there continue to be substantial disparities across Canada in the programs, services and facilities that provincial governments are making available for young offenders, and this is having an impact on youth justice courts and sentencing. Some of this variation in access to

¹²⁵ *Y.C.J.A.* s. 38(1).

¹²⁶ *R. v. L.E.K.*, [2000] S.J. 844 (Sask C.A.), para 20. To the same effect see, *R. v. R.J.H.*, [2000] A.J. 396 (Alta C.A.).

¹²⁷ See e.g. A. Doob, *Youth Court Judges' Views of the Youth Justice System: The Results of a Survey* (Centre of Criminology, University of Toronto, 2001)

resources and programs reflects differences in the financial support that is available for youth corrections and related programs, but there are also significant philosophical differences due to different political philosophies.

One important example of this disparity is in the availability of the community-based sentence of intensive support and supervision, a sentence that can only be imposed with the agreement of the provincial director.¹²⁸ In comparison to ordinary probation, this type of sentence offers a greater possibility for control and sanction of the youth as well greater access to rehabilitative services, and this could be an important, rehabilitation focussed alternative to custody. While intensive support and supervision is available in most jurisdictions, it is not available in Saskatchewan and is a sentencing option in a few places in Ontario.

In *R v B.M.*¹²⁹ Lafond-Turpel Prov Ct J. was sentencing a sixteen year old aboriginal youth with fetal alcohol spectrum disorder for two robberies and an assault. The judge believed that conferencing would be especially valuable for the youth, but noted that there were no trained individuals available to organize a conference; she commented:

As a judge who has conducted sentencing circles, the lack of resources or support for this part of the new YCJA is a matter of great frustration and limits what can be accomplished in terms of addressing root causes and rehabilitation. Yet if this case is any measure, it is worth trying even without supports because so much more can be learned of the youth's circumstances and alternatives. It is not feasible for this approach to be used extensively in the future without implementation support.

In Ontario, one reason for the relative lack of community sentencing options is that the previous provincial government declined some federal funding that was available for this type of sentencing. The present government has transferred responsibility for all young offenders services to the new Ministry of Children and Youth Services, and seems to have a greater commitment to the provision of community-based services than the previous government.

Conclusion:

The *Y.C.J.A* is an attempt to find a better approach to responding to youth offending in Canada. It is also, in some respects, a political compromise. To obtain the support of the provincial governments, the *Y.C.J.A* gives significant flexibility to these governments about how to implement the law, and as a result there has been substantial variation in how young offenders in different provinces are treated.

In order to appease the vocal law-and-order critics of Canada's youth justice system, a number of provisions of the *Y.C.J.A.* place an emphasis on accountability, especially for serious violent offenders, and address some concerns of victims for greater

¹²⁸ *YCJA* s. 42(2)(1) and 42(3)

¹²⁹ [2003] S.J.377 (Prov. Ct.), per Turpel-Lafond Prov. Ct.J; despite the absence of appropriate government programs for the youth, the judge shaped a community based sentence; her sentence, however, was reversed on appeal and a custodial sentence was imposed [2003] S.J. 870. See also comments in *R .v C.P.*, [2004] N.J. 41 (Nfld & Lab Prov. Ct.), per Gorman Prov. Ct.J.

participation in the justice process. Some provisions of the *Y.C.J.A.* were intended to result in an increase in the relatively small number of the most serious offenders serving longer adult sentences, and to allow for the publication of identifying information about young offenders who commit very serious offences. While the new statute continues to recognize that young persons have the right to due process of law, there is some weakening compared to the *Y.O.A.* in the protection of legal rights, for example in the admission of youth statements to the police — a reflection of a law-and-order agenda.¹³⁰ Some of the provisions that most directly address the concerns of law and order critics, however, have been ruled unconstitutional by the Quebec Court of Appeal.

To address the concerns of child-advocacy groups and politicians who wanted a more supportive and preventive approach to youth offending, the *Y.C.J.A.* was intended to move youths charged with less serious offences out of custody facilities and the youth courts, and to have more effective community-based responses to youth offending. While it is the responsibility of each province to determine whether more community-based services will be made available, it is clear that the new *Act* has resulted in substantially more diversion and less use of custody for adolescent offenders in Canada. It is, however, the responsibility of each province to determine whether more community-based services will be made available. It is apparent in British Columbia that an effort has been made to shift some resources out of custody and into community based programming.

The more coherent message of the *Y.C.J.A.* has resulted in significantly less use of custody for youths. However, the Act continues to allow for substantial variation between jurisdictions in terms of policies and resources available to deal with young offenders. The principles in the *Y.C.J.A.* are important, but their significance will depend on the actions of justice system officials. In individual cases, these principles will be applied by police officers, prosecutors, judges, and youth court workers, exercising their individual professional judgment. As under the *Y.O.A.*, judges dealing with individual young offenders are constrained by what resources and programs are available. Moreover, the policy and resource decisions of provincial governments will continue to have a profound effect on Canada's youth justice system and on how principles are applied in individual cases. Ultimately, it will be the cumulative effect of these decisions by provincial and territorial governments and by individual professionals that determines whether the hopes of Justice Canada for the new Act are achieved, namely the aspiration that "the *Y.C.J.A.* will correct fundamental weaknesses of the *Y.O.A.* and result in a fairer and more effective youth justice system."¹³¹

In every society there are real limits to the potential of criminal laws and the youth justice system to protect society and reduce youth crime. Public policies related to health, education, child welfare, law enforcement and gun control, as well as a range of cultural and social factors, are much more important for determining a country's youth crime rate than its youth justice system.

¹³⁰ For example, s. 146 of the *Y.C.J.A.* allows for the admission of the confession of a youth to police even if there is not full compliance with the cautioning requirements of the Act. Section 25 (10) allows provinces to seek reimbursement from parents for the costs of paying a lawyer to represent their children; at the time of writing, no province has chosen to implement this provision, but if it is implemented, parents are likely to discourage their children from exercising their right to have legal counsel.

¹³¹ Department of Justice Press Release, "Why New Youth Justice Legislation?" (February 2001).

Whether the *Act* contributes to Canada having less youth offending and a safer society remains to be seen. It is submitted that ultimately, the law can only play a limited role in making society safer and in advancing the interests of youth. Decisions of governments about resources for the youth justice and corrections systems, and broader range of social policies are much more likely to have a significant impact on levels of youth crime.

Further Reading

Anand & Bala, "The Quebec Court of Appeal *Youth Justice Reference*: Striking Down the Toughest Part of the New Act" (2003), 10 *Criminal Reports* (6th) 397 - 418.

Bala, "Diversion, Conferencing and Extrajudicial Measures for Adolescent Offenders" (2003), 40 *Alberta Law Review* 991 - 1027. There are a number of other articles on the YCJA in this volume of the *Alberta Law Review*.

Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) - a text published just before the Act came into force, available \$44.95 + GST + s & h, tel.1-888-314-9014 www.irwinlaw.com

Bala & Anand, "The First Months Under the Youth Criminal Justice Act: A Survey of Caselaw" (Spring, 2004), 46 *Can. J. Crim.* 251-271. There are a number of other articles on youth justice in this special issue of the *Canadian Journal of Criminology*.

Doob & Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004) – criminology and policy analysis of youth justice in Canada.

Green and Healey, *Rethinking Approaches to Youth Justice* (Saskatoon: Purich Publishing, 2003) - a policy oriented focus with some emphasis on aboriginal offenders.

Harris, *Youth Criminal Justice Act Manual* (Canada Law Book, updated looseleaf service)

Roberts & Bala, "Understanding Sentencing Under the Youth Criminal Justice Act" (2003), 41(2) *Alberta Law Review*

Tuck-Jackson et al, *Annotated Youth Criminal Justice Act Service* (Butterworths, updated looseleaf service) (monthly email updates and available through Quicklaw, BYOU data base)

Tustin & Lutes, *A Guide to the Youth Criminal Justice Act* (Toronto: Butterworths, 2004)
- an annotated print version of the Act