JUSTICE FOR YOUNG OFFENDERS

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EXECUTIVE SUMMARY

Canadian youth justice legislation has evolved considerably since the mid nineteenth century when the first criminal laws specific to young people were introduced. The *Juvenile Delinquents Act* of 1908 created a separate justice system for young people and was based on a philosophy of *parens patriæ*, which required the state to act as a surrogate parent when children were neglected or in need of guidance. The *JDA* was subject to sharp criticism in the 1960s for its failure to recognize the civil rights of young people. The *JDA* remained in force until 1984, when the *Young Offenders Act* replaced it. The *YOA* attempted to balance the due process rights and special needs of young offenders with the protection of society. The *YOA* was not effective in reducing youth crime, and led to an unprecedented use of incarceration for young offenders. After amendments were made to the *YOA* in 1986, 1992, and 1995, it became clear that the Act needed to be replaced. In 1996, the Standing Committee on Justice and Legal Affairs conducted a review of the state of youth justice in Canada. After their report was released in 1997, the government began their workings on the *Youth Criminal Justice Act.*

The *Youth Criminal Justice Act*, while an attempt to take youth crime seriously, cannot be considered a hard-line, retributive approach to reducing criminality among young people. It is, in fact, a legislative attempt to hold young offenders accountable for their actions and to provide them with meaningful consequences in an effort to deter future criminality. The *YCJA* focuses on the use of extrajudicial measures including police based diversion, crown cautions, and extrajudicial sanctions These measures make use of youth justice committees and conferences to deal with non-violent, less serious offenders, while concentrating the resources of the formal justice process on young offenders charged with more serious, violent offences. It is hoped that the *YCJA* will reduce the disparity in sentencing of young offenders by providing judges with clear principles for setting the nature and duration of the sentence available in respect of a particular crime. It is also hoped that the rehabilitation and reintegration of young people will be achievable under the new Act. The *YCJA* declares that rehabilitation and reintegration are necessary for the protection of the public. To further this goal, the Act provides that a portion of each youth sentence will be served in the community. The Act, if implemented by the provinces with the intent to adhere to its guiding principles, has the potential to provide the youth justice system with a means with which to make effective and intelligent decisions and ultimately work toward its primary objective - the protection of the public.

INTRODUCTION

As the twentieth century drew to a close, the Canadian youth justice system underwent a major overhaul with the implementation of the *Youth Criminal Justice Act* (*YCJA*). The previous juvenile legislation, the *Young Offenders Act* (*YOA*), was unpopular with the public, hard-line 'just deserts' critics, and children's advocates alike. The implementation of the *YCJA* was meant to reduce the use of custody for young offenders while holding young people accountable for their criminal conduct. The primary goal of this legislation was and continues to be to protect society, but the rehabilitation of young offenders and respecting the due process rights of youths are related goals that are not overlooked by the Act. This clear statement of principle was an improvement on the balancing act attempted by the *YOA* in which many competing principles led to great disparity in the treatment of youths in the juvenile justice system.

Youth crime has always been a serious and complex problem in Canada, but the legislative 'solutions' to this problem have evolved considerably in the past century. This paper is an attempt to describe the evolution of Canadian juvenile justice legislation and compares the principles and practice of the *Juvenile Delinquents Act*, the *Young Offenders Act*, and the *Youth Criminal Justice Act*. The impact that each Act had (or will have) on the youth justice system will also be considered.

JUVENILE JUSTICE LEGISLATION IN CANADA PRIOR TO 1908

At the end of the nineteenth century in Canada and in many other western nations, the concept of youth had undergone a dramatic shift. Centuries ago, "few distinctions were made on the basis of age and young people were fully integrated into the main stream of social life" (Caputo, 1987, p. 126). Many children performed menial jobs or apprenticed into trades at an early age, and education was a luxury reserved for the rich. Sociologist Philippe Ariès, in his book, *Centuries of Childhood: A Social History of Family Life*, argues that a concept of childhood began to develop in Europe in the seventeenth century when infant mortality rates were declining (cited in Smandych, 1995, p. 8).

According to Ariès, in medieval times, a high rate of infant mortality worked against the establishment of strong emotional bonds between parents and their offspring. As the rate of infant mortality declined, due to improved sanitation and what was effectively the elimination of the plague, children were expected to live into adulthood and parents were thus allowed to make an emotional investment in their children. Societal ambivalence toward youth was gradually replaced by an interest in protecting children and fostering their development. By the end of the nineteenth century, there was a general consensus in Canada that children were fundamentally distinct from adults and required special care and guidance.

Until the 1890s, there was no clear distinction in Canadian criminal law between adults and youths. There was, however, a defence of *doli incapax* available to children aged seven to thirteen who were considered incapable of understanding the nature and

consequences of the criminal act for which they were charged. Despite the *doli incapax* defence-which could be rebutted if the Crown could show that the child did indeed understand the consequences of his actions-children could, if convicted, face the same dispositions as adult criminals (Bala, 1988). According to the common law, "a child under the age of seven years was deemed incapable of committing a criminal act" (Bala, 1988, p.11) and so could not be held responsible in a criminal proceeding. In a report in 1849, the Brown Commission detailed the extensive use of corporal punishment on incarcerated youths at Kingston Penitentiary and criticized the jailing of youths with adults, stating:

> It is distressing to think that no distinction is now made between the child who has strayed for the first time from the paths of honesty, or perhaps has never been taught the meaning of sin, and the hardened offender of mature years. All are confined together to the unutterable contamination of the common goal; and by the lessons there learnt, soon became inmates of the Penitentiary (Brown Report (1849) cited in Griffiths and Verdun-Jones, 1994, p. 598)

While the *Juvenile Delinquent Act* (*JDA*), given Royal Assent in 1908, was the first legislation to fully distinguish child offenders from adult criminals through the creation of a separate youth justice system, the *JDA* was not the first legislative indication of the Canadian government's commitment to differential treatment of delinquent youths (Jones, 1997). An Act for the Establishment of Prisons for Young Offenders, adopted in 1857, made possible the establishment of reformatories to which youths could be sentenced and An Act for the Speedy Trial and Punishment of Young Offenders shortened the length of pre-trial detention and created bail provisions for youths charged with a criminal offence (Hylton, 1994). The Arrest, Trial and Imprisonment of Young Offenders Act of 1894 was arguably the most significant juvenile legislation prior to the *JDA*. The preamble to the 1894 Act was reflective of a legislative effort to keep youths separate from adults in the justice process. Whereas it was desirable to make provision for the separation of youthful offenders from contact with older offenders and habitual criminals during their arrest and trial, and to make better provision than now exists for their commitment to places where they may be reformed and trained to useful lives... Section 2 of the Act required that young people, prior to sentencing, be "kept in custody separate from older persons charged with criminal offences" and section 3 provided that an offender appearing to be under fourteen years of age could be sentenced to a home for neglected children. This legislation was intended to reduce the deleterious influence of adult criminals on young offenders, who were seen to be particularly susceptible to rehabilitation and treatment. Despite the good intentions of Parliament, delinquent youths were frequently sentenced to adult facilities.

THE *JUVENILE DELINQUENTS ACT*: AN EFFORT TO SAVE CHILDREN AND PROTECT THE COMMUNITY

When the *Juvenile Delinquents Act* became law in 1908, it represented the culmination of the efforts of a 'child-saving' movement which sought to establish a separate justice

system for youths in conflict with the law (Bala, 1988). Reformers active in this movement argued that children should be treated in a manner different than adults by virtue of their lack of maturity and their dependence on adults for guidance and care. Prior to the enactment of the *JDA*, a youth who had broken the law was, in most cases, subject to the same procedures and dispositions as were adult criminals. By creating a justice system for delinquent youths, it was believed that destitute and neglected children could be saved from future criminality as they would not be subject to incarceration with adult criminals and would be provided treatment and special care. The safety of the community would be enhanced by the overall reduction of criminality. These ideas were expressed in the preamble of the *JDA*:

> Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against the association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts...

The dual purpose of the Act was also articulated in section 7, which provided for transfer of the youth to an adult court if the offence for which he is charged is indictable. According to this section, "such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it." The Juvenile Delinquents Act was based on a child-welfare model of juvenile justice. A central concept of child-welfare philosophy is *parens patriæ*, which places a moral obligation on the state to act as a surrogate parent when a child is neglected or misguided. Proponents of the child-welfare approach argued that young people "became delinquent as a response to poor parenting or economic and social disadvantages" (Leschied & Jaffe, 1995, p. 419). The underlying philosophy was that the state should, through the youth court and treatment facilities, provide the guidance and support that the parents of juvenile delinquents had failed to provide. This philosophy was clearly stated in section 31 of the *JDA*:

> This Act shall be liberally construed to the end that its purpose shall be carried out, to wit: That the care and custody and discipline of a juvenile delinquent shall approximate nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

While the youth court was to fulfill a parental role by meeting the special needs of the child involved in the court process, the delinquent's parents were not excluded from the proceedings in which their child was an accused. Section 8 of the *JDA* stated that: "Due notice of the hearing of any charge of delinquency shall be served on the parent or parents or the guardian of the child..." This provision was included to ensure that the best interests of the child could be assessed by the court. If the child's parents were not in attendance in court, the judge could assume that the child was neglected, and could

involve the appropriate child-welfare authorities in the child's case, if necessary. However, if the delinquent's parents were present at their child's hearing, the judge could take the parents' concern and interest into consideration when deciding on a suitable disposition for their child.

Evidence of the child-welfare approach taken by the *JDA* can be found in the definition of 'juvenile delinquent' which is clearly distinct from the term 'criminal', as set out in the Act under the *JDA*, delinquents were not criminals but misguided youths, and the behaviours that constituted delinquency were not, in all cases, offences for which adults could be charged. Section 2 (c) of the *JDA* read:

> "juvenile delinquent" means any child who violates any provision of The Criminal Code..., or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, for which violation punishment by fine or imprisonment may be awarded; or, who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute.

In a subsequent revision of the *JDA*, this subsection was amended to include in the definition of 'juvenile delinquent,' "any child who...is guilty of sexual immorality or any similar form of vice..." Offences for which adults could not be charged, but for which those under sixteen years of age could, were referred to as 'status offences,' and encompassed a wide variety of behaviours including truancy, incorrigibility, drug use, and sexual immorality, as mentioned above. A significant proportion of all offences committed by juveniles under the *JDA* were status offences, as opposed to criminal or quasi-criminal, offences. In Ontario, for example, in 1973, committals to industrial schools for status offences constituted 42.5% of all committals made (Leschied & Jaffe, 1995, p. 421). In other jurisdictions, status offences made up a smaller, yet substantial proportion of acts for which a committal to a training school was given as a disposition. The definition of delinquency given in the *JDA* was intended to ensure that children guilty of offences against the Criminal Code were treated in a manner similar to unruly or neglected youths. The focus of the youth court was the offender and his special needs, rather the offence for which he was charged.

The *Juvenile Delinquents Act* applied to boys and girls between seven and eighteen years of age, but the maximum and minimum ages varied by province, however. The maximum age ranged from sixteen to eighteen years, while the minimum ranged from seven to fourteen years of age. If a child was under the minimum age legislated by the province in which the offence was committed, he would be dealt with by the child welfare system, and not by the courts. Young offenders over the maximum age indicated by provincial legislation were treated as adults and were subject to adult dispositions. This lack of uniformity led to a great disparity in the treatment of troubled youths across Canada (Bala, 1988).

YOUTH COURT PROCEEDINGS UNDER THE *JUVENILE DELINQUENTS ACT*

Section 10 of the *JDA* provided that the youth court was to be closed to the public, and would take place "without publicity and separately and apart from the trials of other accused persons." Trials were to be held, if possible, in private quarters - in the office of a judge or a room in a municipal building- the courthouse- or within a detention facility. No newspaper or any other media could disclose the name of the juvenile delinquent or his parent without permission of the presiding judge. The intent of section 10 was to ensure that delinquents would not be treated in a manner similar to adult criminals. Informal, private trials were thought to be the most effective mechanism with which to meet the special needs of young offenders.

The *JDA* allowed for the transfer of an accused youth to adult court if the offence for which he was charged was indictable and the youth was actually or apparently fourteen years of age or older. The decision to transfer a youth was made by the presiding youth court judge who could rescind a transfer order at any time before the proceedings against a youth commenced in adult court. The 1908 legislation failed to set out provisions for the appeal of a decision to transfer a youth to the ordinary court, but in a revision of the Act (the *Juvenile Delinquents Act*, S.C. 1929, c. 46) section 37 provided that "A Supreme Court judge may, in his discretion, on special grounds, grant special leave to appeal any decision of the youth court," including a decision to transfer (Jones, 1997). Subsection 37 (2) of the 1929 revision stated that the right to appeal a youth court decision would be reserved for exceptional cases for which an appeal would serve the public interest and the due administration of justice. The right to appeal a decision to transfer or any other decision of the youth court was not a universal legal right.

Dispositions set out by the *Juvenile Delinquents Act* were meant to meet the special needs of delinquent youth. A young person found to be delinquent could face a range of penalties including a fine of up to ten dollars (in a revision of the *JDA*, this amount was increased to twenty-five dollars), a suspended sentence or placement in a foster home. A youth could be committed to "the care or custody of a probation officer or any other suitable person" (Juvenile Delinquents Act, S.C. 1908, c. 40, sec. 16), a children's aid society, an industrial school or a reformatory. Any juvenile delinquent, according to subsection 16 (3), whether in custody or at home, would continue to be a ward of the court until the age of twenty-one or until discharged by the court. This provision allowed youth court judges to commit young people to custody indeterminately up to their twenty-first birthday. A youth court judge could also adjourn a hearing at any point for a determinate or indeterminate length of time.

THE LONG ROAD TO REFORM: 1962-1984

The *parens patriæ* approach to juvenile justice, initiated by the *JDA*, reigned supreme and was virtually unchallenged for fifty-four years. One commentator has opined that this occurred perhaps because "the *JDA* operated in a critical vacuum" (Bolton et al., 1993, p. 948). In the 1960s, however, criticism of the Act began to emerge. Many academics

and workers within the justice system were concerned with the lack of uniformity in maximum and minimum ages of children, and the disparity in sentencing practices across provinces. Further, it was argued by some critics that the label 'juvenile delinquent', which was applied to thousands of children for a wide range of behaviours, was stigmatizing. The intention of the *Juvenile Delinquents Act* was to remove the stigma attached to young offenders, as evidenced by the preamble of the Act, which states that it is "inexpedient that youthful offenders be classed... as ordinary criminals." However, labelling theorists held that many 'normal' youths were declared delinquent by the youth justice system and the label consequently became a part of the self-image of a number of young people (Bolton et al., 1993). By branding children 'delinquent' for behaviours that by today's standards are considered 'normal,' such as truancy or pre-marital sexual activity, the youth justice system was inadvertently promoting future deviance among status offenders who were lumped into the same general category as juvenile rapists and murderers.

The *JDA* was also criticized for failing to provide due process rights to young offenders (Griffiths and Verdun-Jones, 1994). Under the *JDA*, judges had were given a considerable amount of freedom in the determination of dispositions and thus, potential for abuse existed (Hackler, 1987). In the sixties, several landmark decisions were made by the United States Supreme Court in cases involving youths given unduly long sentences. In *Kent v. U.S,* 383 U.S. 541 (1966), it was decided that juveniles should have the right to counsel and should be entitled to a hearing. In the case In *Re Gault,* 387 U.S. 1 (1967), the United States Supreme Court established a youth's privilege to be free from self-incrimination and to be protected by other due process rights afforded adults (Bolton et al., 1993). Under the *JDA*, few provisions for the legal rights of young people were in place, and it was argued that because of this, many youths were treated in a more punitive manner than were adults found guilty of similar offences (Griffiths and Verdun-Jones, 1994). Many critics of the juvenile justice system believed that Canada should follow the lead of the United States and legislate legal rights for youths.

In response to mounting criticism of the *JDA* and a marked increase in youth crime (Caputo, 1987), the Canadian government appointed a Committee of the Department of Justice to compile information on juvenile delinquency in 1962. This five-person committee consulted with various professionals working with youths in the justice process, including judges, legal counsel and child welfare workers (Bolton et al., 1993). A report by the Committee was released three years later in 1965. After several years of formulating legislative reforms, Bill C-192 was drafted and introduced to Parliament in 1970. The policy objectives of Bill C-192 were to remove status offences from the definition of delinquency, to create uniformity in the maximum and minimum ages to which the legislation applied and to introduce legal protections for young offenders (Bolton et al., 1993). To the displeasure of many children's rights advocates, this bill was not enacted because of considerable opposition within the House of Commons and the youth justice system.

The process of reform did not cease with the death of Bill C-192, however, and it became increasingly apparent in the 1970s that the *parens patriæ* approach was not working to

reduce recidivism. The public began to call for greater accountability for young offenders and the government was under pressure once again to institute juvenile legislative reforms. With the introduction of the Canadian Charter of Rights and Freedoms in 1982, a new Act to replace the *JDA* became a constitutional necessity, and in that year, Bill C-61 was introduced. This legislation was given Royal Assent in 1984 and was entitled the Young Offenders Act.

THE GUIDING PRINCIPLES OF THE *YOUNG OFFENDERS ACT*

As the *Young Offenders Act* (*YOA*) was criminal law, as opposed to child-welfare legislation, (Bala, 1988, it represented a significant philosophical shift from the Juvenile Delinquents Act. In 1984, a strict *parens patriæ* philosophy gave way to principles of societal protection, the special needs of young offenders, and the least possible interference with the freedom of youths (Bolton et al., 1993). In effect, the *YOA* was based on a hybrid model composed of child-welfare and justice models. The special needs of youths were still a priority to the court; however, these needs were to be balanced with procedural protections to ensure that young people were not subjected to harsher sentences than would be given to adults found guilty of a similar offence. The hybrid model has, on its surface, contradictory policy implications with respect to young offenders. Proponents of the Act argued that youth crime was a particularly difficult problem which must necessarily balance competing societal goals in an effort to achieve a solution. This balancing act was not a new feature in juvenile legislation- the *JDA*, like the *YOA*, was aimed at meeting the special needs of young people while protecting society. In fact, it can be argued that all Canadian juvenile legislation, including the new *Youth Criminal Justice Act*, have attempted to strike a balance between competing goals to some degree. However, the successive Acts differ in the *priority* given to each goal. Under the *JDA*, the best interest of the child was paramount, but community protection was also a guiding principle of the legislation. The *YOA* attempted to balance three guiding principles: the protection of society, the special needs of young offenders and due process rights. Individual judges working under the *YOA* have had to decide which principle should receive priority under a variety of circumstances. As will be shown later, the new *YCJA* gives priority to the protection of society while recognizing that this goal is best achieved by rehabilitating and reintegrating young offenders. Further, the *YCJA* aims to ensure public safety by holding young people accountable for their actions and by providing meaningful consequences to youths in the hope that they will be deterred from future criminal activity.

Canada's policy for dealing with young offenders was articulated in the Declaration of Principle (section 3) of the *YOA* which, like the *JDA*, was to be liberally construed by the youth courts. This policy was intended to address the special needs of youth while both guaranteeing their due process rights and protecting society. The limited accountability and the special needs of young offenders were addressed in subsection 3(1)(a) which read:

> while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as

> adults, young persons who commit offences should nonetheless bear responsibility for their contraventions.

Further, subsection 3(1)(c stated that young offenders, "because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance." In essence, young people were to be held to a lower standard of accountability and to be given special treatment to facilitate rehabilitation. The influence of the child-welfare model was clearly evident in the Declaration of Principle, but it was tempered with a notion of the least possible interference inherent in the justice model- the severity of a disposition had to be warranted by the offence (Hak, 1996). If the protection of society was not threatened, subsection 3(1)(d) allowed for the use of alternative measures or no measures at all. There were still some remnants of the philosophy of *parens patriæ*, particularly in subsection 3(1)(h) which stated that children "should be removed from parental supervision...when measures that provide for continuing parental supervision are inappropriate."

The protection of society was addressed in section 3(1)(b) which states that "society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour." The *Young Offenders Act* was intended to aid in the protection of society by working towards the rehabilitation of youths while removing dangerous youths from the community (Hak, 1996). After an amendment to the *YOA* in 1995, subsection 3(1)(c) stated that:

> …the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs of a young person that are relevant to his offending behavior.

From the above, it was apparent that the principles of special needs and the protection of society, while seemingly incompatible, were in fact, positively associated. If the special needs of youths were adequately met by the juvenile justice system, society would benefit from a reduction in criminality among young people.

A third guiding principle of the *Young Offenders Act* was that young people ought to be afforded the same legal protections as adult criminals. It was recognized that if we were going to criminalize young people, we were required to also ensure their legal rights were protected. The due process rights of young offenders were set out in the *YOA*'s Declaration of Principle in subsections (e), (f), and (g). According to subsections 3(1)(e) and (f), youths had "...a right to be heard in the course of, and participate in, the processes that lead to decisions that affect them, and that young people should have special guarantees of their rights and freedoms" which "include a right to the least possible interference with freedom that is consistent with the protection of society...". Under the *YOA*, young offenders were granted the right to give full answer and defence in court, and any disposition given must not have deprived a young offender of his freedom for an

inappropriate length of time. The need for treatment was not sufficient justification for a long period of custody as it had been under the *JDA*. Youths found guilty of minor offences, prior to the enactment of the *YOA*, could be placed in a training school for an indefinite period (until the youth reached the age of twenty-one) in cases where the court found the youth to be in need of special care and guidance (Leschied & Jaffe, 1995).

Another noteworthy legal right of youths was found in subsection 3(1) (g) of the *Young Offenders Act*, which read that: "young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are...". This statement of principle effectively put a check on the police and other authority figures who had the power to intimidate adolescents into giving self-incriminating or false statements. The legal rights of young people, those included in both the *YOA*'s Declaration of Principle and the *Charter of Rights and Freedoms,* were particularly important in regards to the arrest and interrogation of youths.

THE YOUTH JUSTICE PROCESS UNDER THE *YOUNG OFFENDERS ACT*

The *Young Offenders Act* created a uniform system of justice for Canadian youths which resembled the adult system in formality, but remained distinct from the adult system, as it did under the *JDA*. Across the country, minimum and maximum ages to which the legislation applied became 12 and 17 years, respectively. Adolescents could no longer be charged with 'delinquency'- if a youth were to be charged with an offence, it must be a violation of criminal law (Hylton, 1994). Youth court judges, under the *YOA*, had much more legal training than their predecessors. This, combined with the increased legal representation of young offenders, led to an adversarial courtroom setting much like that seen in adult court where the 'adversaries' are the Crown and the Defence counsel and the judge is an objective intermediary. In contrast to adult court, however, the proceedings always followed summary conviction procedure to ensure that young people spent as little time in the formal process as possible. There was no preliminary hearing in youth court and a youth rarely spent more than a few months in custody prior to trial.

The *Young Offenders Act* had provisions for the transfer of an adolescent to the ordinary court, detailed in section 16. A transfer was automatic in instances where the offender was sixteen or seventeen years of age at the time of the offence and was charged with a serious indictable crime such as homicide, manslaughter or aggravated sexual assault. A transfer was also possible if an accused was over fourteen when he committed a serious offence and the court decided that it was in the best interest of both the youth and the community to try the young person as an adult. A transfer hearing must have taken place prior to the trial and the adjudication of a youth. Either the prosecution or defence could apply for a transfer, and the onus fell on the applicant to show the court that a transfer would be appropriate.

The *YOA* also provided that courtroom proceedings could be avoided through the implementation of alternative measures programs which may be used to deal with youths charged with minor, nonviolent offences who have no prior convictions. The legal framework for the use of alternative measures was laid out in section 4 of the *YOA*, which

stated that the measures must be "part of a program of alternative measures authorized by the Attorney General or his delegate" and are appropriate given the circumstances of the young offender and the interests of society. Further, the young person must have accepted responsibility for the criminal act for which he had been charged and must have freely consented to participate. The youth court also had the discretion to refrain from imposing any measures at all, as stated in the Declaration of Principle, if doing so would not be at odds with the protection of society.

In effect, the *YOA* opened the doors of the youth court to the public and the media. This stood in sharp contrast to the *in camera* proceedings held in the office of the judge or in some other private room that took place under the *Juvenile Delinquents Act.* Allowing members of the community and the media into the courtroom to scrutinize the court arguably increased accountability within the juvenile justice system (Milner, 1995). While the media could report on a youth's court appearance, no names of young offenders or juvenile witnesses could be disclosed (unless the person in question was a youth transferred to adult court or was at large and posed a significant threat to the community). Further, the judge was free to remove any person from the courtroom if the administration of justice demanded such action. The anonymity of young offenders was also provided for in sections 40 through 46 which placed restrictions on access to the criminal records of youth. Records were to be kept by the RCMP in a central repository and could be accessed only by a select group: the young offender himself, his lawyer or parent. Records had to be destroyed three years after the completion date for a summary disposition and after five years for an indictable offence. Protecting the anonymity of young offenders was thought to be essential to the rehabilitation and the subsequent reintegration of the youth into the community once his disposition has been served.

Dispositions available to judges under the *YOA* covered a much broader range than those allowed by the *JDA*. The maximum fine that a youth could receive was one thousand dollars, up from a maximum of twenty-five dollars. A youth could be ordered to pay restitution to the victim of his offence although it should be noted that this disposition was usually reserved for offenders charged with property offences. Custodial sentences could be imposed: up to two years in open or secure custody, except when an adult found guilty of the same offence would face a life sentence, in which case the youth could be given a penalty of up to three years. As of the 1995 revisions to the *YOA*, other exceptions were made for those guilty of first or second degree murder. A young offender could receive a sentence of up to ten years for first-degree murder (of which seven would be served in custody and three in the community). For second degree murder, a youth could be given a seven year sentence: four years must be served in custody and three in the community. A combination of the above dispositions could also be given by the court.

REFORMING THE *YOUNG OFFENDERS ACT*

The *Young Offenders Act*, when it came into force in 1984, was hailed as "one of the most significant pieces of social policy legislation enacted in Canada during this generation, perhaps this century" (Hylton, 1994, p. 229). However, it was unpopular with many Canadians who thought that it was not tough enough. These critics point to the so-

called epidemic of violent youth crime in the United States and Canada. In the spring of 1999, for example, a number of tragedies involving youth violence shocked North America: the Columbine School shooting in Colorado in which two young men opened fire on schoolmates and subsequently killed themselves, as well as 'copycat' school shootings in Taber, Alberta, and Atlanta, Georgia. Fear of crime was on the rise in Canada, fuelled by the media in an attempt to boost readership or viewers, and politicians have been under a significant amount of pressure to get tough on youth crime.

The *YOA* had been unpopular with children's advocates as well, who were concerned with the overuse of incarceration for dealing with troubled youths. Another problem with the *YOA* was the disparity in sentences given to young people across jurisdictions and within jurisdictions who were sentenced by different judges. This arose from a lack of any clear legislative guidelines for sentencing and the ambivalence inherent in the Declaration of Principles in the Act (Doob, Marinos & Varma, 1995). The disparity in dispositions given to young offenders was thus expected because it was set out that each judge had to give priority to one of the principles put forth in the JOA depending on various circumstances.

Amendments to the *Young Offenders Act* were made in 1986, 1992, and 1995. Changes made to the *YOA* in 1986 included a provision for a responsible person to provide pre-trial supervision to a young offender. The purpose of this amendment was to reduce the use of pre-trial custody for youths, which had become quite common after 1984. A second amendment was the inclusion of non-compliance with a disposition as being a criminal offence in its own right. Other substantive changes included the publication of the names of youths who were considered dangerous and were at large, and the extension of the three year maximum custody disposition for youths who committed an offence while serving a sentence for a previous conviction. The 1992 amendments included an increase of the maximum sentence for murder from three to five years, a provision to shorten the length of time spent in prison before parole eligibility for youth transferred to adult court and found guilty of murder. Further, a new standard was established for the transfer of a young offender to the ordinary court that made the protection of society paramount (Hylton, 1994). Bill C-37, proclaimed in force in December of 1995, provided for the transfer to adult court of 16 and 17yearold youths charged with personal injury offences resulting in serious harm or death. Other amendments made in the 1995 legislation included: an increase of the maximum sentences for first and second degree murder to seven and ten years, respectively; a provision which allowed the records of serious young offenders to be retained for a longer period of time; and an extension of the period of time a young offender given an adult sentence for murder had to serve in prison before becoming eligible for parole (Sapers & Leonard, 1996).

Despite the considerable amount of criticism it received, the *Young Offenders Act* was clearly an improvement over the *JDA* as it represented a balance of the due process rights of young people, the protection of society, and the special needs of young offenders (Sapers & Leonard, 1996). Unfortunately, this attempt to balance a number of societal goals without establishing a consistent set of policy objectives led to great disparity in the treatment of young offenders across Canada, and in some provinces, an over-use of

incarceration. While the *YOA*'s apparent ambivalence was an honest effort to solve the difficult social problem of youth crime, it was not working to reduce recidivism or to decrease the amount of youth crime in Canada. In 1996, the Standing Committee on Justice and Legal Affairs conducted a review of the juvenile justice system in Canada, and compiled a report, released in 1997, which included many recommendations for improvement (Department of Justice, 1998). The Liberal government of Canada subsequently developed its Youth Justice Strategy which recognized that "public protection must be the principle objective of youth justice renewal."

The Youth Justice Strategy focused on three areas: youth crime prevention, providing young people with meaningful consequences for their actions, and the rehabilitation and reintegration of young offenders (Department of Justice, 1999a). The government proposed that by focusing attention on and putting resources into these three areas, the protection of society would result. The logic was quite simple: providing meaningful consequences for criminal offences committed by youths would have both a specific deterrent effect (the young offender himself will be less likely to commit further crimes) and a general deterrent effect (other adolescents will be discouraged from committing offences). Rehabilitating and reintegrating young offenders into the community after their dispositions were served would reduce recidivism, and thus, would have a significant impact on youth crime. Finally, by working pro-actively to prevent youth crime by addressing the social-structural factors involved in criminal behaviour, the Youth Justice Strategy would further the primary goal of the *Youth Criminal Justice Act* - the protection of society.

THE *YOUTH CRIMINAL JUSTICE ACT*: IN PRINCIPLE AND PRACTICE

Bill C-68, the *Youth Criminal Justice Act* came into force on April 1, 2003. The Act deals with offenders who were aged twelve to seventeen at the time of the offence. This legislation is intended to reduce the disparity in the dispositions given by youth courts across Canada by providing clear principles and objectives with respect to sentencing. According to Nicholas Bala, a professor of Law at Queens University and author of *Youth Criminal Justice Law* (Irwin, 2003), "the *YCJA* is a lengthy and complex structure that structures judicial discretion for such issues as bail, sentencing and release from custody"(2005).

The *YCJA* "is based on an accountability framework that promotes consequences for crime that are proportionate to the seriousness of the offence" (Department of Justice, 1999b).. Young people who have committed lesser offences, such as property crimes, will be diverted from the formal justice process via alternative measures or community based sentences, while young offenders charged with serious offences will be dealt with more punitively and may receive adult sentences (Department of Justice, 1999b). The main message of the Act is that the use of custody is to be reduced (Bala, 2005). The YJCA promotes extra-judicial measures to deal effectively with the vast majority of less serious youth crime. According to Hilary Linton, "the legislation emphasizes that out-of-court measures are often the most appropriate way of meeting the Act's objectives, particularly the goal of reducing Canada's over reliance on incarceration of youths"

(2004). One major goal of the *Youth Criminal Justice Act* is to encourage rehabilitation of young person primarily through the use of non-custodial sentences (R. v. A. (E.S.), 2003 CarswellAlta 628 (Alta. Prov Ct.)).

The preamble of the *YCJA* is a new feature in juvenile justice legislation which contains the statement of values upon which the legislation is based. It is declared that, "Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility, and ensures accountability through meaningful consequences and effective rehabilitation and integration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young offenders.". The preamble also states that the community must share in the responsibility of meeting the needs of young people and providing guidance to them, and must aid in the prevention of youth crime by addressing its causes. It is also recognized that youths have special guarantees of their rights and freedoms, including those stated in the *Charter of Rights and Freedoms* and the *Canadian Bill of Rights.*

The Declaration of Principle, contained in section 3, is to be used in interpreting the entire Act. It is a significant departure from that contained in the *YOA*. The declaration of principal contains four main sections. The first statement of principle, contained in subsection 3(1)(a), lists a number of ways in which the youth criminal justice system helps to protect society: prevent crime by looking at the underlying or basic reason for the behavior, rehabilitate youth and integrate or bring them back into society, and ensure that youth receive meaningful consequences for breaking the law. The second statement of principle, in subsection 3(1)(b), states that the youth justice system must remain separate from the adult system and emphasize "fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity." The youth justice system must also provide a higher degree of procedural protections for young people and place a "greater emphasis on rehabilitation and reintegration." The third statement of principle, contained in subsection 3(1)(c), declares that measures used to deal with young offenders should reinforce respect for the values of society, encourage reparations to victims and the community, be meaningful to the young person, and "respect gender, ethnic, cultural, and linguistic differences" among young people. The final statement of principle, contained in subsection 3(1)(d), states that special considerations must be made by the youth justice system. First, youths have legal rights which allow them to participate in proceedings against them and any decisions that are made that affect them. Another consideration must be made for the victims of offences. Victims "should be treated with courtesy, compassion, and respect for their dignity...and should suffer the minimum degree of inconvenience" and should be allowed to participate in, and receive information about, criminal proceedings against their perpetrator. Additionally, parents of young offenders should be encouraged to lend support to their children "in addressing their offending behaviour." A unique aspect of the *Youth Criminal Justice Act* is the inclusion of principles and objectives, not only for the legislation as an entirety, but for various stages of the youth justice process.

One of the key goals of the *Youth Criminal Justice Act* is to increase the use of non-court responses to less serious youth crimes. This means that youth are diverted or kept form going through the formal youth justice process. The term given for this concept in the Youth Criminal Justice Act is "extrajudicial measures". Section 4 of the *YCJA* outlines the principles that apply to the use of extrajudicial measures.. Section 4 states that extrajudicial measures are "often the most appropriate and effective way to address youth crime." They are adequate measures for first-time non-violent offenders, and may be used to deal with youths with a prior conviction or those who have subject to extrajudicial measures in the past, if appropriate. Accordingly, there is "nothing in the Act precludes the use of extrajudicial measures for a young person who has previously been dealt with under this part of the Act or who has previously been found guilty of an offence" (*Canadian Encyclopedia Digest*, 2007). Section 5 outlines the objectives of extrajudicial measures: to provide a timely and effective response to youth crime, to promote the reparation of harm done to victims, to encourage the families of young offenders and the community and to allow victims to participate in the justice process.

In the Act, there are three ways to divert a case from the formal youth justice process. The first is police based diversion. The *YCJA* gives police the discretion, before a charge is laid, to take no further action, to give a warning or caution, or to make a referral. The second is a crown caution, where a youth is given a warning by a crown prosecutor after a charge has been laid. The third involves extrajudicial sanctions, which are similar to the alternative measures under the *YOA*. Extrajudicial sanctions are the most formal type of extrajudicial measure. An extrajudicial sanction is meant for more serious offences and offenders. An extrajudicial sanction will involve a probation officer and often will involve the use of youth justice committees or community conferences. Youth justice committees are groups of community members who volunteer to work with youth who have come into conflict with the law. Community conferencing involves the coming together of people who are interest in a youth, who are responsible for the youth, or who are affected the youths actions, to give advice to decision makers about the youth's case. It is believed that "the move towards the increase use of community-based responses is consistent with a growing interest in "restorative justice" in Canada (Bala, 2003, para. 5). Section 10 of the *YCJA* says that an extrajudicial sanction may be used when a warning, caution, or referral is not adequate because of the seriousness of the offence, the nature and number of previous offences and other aggravating circumstances. Young people are not allowed to participate in an extrajudicial sanction program if they deny having committed the offence, or if they opt to have the charge dealt with in court (subsection 10(3)). The young person must freely consent to participate in the program and must take responsibility for their offence.

If the youth goes through the formal youth justice process and is found guilty, the youth will receive a sentence. The purpose of sentencing under the *YCJA*, as stated in subsection 38(1), is clearly to hold young people accountable for their criminal acts. Sentencing, according to the *YCJA*, should strike a balance between the interests of both society and the young offender. The principles of sentencing are outlines in section 38(2). The *YCJA* provides that sentences should be proportionate to the seriousness of the offence and should promote the rehabilitation and subsequent reintegration of young

offenders into the community after their sentences are complete. Sentences handed down by the youth justice court should not be more severe than those given to adults found guilty of the same offence, and should be similar to those given to other youths for the same offence. Section 39 of the *YCJA* sets out the circumstances in which a custodial sentence may be imposed. This disposition is limited to violent offences, non-compliance with non-custodial sentences, indictable offences for which an adult would be imprisoned for more than two years and in other exceptional (but undefined) situations. With regard to violent offences, the Supreme Court of Canada has determined that violent offences do not include offences against property but are defined as offences in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm (*R. v. C.D.R.* and *R. v. C.D.K.* [2005] 3 S.C.R. 668) . Writing for the majority, Justice Bastarache, deferred heavily to Parliament's goal of restricting the use of custodial sentences for young offenders.

Youth sentences, in many respects, remain similar to those made available under the *YOA*. For example, the maximum length for a single first offence (not including murder) is two years. The maximum for multiple offences (not including murder) is three years. For first degree murder, the maximum sentence is ten years and seven years for second degree murder. The numerous sentencing options available to youth justice court judges are outlined in subsection 42(2) where it is clear that the *YCJA* provides a youth justice court judge with a choice of many types of sentences to hand down once a youth has been found guilty. Sentences include a reprimand, absolute discharge, conditional discharge, fine, compensation, restitution, pay purchaser, personal service community service, probation, intensive support and supervision, attendance order, custody and supervision order, deferred custody and supervision order and intensive rehabilitative custody and supervision order.

One new sentencing provision introduced in the *YCJA* gives judges a special sentencing option for violent, repeat young offenders. Section 42(2)(r) provides that a youth court judge, when deciding on a disposition for a youth, may "make an intensive rehabilitative custody and supervision order" that is for a specified period of time, not to exceed two years from the commencement of the youth's committal unless the offence for which the sentencing applies warrants a period of custody longer than two years (murder and sexual assault, for example). This provision allows judges to direct treatment and other programming for violent young offenders who would have, under the *YOA*, received little if any treatment. Youth court judges may be less willing to impose adult sentences for violent young offenders now that the intensive sentencing provision is in force.

The *YCJA* also introduces a new approach for the custody and supervision of young offenders given youth sentences. According to section 83, which details the purposes and principles of youth custody and supervision, the least restrictive measures (consistent with the protection of society) should be employed. Further, the right to due process of young persons should be respected, and an effective review procedure should exist. Since the *YCJA* was enacted, the Supreme Court of Canada has examined certain aspects of the Act in greater detail. They have paid close attention to Parliament's aim of reducing over-reliance on custodial sentences for young offenders in Canada. In R. v. B.W.P.

([2006] 1 SCR 941) a unanimous court held that general deterrence is not a factor to be considered in sentencing.

A new provision contained in the *YCJA* provides that judges must, when handing down a custodial sentence to a youth, reserve a proportion of the sentence (usually one-third of the sentence) to be served in the community. Another provision dealing with custody and supervision that will affect young offenders can be found in section 10(4) of the Act. This section provides that if there are grounds to believe that a young person is likely to commit a violent offence which could result in death or serious injury before the end of the sentence, the Provincial Director can have the youth brought before the youth justice court. The court may then decide to detain the youth in custody for the duration of his sentence.

One of the most significant changes contained in the *YCJA* is the elimination of transfer hearings. A new process for the application of adult sentences to youths is outlined in sections 61 through 81 of the Act. At the outset of proceedings against a youth, the Crown prosecutor may give notice that an adult sentence may be sought. According to section 61, the youth must be over fourteen and stand accused of a presumptive offence or an offence for which an adult could be subject to incarceration for more than two years. The trial would then take place in youth court, and if the accused were found guilty, an eligibility hearing would follow (unless the adult sentence application is unopposed by the young person). The test, under the old *YOA* process, requires the judge to balance the special needs of the youth and the protection of society. Under the new process, the youth court judge would consider the offender's age, character, maturity level, prior convictions, as well as the seriousness of the offence, and any other relevant factors. If the judge, taking all of these factors into account, decides that a youth sentence would not be appropriate to hold the youth accountable, the judge would then give the youth an adult sentence. Section 72(2) of the *YCJA* places the onus on the young person to satisfy the court that an adult sentence is not appropriate. The constitutionality of this reverse onus has been challenged in several provinces (*Quebec (Minister of Justice) v. Canada (Minister of Justice*) (2003, 10 C.R. (6^{th}) 281 (Que. C.A.); *R. v. T. (K.D.)* 2006 BCCA 60; *R. v. B.(D.)* [2006] W.D.F.L. 2053) with inconsistent results. Quebec and Ontario courts have held that the reverse onus is unconstitutional while in British Columbia the provision in question has not been held to violate the *Charter of Rights and Freedoms.* The Court of Appeal's decision in *R. v. B.(D.)* is on appeal to the Supreme Court of Canada and is tentatively scheduled for hearing in October of 2007.

Another set of changes introduced by the *YCJA* worthy of mention are the provisions relating to the publication of the names of young offenders. Under the *YOA*, the name of a young person found guilty of a presumptive offence cannot be published. Only when a young person is transferred to the ordinary court for trial, or when a youth is dangerous and at large, can his name be published. The *YCJA* defines a presumptive offence as either murder, attempted murder, manslaughter, aggravated sexual assault, or another serious violent offence for which an adult could face a sentence of two years or more committed by a young person who has been subject to at least two separate judicial determinations (this definition is an expansion of that contained in the old *YOA*). Under

the *YCJA*, the names of young offenders will be publishable in cases where the youth receives an adult sentence or when the offender is dangerous and at large and the judge decides to release the youth's name. If the young person is convicted of a presumptive offence but receives a youth sentence, the offender can apply to the court to prevent the publication of his or her name. Section 109 permits young offenders to publish their identities after they have turned eighteen years of age.

DISCUSSION

While the *YCJA* improves upon its legislative predecessors, it nonetheless invites some concerns, particularly with respect to the age at which a young offender can be transferred to the adult system and in regards to the provisions for the publication of names of young offenders. The new legislation allows for young people over the age of fourteen, not sixteen as under the *YOA*, to receive adult sentences. Furthermore, the names of young people who may be subject to adult sentences can be published. These provisions may work against the objectives of rehabilitation and reintegration put forth in the Declaration of Principles. Sending young people who are just entering their teen years, into the adult system and disclosing their identities to the public will make returning to the community as productive citizens extremely difficult. This brief discussion of the potential impact of the *YCJA* is by no means exhaustive. We are beginning to see and will continue to see in the coming years, precisely what effect the new law will have on the administration of youth justice in Canada. While the long term results of the Act remain to be determined, what has not been seen since the *YCJA* came into force is a significant increase in youth crime (Bala, 2006).

The *YCJA*, with its clear declaration of principles and its innovative approaches to youth justice, has the potential to deal with many of the problems that have plagued the youth system since the introduction of the *YOA*. One such problem was the over-use of custodial dispositions for youth. If commitment to its principles prevails, the *YCJA* will effectively reduce the number of young people in custody, particularly those found guilty of property offences and other lesser offences. At this point, it appears that the Supreme Court of Canada is taking those principles seriously in its interpretation of the *YCJA*. The use of extrajudicial measures will increase the efficiency of the justice system by putting additional resources into the formal processing of more serious offenders.

Another problem faced by the youth justice system under the *YOA* was the disparity in sentences given to youths within and across jurisdictions. Under the *YCJA* the disparity may lessen considerably as the new Act states in subsection 38(2)(b) that in regards to a sentence imposed by the youth justice court, "the sentence must be similar to the sentence imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances." Judges will no longer have a free hand to apply any sentence deemed 'appropriate' by the court. A potential barrier to the reduction in sentencing disparity is the flexibility the *YCJA* gives to the provinces "to choose the options...that best meet their needs and suit their systems" (Department of Justice, 1999a). If, for example, one province does not implement a program of extrajudicial

sanctions, the youths in that province will likely receive more formal processing and potentially more custodial dispositions than will youths in the other provinces that have implemented such programs. According to Nicholas Bala:

> However carefully-crafted the statue may be or however diligently it is applied by the judiciary, the success of the new law will, in significant measure, depend upon the willingness of both levels of government to provide sufficient funding and resources to support the regime. Without adequate community-based sentencing alternative that can both constrain and rehabilitate a youth, there is a real prospect that judges will be reluctant to substantially reduce the use of youth custody" (Roberts & Bala, 2003).

A third problem that the *YCJA* attempts to remedy is that, under the *YOA*, children in the justice process were given little treatment in custody and no real attempt at reintegration was made. The *YCJA* promotes rehabilitation and reintegration as two of its primary objectives, as the safety of the community requires that young offenders become productive members of society. Part of every custody sentence given to a youth must include a portion to be served in the community. This will presumably help young offenders make a smooth transition from being in custody to returning to the community.

The *YCJA* represents a Parliamentary commitment to take youth crime seriously by holding young people accountable and by providing them with meaningful consequences for their criminal behaviour. It is also, perhaps more importantly, a commitment to divert the vast majority of young offenders who are charged with non-violent, less serious offences, out of the formal criminal justice process. The *YCJA* has clear, consistent principles that are set out not only in the Declaration of Principles, but are reaffirmed throughout the Act. Because of its clarity and consistency, the *YCJA* provides encouragement to the public, children's advocates, and workers within the youth justice system who all have a stake in helping young people become productive, law abiding members of society.

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