

**MANDATES IN MOTION:  
EXPLORING JUDICIAL DECISIONS TO  
INCARCERATE YOUTH UNDER THE YCJA**

by

Maya Andrée Wittes  
Bachelor of Arts (Hons), Simon Fraser University, 2005

THIS IS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in the  
School of Criminology

© Maya Andrée Wittes 2011  
SIMON FRASER UNIVERSITY  
Summer 2011

All rights reserved.

However, in accordance with the *Copyright Act of Canada*, this work may be reproduced, without authorization, under the conditions for *Fair Dealing*. Therefore, limited reproduction of this work for the purposes of private study, research, criticism, review and news reporting is likely to be in accordance with the law, particularly if cited appropriately.

## APPROVAL

**Name:** Maya Andrée Wittes  
**Degree:** Master of Arts  
**Title of Thesis:** Mandates in Motion: Exploring Judicial Decisions to Incarcerate Youth Under the YCJA

**Examining Committee:**

**Chair:** Brian Burtch, Ph.D.  
Professor

---

**David MacAlister, LL.M.**  
Senior Supervisor  
Associate Professor

---

**J. Bryan Kinney, Ph.D.**  
Supervisor  
Assistant Professor

---

**Brock Martland, LL.B.**  
External Examiner  
Barrister & Solicitor  
Smart, Harris & Martland

**Date Defended/Approved:** 30 May 2011



SIMON FRASER UNIVERSITY  
LIBRARY

## Declaration of Partial Copyright Licence

The author, whose copyright is declared on the title page of this work, has granted to Simon Fraser University the right to lend this thesis, project or extended essay to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users.

The author has further granted permission to Simon Fraser University to keep or make a digital copy for use in its circulating collection (currently available to the public at the "Institutional Repository" link of the SFU Library website <[www.lib.sfu.ca](http://www.lib.sfu.ca)> at: <<http://ir.lib.sfu.ca/handle/1892/112>>) and, without changing the content, to translate the thesis/project or extended essays, if technically possible, to any medium or format for the purpose of preservation of the digital work.

The author has further agreed that permission for multiple copying of this work for scholarly purposes may be granted by either the author or the Dean of Graduate Studies.

It is understood that copying or publication of this work for financial gain shall not be allowed without the author's written permission.

Permission for public performance, or limited permission for private scholarly use, of any multimedia materials forming part of this work, may have been granted by the author. This information may be found on the separately catalogued multimedia material and in the signed Partial Copyright Licence.

While licensing SFU to permit the above uses, the author retains copyright in the thesis, project or extended essays, including the right to change the work for subsequent purposes, including editing and publishing the work in whole or in part, and licensing other parties, as the author may desire.

The original Partial Copyright Licence attesting to these terms, and signed by this author, may be found in the original bound copy of this work, retained in the Simon Fraser University Archive.

Simon Fraser University Library  
Burnaby, BC, Canada

## **ABSTRACT**

The *Youth Criminal Justice Act (YCJA)*, implemented April 1, 2003, was considered a remedy to the flawed *Young Offenders Act (YOA)*. Canada, once claiming the unenviable distinction as a world leader in youth incarceration rates, sought to reduce the rate of custodial sentences with the new legislation by implementing clear principles as well as the “four gateways” to custody, as articulated in s. 38 and s. 39 of the *Act*. The purpose of this thesis is to explore how judges have been applying the law when electing a custodial sentence for young offenders. A case-law analysis of 87 court cases is employed. The research reveals a lack of conformity among judges in making the decision to incarcerate youth. Among the issues considered are the various themes surrounding custodial sentences, the reasons for variability in sentencing, and the prospective amendments to the *YCJA* that are to come.

**Keywords:** custody; young offenders; Youth Criminal Justice Act; juvenile justice

To my angel rock, Kilo 3. You shined your light down and led me to the finish line.

And to my Grandpa, Herb Wittes, who taught me from a young age the importance of learning something new every day; you inspire me still.

## **ACKNOWLEDGEMENTS**

Firstly, to my supervisor, David MacAlister, for being a mentor not only academically, but at times personally too. It's been a long road and I thank you for your support and encouragement. Thanks to Bryan Kinney for his wit and wisdom. Thanks also to Brian Burtch and Brock Martland, whose involvement brought this experience full circle – from my final undergraduate year to my thesis committee. Thanks to the School of Criminology, home of my BA and now my MA, and many fond memories throughout.

To my dear friends, all of whom have been sources of strength and motivation throughout this journey; AS, ED, JO, LB, AN, SK, KB, EB, MD, KM, KS, AH. Thanks to the people I spend half my life with, my colleagues, whom won't have to hear me whingeing about the challenges of working while writing a thesis. A special thanks to Nadine too.

And finally to my parents, Paul & Nicole. Your love and support have carried me through these academic endeavours; I couldn't have done this without you. Merci, je vous aime.

## TABLE OF CONTENTS

Approval.....	ii
Abstract.....	iii
Dedication.....	iv
Acknowledgements.....	v
Table of Contents.....	vi
List of Tables and Figures.....	viii
<b>1: Introduction.....</b>	<b>1</b>
<b>2: Literature Review.....</b>	<b>4</b>
2.1 Youth Justice Models.....	4
2.2 Canada's History of Youth Justice Laws.....	8
2.2.1 <i>Juvenile Delinquents Act</i> (1908-1984).....	8
2.2.1.1 Rehabilitation, but no Rights.....	9
2.2.2 <i>Young Offenders Act</i> (1984-2003).....	10
2.2.2.1 Process without Principles.....	11
2.2.2.2 Overuse of Custody.....	13
2.2.2.3 Not Enough Emphasis on Rehabilitation.....	14
2.2.3 Youth Criminal Justice Act (2003-present).....	15
2.2.3.1 Proactive Principles.....	16
2.2.3.2 Cracking Down on Custodial Sentences.....	18
2.2.3.3 The Revival of Rehabilitation.....	19
2.2.4 Swinging the Pendulum towards Crime Control.....	21
2.3 Youth Justice as Politics: "Getting Tough" Is Getting Old.....	22
2.3.1 Bill C-4: The Latest "Get Tough" Regime.....	23
2.4 Youth Should Be Sentenced Differently from Adults: An Age-Old Belief.....	27
2.4.1 The Beginnings of "Best Interest of the Child".....	28
2.4.2 Losing the Line in the Sand.....	32
<b>3: Methodology.....</b>	<b>34</b>
3.1 Method.....	34
3.2 Sample.....	35
3.3 Analysis.....	39
3.4 Ethics.....	40
<b>4: Descriptive Analysis.....</b>	<b>41</b>
4.1 Offence Profile.....	42
4.2 Sentence Profile.....	43
4.3 Court Profile.....	44

<b>5: Case Law Analysis</b> .....	<b>46</b>
5.1 S. 39 (1) A,B,C, and D: The Four Gateways to Custody .....	46
5.1.1 39 (1)(a): A Violent Offence.....	47
5.1.2 39 (1)(b): Failure to Comply with Non-Custodial Sentences .....	48
5.1.3 39 (1)(c): Indictable Offence and History that Indicates Pattern of Guilt.....	49
5.1.4 S. 39 (1)(d): The “Exception” to the Rule.....	50
5.2 Policy and Principles .....	54
5.2.1 Proportionality .....	56
5.2.1.1 Proportionality with an Edge .....	58
5.2.2 Protection of the Public: In What Sense? .....	59
5.2.3 Meaningful Consequences: Deterrence in Disguise? .....	61
5.2.4 Accountability: A Loaded Principle .....	66
5.2.5 Rehabilitation: The Bottom Line .....	72
5.2.5.1 Custody: When Efforts to Promote Rehabilitation in the Community Fail.....	73
5.2.5.2 Custody: An Escape from Outside Influences .....	75
5.2.5.3 Custody Culture Going against the Grain of Rehabilitation .....	76
5.2.5.4 Custody: Rehabilitation versus Reintegration?.....	77
5.2.5.5 Does Rehabilitation Have the Final Word? .....	79
5.2.6 Keeping the Principle of Principles Straight.....	81
5.3 Deterrence: The Wild Card Re-Surfaces.....	83
5.3.1 Appellate Courts: Paving the Road after <i>B.W.P.</i> .....	84
5.3.2 British Columbia: Home of the Outliers.....	87
5.3.3 Adult Sentences: the Green Light for Deterrence and Denunciation.....	89
5.4 Aboriginal Youth Are Different .....	91
5.4.1 Justice for All?.....	97
5.5 Adult Sentences: The “Exception” to the Rule .....	99
5.5.1 A Question of Accountability .....	100
5.5.2 The Road to an Adult Sentence: Where the <i>Code</i> Meets the <i>Act</i> .....	101
5.5.3 Adult Sentences: Offence-Centric? .....	105
5.5.4 Swimming with the Sharks .....	106
5.5.5 The Cement is Not yet Quite Dry.....	108
5.5.6 Older Youth or Little Adults? It’s a Gray Area .....	109
 <b>6: Conclusion</b> .....	 <b>113</b>
6.1 Mandates in Motion .....	115
6.2 The <i>YCJA</i> : “Only for <i>Most</i> Young Persons <i>Most</i> of the Time” .....	117
 <b>Works Cited</b> .....	 <b>123</b>



## LIST OF TABLES AND FIGURES

Figure 1: Models of Youth Justice .....	5
Figure 2: Comparing Adult and Youth Sentencing Principles* .....	27
Figure 3: <i>QuickLaw</i> Screen Shot of Exact Search Terms.....	37
Table 1: Demographics.....	41
Figure 4: Reason for Custody: Primary Offence Type .....	43
Figure 5: Sentence Type.....	44
Figure 6: Court Profile.....	45
Figure 7: Sentencing Principles for Youth versus Adult Sentences .....	55

## 1: INTRODUCTION

Canada has gone through a series of changes in the last one hundred years in regard to its young offender legislation. Its first legislation was the *Juvenile Delinquents Act (JDA)*, implemented in 1908 was replaced in 1984 by the *Young Offenders Act (YOA)*. The *Young Offenders Act* reigned for two tumultuous decades before being replaced in 2003 by the current *Youth Criminal Justice Act (YCJA)*. A youth justice system that was guided by contradictory and unclear principles, accompanied by the unenviable distinction as a world leader in youth incarceration rates, forced the succession from the *YOA* to the *YCJA*. These legislative changes reflect overall societal changes in attitudes and beliefs about youth crime, as well as altered policy priorities reflected by movement on the justice-model continuum. While the *YCJA* has ostensibly achieved a more balanced equilibrium of sentencing principles and philosophies, it is still based on a mixed model of youth justice and therefore contradictions remain in the system. Furthermore, the current political climate is once again encouraging a crime-control-oriented shift in the structure of Canada's youth crime legislation.

It has become the public routine in Canada to criticize this country's youth crime legislation for being too soft on our young offenders, particularly for being too lenient in its sentencing. However, even while demands to "crack down" on young offenders have persisted, under the *YOA* Canada had reached the point of incarcerating youth at a higher rate than any other country in the world (Winterdyk, 2005). Although the United States has a youth homicide rate six times that of its northern neighbour, under the *YOA* the Canadian judicial system was incarcerating twice as many youth as the United States, and ten to fifteen times as many as most European countries, New Zealand and Australia (Bala & Anand, 2004; Bell, 2012; Campbell, 2005; Doob & Cesaroni, 2004). Although it was not the sole problem of the dysfunctional youth justice legislation, Canada's high youth incarceration rate was one of the *YOA*'s most severe symptoms.

In response to these criticisms and perceived failures, the *YOA* was replaced by the *YCJA* on April 1<sup>st</sup> 2003. One of its main mandates has been to reduce the use of custodial sentences, reserving such punishment primarily for what are considered serious, violent or repeat young offenders. Guided by “the four gateways”<sup>1</sup> to incarceration, judges must now adhere to at least one of the four criteria required in imposing a custodial sentence as listed in s. 39 of the Act. Furthermore, clear and succinct sentencing principles set out in the Preamble and s. 38 strive to reduce variation, interpretation, and discretion among judges by guiding their sentencing decisions. Thus, “s. 38 & s. 39 reflect the policy position taken by the government that the use of custody in youth courts under the *YOA* was excessive” (Bala & Roberts, 2009, p. 338).

While the *YCJA* has been considered a more systematic remedy for Canada’s young offender policy, it has been the subject of litigation in the Supreme Court of Canada. The majority of these cases have been related to the Act’s more controversial “get tough” provisions, which the Supreme Court has had to rein in considering one of the Act’s primary mandates is to reduce the rates of custody. Of particular importance was the decision in *R. v. B.W.P.*, in 2006, which determined the sentencing principle of deterrence was not intended to be included in the Act by Parliament. As such, this principle was banned from application to youth sentences. Corrado, Gronsdahl, MacAlister & Cohen (2006) argue that deterrence causes variability in sentencing as demonstrated with the *YOA*, thus its elimination from the Act serves as another effort by Parliament to make Canada’s youth justice system more standardized. As well, as stated by the Supreme Court in *B.W.P.*, “deterrence...will always serve to increase the penalty or make it harsher; its effect is never mitigating” (Para 36), which would contradict the mandate to reduce custody.

The primary aim of this thesis is to investigate how judges are using and interpreting the sentencing principles and four gateways to custody when choosing to sentence a youth to custody. In taking a legal approach, court cases for which a custodial sentence was issued provide the database for this research. Particularly, case law since the 2006 Supreme Court case of *B.W.P.* is considered.

---

<sup>1</sup> As cited in Bala, Carrington & Roberts, 2009 (p. 146). The term gateway is commonly used amongst justice system professionals and was adopted by the Supreme Court of Canada in *R. v. C.D.* (2005).

Secondly, this thesis explores how judges proceed without access to deterrence and denunciation – principles available under the adult sentencing process and previously available under the *YOA*– as well as whether judges are using some of the *YCJA* principles as catch words that may be used to disguise the indirect incorporation of deterrence through the use of terms such as “meaningful consequences”, “proportionality”, and “accountability”. If this proves to be the case, this lends support to Corrado, Gronsdahl, & MacAlister’s prediction (2007) that despite efforts to make the *YCJA* clear, mixed model justice systems are just too complex to allow for principled sentencing.

Chapter Two evaluates the literature examining the principles, philosophies, impacts and failures of Canada’s evolving young offender legislation. This literature review considers the guiding punishment principles of Canadian youth criminal legislation from the advent of the *JDA* in 1908 to the introduction of the *YCJA* in 2003, as well as the theoretical models that underlie them. This chapter will also discuss the inception of the “best interest of the child” concept, addressing why it is still important today to maintain a separate youth justice system, despite the current conservative push to minimize the differences that separate it from the adult justice system.

Chapter Three discusses the methods adopted for the present study, reviewing the sample, research instruments, data analysis, ethical considerations and limitations of this study. Chapter Four presents a brief descriptive analysis to “paint the picture” of the sample, and Chapter Five will harness qualitative analysis to unearth themes, patterns and interpretations in how judges are applying the law. Chapter Six will discuss these results in relation to the literature reviewed in Chapter Two, along with outlining the future prospects for the *YCJA*.

## **2: LITERATURE REVIEW**

### **2.1 Youth Justice Models**

Corrado (1992) presents five models of youth justice that are theoretical in nature; they are comprised of principles derived from an array of criminological theories that focus on the root causes of and societal reaction to youth crime. These models provide a framework for analyzing complex youth legislation as well as facilitate comparisons between governmental youth justice policies (Corrado 1992). This is important in developing and modifying youth justice laws. The five models may be viewed on a continuum. The progression from left to right could be classified as going from a social welfare to a conservative paradigm of perceptions of young offenders and youth justice; where on the far left is the Welfare model, and on the far right the Crime Control model. The Welfare model stresses the needs of the offender, whereas the Crime Control model stresses the need to protect society.

No youth justice system will fit into a single model; in practice, there is some overlap with the five sentencing models (Corrado 1992). They are: the Welfare model; the Corporatist model; the Modified Justice Model; the Justice Model; and the Crime Control Model. Figure 1 provides a synopsis of these models on a continuum.

**Figure 1: Models of Youth Justice**



Note. Adapted from Corrado, 1992, p. 4.

The Welfare model follows a positivist philosophy, which regards child and adolescent behaviour as explained by external socio-demographic factors (Corrado et al., 2007). More specifically, it recognizes that a youth’s family, peers, culture, education, health, and socioeconomic status are causal factors in a youth’s behaviour. Furthermore, children were regarded as being *doli incapax*, where their lack of maturity left them incapable of “understanding the nature and consequences of the criminal act for which they were charged” (John Howard Society of Alberta, 2007, p. 4). This reflects an ideology that is in direct opposition to the classical school’s view that behaviour is the product of rational choice and free will. Therefore, from the Welfare model’s perspective, youth are not to be held accountable for their acts. Furthermore, youth are not considered to commit criminal acts *per se*, but rather are considered to be in a “state of delinquency” (Corrado, 1992). As a result, a youth justice system based on this model is primarily concerned with treatment and rehabilitation of the young offender. Broad discretion and informal proceedings which personalizes each sentence to

accommodate the youth's rehabilitative needs characterizes a Welfare-based justice system (Corrado et al., 2007).

The Corporatist model follows the Welfare model on the theoretical continuum. As such, the focus remains on the interests of the youth. The Corporatist model focuses on diverting youth from the formalized criminal justice court system (Pratt, 1989). It advocates an administrative system to cater to youth, whereby community-based programs and agencies are the handlers of young offenders. Thus, Restorative Justice theory is at the core of the Corporatist model; the purpose of intervention is to "retrain" the youth through reconciliation, restitution, and reparation of harm (Corrado, 1992). However it is important to note the Corporatist model recognizes a bifurcation or division in its approach to youth justice approach, where there is a separation between "serious/violent/dangerous/hard-core criminals" who cannot be adequately reformed through community sanctions and so custody would be considered most appropriate, versus "the rest/non-violent/minor offenders" for whom non-custodial sanctions are deemed most appropriate (Pratt, 1989, p. 244).

The Modified Justice model lies in the middle of the continuum. It was created as a compromise of the conflicting traditional models (Corrado, 1992). This model is essentially a blend of the four other models and is accordingly rather complex. The Modified Justice model results in the implementation of diverse and often contradictory policies (Campbell, 2005). For instance, this model focuses "on offender characteristics and rehabilitation yet reinforcing procedural fairness, due process and accountability by imposing sentences that are proportionate to the seriousness of the offence" (Corrado et al., 2007, p. 25). As such, less serious offenders are to be diverted from the formal justice process, whereas serious and violent offenders are to be treated punitively. Also, dual roles for personnel are required to fulfill the constellation of principles and processes; criminal justice officials need to ensure that individual rights are protected, and child care/social workers need to ensure that individual needs are met (Campbell, 2005). Thus the Modified Justice model is a multi-dimensional conglomeration of the

four traditional models of youth justice. This model best describes both the *YOA* and *YCJA*.

The Justice model sits to the left of the Crime Control model. It is based on the neo-classical theory of youth crime which postulates that youth wilfully engage in criminal behaviour and they are to be held accountable for their actions; however, punishments should be proportionate to the crimes committed (Corrado et al., 2007). Due process is a key tenet of this approach. The Justice model does not so much focus on protection of the public as it focuses on the justice process itself. Furthermore, the Justice model views indeterminate rehabilitative treatment initiatives (which are central to the Welfare model) as intrusive and in violation of a young person's rights (Corrado et al., 2007). A youth justice system based solely on the Justice model would reflect the adult criminal justice system in that criminal offences, procedural rights, and determinate sentencing proportionate to the severity of the offence are the norm (Corrado, 1992). However, because of the neoclassical philosophy which defines this model, youth are recognized as being less accountable than adults for their actions due to their limited development and maturity.

Finally, the Crime Control model falls on the far right side of the continuum, and emphasizes protection of the public. The focus is on the actual offence as opposed to the offender (Corrado et al., 2007). As a result, the Crime Control model advocates incarceration with objectives of both punitiveness and societal protection (Corrado, 1992). Deterrence, accountability, and retribution are at the core of this model. Youth are considered to be responsible for their actions and as such should be held accountable. Another distinguishing factor the Crime Control model holds, compared to the Welfare and Corporatist models, is that due process is a key principle (Corrado, 1992). Youth are accorded with legal rights in a criminal law context; they are to be put through an adversarial system, they are also to have the legal rights affiliated with adult criminal procedure. As such, lawyers and criminal justice officials are the primary personnel who deal with young offenders. This model is best illustrated when politicians use the "get tough on crime" approach for criminal justice platforms (Corrado et al.,



2007). Furthermore, the Crime Control model is exemplified in the United States where some states have lowered the youth court age jurisdiction to 16 years old and have employed automatic transfers to adult court for serious and violent young offenders (Corrado et al., 2007).

There has historically been significant overlap in terms of the way the models played out in Canada's youth justice legislation, and this has proven to be problematic at times. The *YCJA* is similar to the *YOA* in that it may be classified as a Modified Justice Model, but instead of having all principles meet "in the middle", some principles are more Welfare oriented (paramountcy of the needs and best interest of the child) while others are more Crime Control oriented (adult sentencing, the handling of Serious Violent offenders). However, while the structure (or lack thereof) of the *YOA* led to a chaotic conglomerate of justice principles, the *YCJA* has attempted to achieve a delicate balance of them all.

## **2.2 Canada's History of Youth Justice Laws**

### **2.2.1 *Juvenile Delinquents Act (1908-1984)***

*"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..."* (Preamble of the *JDA*, as quoted in John Howard Society of Alberta, 2007, p. 5)

Canada's enactment of the *JDA* (1908) marked the development of a youth justice system separate from adults, designed for delinquent children and youth from age 7 to adulthood; however, a provision of the Act allowed each province to define a youth by setting their own maximum age which led to discrepancies in youth sentencing; the maximum age ranged from 16 to 18 (Olivo, Goldstein & Cotter, 2001). Adhering to the Welfare model, the *JDA* focused on the rehabilitation and treatment of the offender, not on the offence itself. As Anand (2003, p. 946) states, "rehabilitation

was the engine that drove sentencing decisions.” This Act also reflected the positivist philosophy that delinquent and criminal behaviour amongst children and youth was environmentally determined, that juveniles were not mature enough to possess *mens rea*, and thus could not be held criminally accountable or responsible for their acts (Corrado, 1992).

The *JDA* involved application of the welfare model principle of *parens patriae*, whereby “the court’s role was similar to that of the parent, intervening in the place of parents who were not able to effectively guide the child into adulthood” (Olivo et al., 2001, p. 117). Judges, under such conditions, were given the power to act as guardians according to the principle of the “best interests of the child.” Section 38 of the *JDA* encapsulates the Welfare model’s approach:

“the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and...as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misguided and misdirected child and one needing aid, encouragement, help, and assistance” (as quoted in Corrado et al., 2007, p. 19).

#### **2.2.1.1 Rehabilitation, but No Rights**

Under the *JDA*, police and probation officers were granted extraordinary powers to investigate, apprehend, and monitor youth; “the juvenile court’s ‘rehabilitative ideal’ envisioned a specialized judge trained in social science and child development whose empathic qualities and insight would enable her to make individualized therapeutic dispositions in the ‘best interest’ of the child” (Feld, 1997, p. 3). Judges had the authority to remove delinquents from their homes, and place them in detention centres and training or industrial schools for indeterminate periods. A wide range of behaviour was considered deviant; from status offences such as sexual promiscuity, incorrigibility or swearing to more serious administrative, property, and violent offences. Delinquents had few procedural rights under the *JDA* and were often jailed for indeterminate periods of time (Corrado, 1992; Bala, 1997). In fact, youth were sentenced to longer

periods of detention than adults for similar offences, the rationale being that young offenders required the benefits of a longer period in a rehabilitative environment (Campbell, 2005). Furthermore, status offences were not applicable to adults; these offences were “for youth only”. Often, however, these youth were disproportionately from ethnic or racial minorities and marginalized backgrounds, such as Aboriginal youth. As well, improper treatment within these rehabilitative facilities was often inflicted upon youth (Campbell, 2005). Despite its rehabilitative framework, the *JDA*’s *parens patriae* philosophy, as well as its principles of indeterminate sentencing, seem to hint at Crime Control model aspects as well, since the youth were literally being removed from the community. However, there can be little doubt that a welfare orientation predominated under this legislative scheme. Regardless, the rehabilitative framework was not working.

Criticisms of the *JDA* arose in the 1960s as the civil rights movement gained momentum in the United States. Critics argued the *JDA* was invasive and discriminatory. Furthermore, it was argued that while children were not to be considered like adults in a criminal sense, they needed to have the same basic due process rights as adults (Corrado, 1983). Several attempts to replace the legislation occurred in the 1970s but proponents of the Welfare-oriented *JDA* were able to defeat them (Corrado, 1992). However, by the early 1980s the federal government succeeded in passing a new law: the *Young Offenders Act*.

### **2.2.2 *Young Offenders Act* (1984-2003)**

*“Young persons are said not to be as accountable for their acts as are adults, but even so they must ‘bear responsibility for their contraventions.’ Society must be afforded protection from illegal behaviour, although it does have a responsibility to take measures to prevent criminal conduct by youth. The need for supervision, discipline and control of young offenders is recognized, as is the fact that they have ‘special needs’ and require guidance and assistance. The taking of measures other than judicial proceedings should be considered where not ‘inconsistent with the protection of society.’ The legal and constitutional rights of youth are recognized.”* (Rosen, 2000, p. 3, referring to the *YOA*’s Declaration of Principles).

In the wake of the U.S. civil rights movement, and the 1982 adoption of the *Canadian Charter of Rights and Freedoms*, the *YOA* emerged. After two decades of developing legislative reforms, the *YOA* finally replaced the *JDA* on April 1, 1984. The shift in youth justice policy was fundamental; the *YOA* shifted towards the Justice model, thus moving towards the other end of the continuum. Youth were accorded all of the legal rights contained in the *Charter* and “where the *JDA* emphasized *social intervention*, the *YOA* emphasized *rights and responsibilities*” (Winterdyk, 2005, p. 91, italics in original), but in a manner that was suitable to their age and level of maturity. The new *Act* established an age restriction of 12- to 17-years-old while providing sentences of fixed length. The three main objectives of the legislation were to protect society, deter youth, and hold youth accountable (Bala, 1997). The last of these principles was the most dominant. Throughout the *YOA*’s numerous amendments, all revisions steadily shifted the law further from Welfare principles and closer to a Crime Control model of justice (Bell, 2012; Campbell, 2005). This shift could be partially accredited to the fact that since youth were being allotted rights just as adults, there should also be a shift in the processing and penal tactics that parallel those for adults.

Fuelled by sensationalized media stories about youth violence, public pressure to “get tough” drove modifications to the *YOA* in 1986, 1992, and 1995. Custodial sentences lengthened accordingly with prison terms extending from a maximum of three years to a maximum of five years and finally to ten years. In spite of its amendments, criticisms of the *YOA* emerged concerning confusing principles, inappropriate custodial sentences and inadequate rehabilitation options (Corrado, 1992).

#### **2.2.2.1 Process without Principles**

Several efforts to amend and modify the *YOA* met with continuous struggle given that its very foundation, the Declaration of Principles, had proven to be contradictory, conflicting, and ambiguous (Corrado, 1992; Bala, 1997). (It was precisely this quandary that eventually motivated the creation of new youth legislation in 2003.)

The YOA's troubled principles reflected a melding of disparate models, what Corrado (1992) coined the Modified Justice model. The YOA's increasingly strong emphasis on deterrence often contradicted the standards of proportionality; due process principles guaranteeing procedural rights and Welfare principles stressing rehabilitation conflicted with the Crime-Control and the Justice model principles. Youth became accountable for their criminal behaviour in the form of custodial sentences and transfers to adult court from as young as 16 years old. This combination of contrasting principles soon proved problematic.

Unclear sentencing principles forced judges to exercise substantial discretionary power in their decisions. As a result, there were significant variations in sentencing among the provinces, even among individual judges sharing the same jurisdiction (Winterdyk, 2005). For instance, Campbell (2005) notes that between 1999 and 2000 close to 40 percent of the cases in Ontario resulted in custodial sentences compared to only 27 percent of the cases in Quebec. Between 1998 and 1999, 41 percent of cases in Saskatchewan resulted in custodial sentences, compared to only 18 percent in Alberta (Campbell, 2005). Under the YOA, for some offences, a youth's punitive fate was largely dependent on the province in which charges were laid.

Amendments were made in 1995 in an effort to reduce the use of custody. In Section 24(1.1) of the sentencing principles of the YOA, the amendments read: "custody shall only be imposed when all available alternatives to custody *that are reasonable in the circumstances* have been considered" and when dealing with cases that are not serious or violent, non-custodial sentences should be imposed "*whenever appropriate*" (Bala, 2003, p. 403, italics added). As Campbell (2005) acknowledges, such continually ambiguous wording provided insufficient guidance and direction to sentencing judges despite repeated efforts to clarify the YOA's sentencing principles. From its inception, and throughout and its amendments, the YOA remained ambiguous; "these later amendments had little impact on the provision of...dispositions, and were considered by many in the field to be without substance" (Campbell, 2005, p. 44).

#### 2.2.2.2 Overuse of Custody

A major problem with the *YOA* that occurred almost immediately after its implementation was the overuse of custody. For example, within three years of replacing the *JDA*, custody sentences under the *YOA* went up 85 percent in British Columbia, and rose 148 percent in Manitoba (Bell, 2012). Despite its vague sentencing principles, at least on paper, the *YOA* reserved custody for only serious and violent offenders. However, Canada relied excessively on court- and custody-based responses to non-violent youth: 77% of youth in custody were for sentences of only 3 months or less, and a third of custodial sentences were for less than 30 days (Bell, 2012). Shockingly, despite commitments in the *YOA*'s principles, more than three quarters of youth receiving custodial sentences under the *Act* had not committed violent offences (Campbell, 2005). Furthermore, according to a study done by the John Howard Society of Alberta (1999), youth were sentenced to custody for minor offences at a higher rate than adults. Youth were twice as likely as adults to be given intermediate-length sentences of between one and six months and appeared more likely than adults to receive custodial sentences overall.

An important sentencing principle under the *YOA* was deterrence (Bala, 1997) which reflected its more Crime Control orientation. Judges applying this principle were using a "short, sharp, shock" style of sentencing. As a result, "Canadian youth court judges appeared to be working on the assumption that a little bit of custody is good for many offenders" (Campbell, 2005, p. 229). However, the frequent imposition of custodial sentences did not increase deterrence rates (Bala, 2003), and in fact, it has been noted, "contact with the system often *increases* the likelihood of subsequent offending" (Doob & Cesaroni, 2004, p. 44, italics in original). Indeed, some youth were being sentenced to custody three times or more in a single year (Bell, 2012).

Contrary to s. 24(1.1) of the *YOA*, which stated, "custody shall not be used as a substitute for appropriate child protection, health, and other social measures," custody was increasingly used for child welfare purposes. According to Doob and Cesaroni

(2004), 37 percent of judges indicated that child welfare issues were a relevant factor in half or more of the cases that were sent to custody, partly contributing to the high rate of custodial sentences. Incarcerating youth for non-criminal behaviours or for perceived treatment needs was deemed by parliament to be “fundamentally unfair” and was analogous to the unconstitutional acts of the *JDA* (Barnhorst, 2004, p. 24). This fundamental discord further demonstrated the *YOA*’s conflicting principles.

Even when taking into consideration the blatant overuse of custody under the *YOA*, it is still shocking to consider that at one point, Canada was incarcerating youth at a higher rate than any other country in the world (Winterdyk, 2005). In the United States the youth homicide rate was six times that of Canada, yet under the *YOA* Canada was incarcerating twice as many youth as the U.S., and ten to fifteen times as many as most European countries, New Zealand and Australia (Bala & Anand, 2004; Bell, 2012; Campbell, 2005; Doob & Cesaroni, 2004). As Judge Heino Lilles stated in *R. v. J.K.E.* (1999), the high rate of youth incarceration in Canada had become a “national disgrace”.

### **2.2.2.3 Not Enough Emphasis on Rehabilitation**

The overuse of custody prior to the adoption of the *YCJA* was attributable to the lack of emphasis on rehabilitative Welfare model principles in sentencing, and the inadequate provision of treatment resources. In effect, the *YOA* created a divorce between the justice system and the child/social welfare system which were intertwined under the *JDA* (Bala, 1997). Because funding for community-based programs was a provincial responsibility, too frequently such programs may have been deemed of low political priority, and were accordingly subjected to provincial budget cuts. Youth were often inappropriately processed in the criminal justice system because of a lack of resources in the child welfare system.

Although the *YOA* included rehabilitation objectives in its Declaration of Principles, the progressively Crime-Control orientation left very little room for rehabilitative responses to youth crime. Furthermore, limited sentencing options forced judges to rely heavily on custodial dispositions; while the *YOA* permitted the use of the

limited alternative measures it offered, the *YOA* provided little guidance regarding their use and limited options were available in this regard. Influenced by the Crime Control “get tough” approach, judges could always rely on custody. Alternative measures were applied conservatively. However, in *R. v M. (J.J.)*(1993) the Supreme Court of Canada held that the ultimate aim of all youth sentences must be the reform and rehabilitation of the young people being sentenced; the high court interpreted the *YOA* as too often authorizing disproportionate ineffectual sentencing principles (Bell, 2012).

Under the *YOA*, effective reintegration upon release from custody was not ensured: if a custodial sentence was for 3 years, the youth spent the 3 full years in incarceration (Bala & Anand, 2009; Campbell, 2005). There were few programs to assist youth with reintegration and readjustment into the community, “thus, many young offenders [were] essentially ‘warehoused’ in custodial institutions and subjected to inadequate treatment resources there and in the community” (Corrado, 1992, p. 18). Upon release from custody, youth were returned “cold” back into their communities, and any progress made in custody quickly evaporated. In order to ensure lasting change, a continuation of support services is required after youth are released from prison. Under the *YOA*, there was no support system to help retain any progress made while in custody (Doob & Cesaroni, 2004).

### **2.2.3 Youth Criminal Justice Act (2003-present)**

*“...Canadian Society should have a youth criminal justice system that...reserves its most serious intervention for the most serious crimes and that reduces the over-reliance on incarceration for non-violent young persons”*  
-Preamble to the *Youth Criminal Justice Act*

By the late 1990s, there was a perception that it would be easier to create entirely new legislation than to keep making modifications to the *YOA*. The *Youth Criminal Justice Act* came into effect on April 1, 2003 as a remedy to the perceived flaws of the *YOA*. While the *YCJA* is also based on competing principles and objectives, the *YCJA* “could be viewed as more focused and directive than the *YOA*....The framers of the



*YCJA* constructed a law based mainly on justice model principles with certain sections systematically incorporating principles from the remaining four youth justice models” (Corrado et al., 2007, p. 16). In other words, the *YCJA* systematically incorporates principles from all the youth justice models in order to amplify the benefits of each while also seeking to avoid the conglomerative effects of the *YOA*.

### **2.2.3.1 Proactive Principles**

One major intention of the new legislation was to clarify sentencing principles for judges to reduce inconsistent and ambiguous sentencing practices. Unlike the *YOA*, the *YCJA* provides a Preamble in order to set the tone for the *Act*’s general purpose and effect, and this facilitates judicial interpretation of specific provisions (Bala, 2003). Moreover, the Declaration of Principles of the *YCJA* is more consistent, clear, and mutually supportive compared to the *YOA*, and as such, judges are provided with more guidance on how sentencing should take place. Unlike the *JDA* and the *YOA*, the *YCJA* states in considerable detail the purposes and objectives of the juvenile justice system. The reformed Declaration of Principles reveals that the *YCJA*’s sentencing objectives are interrelated; the *YCJA* seeks to protect society by “holding a youth accountable...through the imposition of just sanctions that have meaningful consequences and that promote his or her rehabilitation and reintegration into society” (s. 38(1)). This objective necessitates a compatible relationship between Welfare and Crime-Control model principles. Effectively, the new legislation is trifurcated; reserving custodial sentences for serious, violent and repeat offenders, deflecting less serious offenders from custody into alternative community-based sentences and programs, and diverting first time and minor offenders from the justice system altogether, (Corrado, Gronsdahl, MacAlister & Cohen, 2010). This reflects Parliament’s recognition that “most young offenders are one-time offenders only and, the less harm brought upon them from their experience with the criminal justice system, the less likely they are to commit further criminal acts” (*R. v. R.C.*, 2005, Para 43).

Under the *YOA*, the Crime-Control principle of protecting the public was interpreted by judges as partly being accomplished by deterrence and incapacitation. Under the *YCJA*, however, “protection of the public” is to be accomplished by promoting prevention strategies such as rehabilitation, reintegration and meaningful consequences in order to promote the *long-term* protection of the public. As Campbell (2005, p. 233) illustrates, “if ‘protection of the public’ is presumed to be a consequence rather than a goal in itself, the judges should be focusing on the actual principles of sentencing rather than trying to be a crime-fighter.” Thus, what appears to be a Crime-Control initiative is in fact being accomplished by a Welfare approach.

In *R. v. B.W.P.*, the Supreme Court of Canada was unanimous in resolving the adult sentencing principle of deterrence has no bearing on youth sentenced under the *YCJA*; a key aspect of the Crime-Control model has been disassembled from the *Act*. In rejecting the inclusion of deterrence in the *Act*, “Parliament aligned itself with the large body of research that shows that increasing the severity of...sentences has no effect on the commission of further crime by the individual offender or other offenders” (Barnhorst, 2004, p. 243). Furthermore, s. 38(2)(a) states, “youth should not receive greater punishment than an adult convicted of the same offence in similar circumstances.” In this way, the *YCJA* maintains that the sentencing of youths ought to be governed by very different principles than those guiding the sentencing of adults.

Proportionality is a central feature of the *YCJA*’s sentencing principles. In response to the *YOA*’s inappropriate sentencing practices, the principle of just sanctions demands that sentences under the *YCJA* “be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence” (s. 38(2)(c)). The seriousness of the offence determines the degree of intervention. Adamant about controlling sentence severity, s. 38(2)(e)(i) of the *YCJA* requires the imposition of “least restrictive sentence that is capable of achieving the purpose [of that sentence].” This basic principle of fairness is encompassed in the Justice model. While proportionality is an important principle, it plays a lesser role with young people than it

does with adults, although that difference diminishes as the youth approaches adulthood (Roberts, 2004).

### **2.2.3.2 Cracking Down on Custodial Sentences**

Custody is an expensive and often ineffective response to youth crime, while appropriate community-based responses often offer a better prospect for rehabilitation (Bala & Roberts, 2009; Campbell, 2005). More specifically, custody has been found to be a breeding ground for forging antisocial peer associations and influences, and as a result, propagating antisocial acts; “custodial placement can often be a more punitive sentence for juveniles than for adults because they are less able to cope with penal sequestration, and they may be more susceptible to the negative effects of inmate subculture” (Bala et al., 2009, p. 134). As well, “stigmatization or premature labelling of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system” (Bala, 2007, p. 3). As such, the repercussions of incarcerating “minor” offenders are evident, and the *YCJA*’s diversionary commitments acknowledge this reality. The *YCJA* provides a stronger emphasis on the use of measures outside of the formal court system as well as stringent rules for the use of custody, than did the predecessor legislation.

In order to remedy the *YOA*’s overuse of custodial sentences, Section 39(1) of the new legislation provides clear restrictions on the imposition of custody; “the Act encourages judges to impose non-custodial sentences. This may be seen as its most dominating feature and primary purpose” (*R. v. D.L.C.* in Bala & Anand, 2004, p. 257). Often referred to as “the four gateways to custody”, a youth justice court will not commit a young person to custody unless the young person has committed a violent offence; has failed to comply with non-custodial sentences; 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; and in exceptional cases where the young person has committed an indictable offence, and 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 s. 38.

By restricting the conditions for which custodial sentences can be imposed, these new guidelines provide much clearer judicial direction than custodial provisions under the *YOA*, thereby minimizing the broad discretion and ambiguity among judges. Judges are to use custodial sentencing as a last resort and only when it is determined that all other options are inappropriate, reserving such punishment primarily for serious, violent and repeat offenders. Section 39(5) states that a youth justice court shall no longer “use custody as a substitute for appropriate child protection, mental health, or other social measures.” Furthermore, judges are now specifically required by s. 39(9) to “state the reasons why [the court] has determined that a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1) [the Declaration of Principles].” Finally, in a provision specifically addressing Aboriginal youth, s. 38(2)(d) dictates that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to Aboriginal young persons.”

Indeed, since the enactment of the *YCJA*, custody rates have plummeted; the first year of the *YCJA* (2003-2004) showed a drop in custody rates of 35 percent, continuing on to a further 36 percent for the next three years, (Bala & Anand, 2009). This steady decline has proven consistent; the latest numbers from Statistics Canada reveal an even further decline of 3 percent from 2006-2007 to 2008-2009, (Thomas, 2010).

### **2.2.3.3 The Revival of Rehabilitation**

The priority of rehabilitation and reintegration while providing meaningful consequences is revealed in the many community-based sentencing options created under the *YCJA*. Section 42(2) of the *YCJA* lists as many as thirteen new sentencing options that were not provided under the *YOA*.

Compared to the *YOA*, judges are provided with many more sentencing options under the *YCJA*. Furthermore, extrajudicial measures and extrajudicial sanctions have become highly encouraged diversionary tactics and reflect the Corporatist principles within the new *Act*; many of these new options are rehabilitation- and reintegration-oriented, encouraging community-based responses to youth crime which have proven to offer a better prospect for rehabilitation (Campbell, 2005). Custodial sentences are now called Custody and Supervision Orders (CSO), meaning there is a community supervision portion of the sentence. Known as the “two-thirds/one-third rule,” two-thirds of the custodial sentence is spent in custody, and one-third is spent in the community under the supervision of a youth worker. This is designed to facilitate the rehabilitation and reintegration of young offenders. A youth worker is set up with the youth before release in order to devise a “reintegration plan” (s. 90). Rehabilitative initiatives aim to remedy the developmental and root causes of criminal behaviour so that youth are no longer left to “hang out to dry” after coming into contact with the justice system. This is especially apparent with the new Intensive Rehabilitative Custody and Supervision (IRCS) sentence – a treatment-intensive custody sentencing option designed for the most serious, and often the most troubled, young offenders (s. 42 (2)(r)).

The *YCJA* has effectively revived a central objective in the *JDA*, the principle of rehabilitation, a principle that was lost under the Crime-Control oriented *YOA* (Campbell, 2005). With new sentencing options such as the CSO and IRCS, custodial sentences now have an element that is Welfare- and restorative-oriented which is still compatible with the Crime-Control principle of “protection of the public.” The difference between the *YOA* and the *YCJA* is that protection and crime prevention are now recognized as *long-term* objectives. The *YOA*’s short-term strategy of the overuse of custody for the protection of society proved unsuccessful. Contrastingly, the authors of the *YCJA* have recognized that “protection of the public” is accomplished by, and interrelated with, sentencing objectives to rehabilitate youth, ensure meaningful consequences, and thereby prevent recidivism.

Although judges are now equipped with many more sentencing options, they are still limited by the resources of the community and can only impose alternative or community-based sentences if they are available. While the *YCJA* is part of a federal strategy that includes some additional support for provincial spending on youth justice, “these new sentences may only be imposed where the provincial government decides to provide services” (Bala et al., 2009, p. 149). For instance, in 2006-2007, the Intensive Support and Supervision Program (ISSP) sentence was applied 347 times across Canada, yet BC accounted for 301 of those cases, (Bala et al., 2009). Hartnagel (2004) contends the creation of community sanctions are pointless if they cannot be funded and operated. Indeed, a lack of integration between provincial ministries/programs, as well as discrepancies in the availability of provincial funds to invest in these programs raises the question as to how the *YCJA* is supposed to be administered equally. Furthermore, while minimizing variability among judges was a key remedy of the *YOA*, this cannot be achieved if the sentencing options for which judges may select differ jurisdictionally.

#### **2.2.4 Swinging the Pendulum towards Crime Control**

Despite its Welfare-orientated commitment towards rehabilitation and reintegration, the *YCJA* has reduced the minimum age for adult sentences from 16 to 14 years old, reinforcing a key principle of the Crime Control model. This change resulted in the removal of the option to transfer youth to adult court, and, instead, gives youth court judges the power to administer adult sentences, thereby facilitating the adult sentencing process. Ironically, with media reports still sensationalizing youth crime and violence, these “get tough” aspects of the new *Act* had initially proven to be the most controversial. Already, the process for the imposition of an adult sentence has been altered as a result of the effect of the Supreme Court of Canada deeming portions of the *YCJA* unconstitutional in regard to the reversal of the onus regarding the suitability of a youth sentence for presumptive offences (*R. v. D.B. (2008)*). As well, refining the interpretation of the *Act* has been done by the Supreme Court in efforts to minimize the use of discretion among judges and maintain limits on the rates of custodial admissions,

one of Parliament's primary goals. As previously mentioned, *R. v. B.W.P.*(2006) served to eliminate deterrence as a sentencing principle, and in *R. v. C.D.*(2005) and *R. v. S.A.C.*(2008) the Court clarified the meaning behind some of the gateways to custody as listed in s. 39, (Corrado et al., 2010).

It appears that some of the "get tough" Crime Control provisions have been challenged from the outset (Corrado et al., 2007). However, the end is not in sight – the Conservative government is now pushing for even more punitive provisions.

### **2.3 Youth Justice as Politics: "Getting Tough" Is Getting Old**

"Getting tough" and "cracking down" on youth crime is not a new campaign tool to amplify political platforms. Feld notes, "many elected officials prefer to demagogue about crime and posture politically to 'crack down' on youth crime rather than to responsibly educate the public about realistic limits of the justice system to control it" (1997, p. 23). However, public perception is influenced by the way and the extent to which they are informed, and all too often the circumstances of the youth in any given case covered by the media or the reasons for their sentence are glossed over, making it easier to demonize youth. For instance, in measuring public attitudes towards reprimanding youth, Barber and Doob (2004) noted that proportionality and severity of sentence were in fact separate dimensions. While there is a clear propensity in the eyes of the public for emphasizing proportionality, their results suggest that proportionality is not always synonymous with harsher sentences, because when confronted with the call to consider youths' circumstances, proportionality in a penal sense recedes in favour of acknowledging the circumstances that have led youth into trouble.

While the common public attitude is that the law is too lenient, this may be symptomatic of the fact that the public believes harsher sentences are a way to reduce crime (Barber & Doob, 2004; Tufts & Roberts, 2002). Therefore, if the government commits to educating the public on all the sanction options under the *YCJA*, as well as important risk and protective factors facing youth today, perhaps there will be a shift in

public demands for “getting tough” on youth. As a result, the fierce political platform which campaigns crime-control initiatives may lose its lustre.

### **2.3.1 Bill C-4: The Latest “Get Tough” Regime**

The *YCJA* has recently proven to be controversial, constituting a political platform for the current conservative shift in government. As a result, the Conservative government had proposed Bill C-4<sup>2</sup> to make amendments to the *YCJA*, which would have consciously swayed it towards the crime control end of the spectrum. This Bill is highly controversial; one clause in Bill C-4 sought to amend the principles of sentencing to include general and specific deterrence, as well as denunciation.

Deterrence has been an underpinning of penal philosophy for over 200 years, representing the belief that criminals will be deterred from crime because the punishments that can be expected outweigh the benefits of offending. Ultimately, there is no evidence that deterrence and denunciation work in the youth justice context, and considerable evidence exists to show that they do not work. A recent meta-analysis conducted by Geigen-Miller for the Solicitor General of Canada found that

“harsher penalties did not reduce recidivism, and in fact contributed to an increase in recidivism. With respect to general deterrence and denunciation, studies of young people’s perceptions of the youth justice system have found that young people are ignorant of many aspects of the youth justice system and tend to under-estimate the penalties that will be imposed on youth offenders. Thus, the message that is intended to be conveyed by instances of general deterrence and denunciation is unlikely to reach the audience” (2008, Para 47-49).

---

<sup>2</sup> Prior to Bill C-4 was Bill C-25: *An Act to amend the Youth Criminal Justice Act*, 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl. October 16, 2007. This bill did not become law before the 39<sup>th</sup> Parliament ended on 7 September 2008. Bill C-4, *An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other acts (Sébastien’s Law (Protecting the Public from Violent Young Offenders))*, appeared at the 3<sup>rd</sup> Sess., 40<sup>th</sup> Parl., on March 3, 2010. At the time of writing it is still in progress.



Reinstating the deterrence principle into the youth criminal justice system would effectively disrupt the delicate balance of justice principles (Geigen-Miller, 2008). Introducing deterrence and denunciation will only encourage harsher – not more lenient – sentences, and as a result, custodial dispositions may increase; “deterrence...will always serve to increase the penalty or make it harsher; its effect is never mitigating” (*R. v. B.W.P.*, (2006), Para 36). This, in effect, guides the youth criminal justice system towards a more crime-control oriented approach. “The efforts to ‘get tough’ and ‘crack down’ repudiate rehabilitation...narrow juvenile courts’ jurisdiction, base youths’ ‘adult’ status increasingly on the offense charges, and reflect a shift toward more retributive sentencing policies” (Feld, 1997, p. 5). In other words, the reinstatement of deterrence as a sentencing principle will ultimately encourage punitive as oppose to rehabilitative sanctions, “re-creating the flaws and confusion that underlay the youth criminal justice system prior to 2002” (Knudsen & Jones, 2008, p. 13). This is particularly concerning for the remedied rates of custody; Cesaroni and Bala argue that the lowered rates of custody since the inception of the *Act* are likely partially attributed to the *omission* of deterrence as a sentencing principle (2008). Thus, the use of deterrence will likely increase the rate of custodial incarceration, and as a result, nullify one of the primary sentencing mandates of the *Act*, which is precisely one of the reasons why the Supreme Court of Canada ruled against the availability of deterrence in *R. v. B.W.P.* (Corrado et al., 2006).

Furthermore, deterrence requires exercising rational choice. The assumptions of rational choice theory are that youth

“...go through a form of ‘moral calculus’ where, when they are thinking about committing an offence, they first think about what it is that they will be gaining from the offence...then they think about what the likelihood is of being apprehended and, if apprehended, what the penalty would be. Next, it assumes that they do a psychological calculation, comparing the value of offending to some combination of the probability of being apprehended and the likely penalty” (Doob, Marinos & Varma, 1995, p. 65).

The problem here is that the literature has demonstrated that youth do not really “prepare” for offences, nor are they often well calculated or planned (Doob et al., 1995). In fact, all fundamental youth crime theories share a central tenet: impulsivity (Corrado et al., 2006). Deterrence, which calls for the foresight and calculations of the costs and benefits of future criminal behaviours, holds no logistical value as a meaningful sentencing principle. Adding insult to injury, “the very youth who commit the most serious and senseless crimes are precisely those who lack foresight and judgment and who will not be deterred” (Bala, 2006 as cited in Corrado et al., 2006, p. 568).

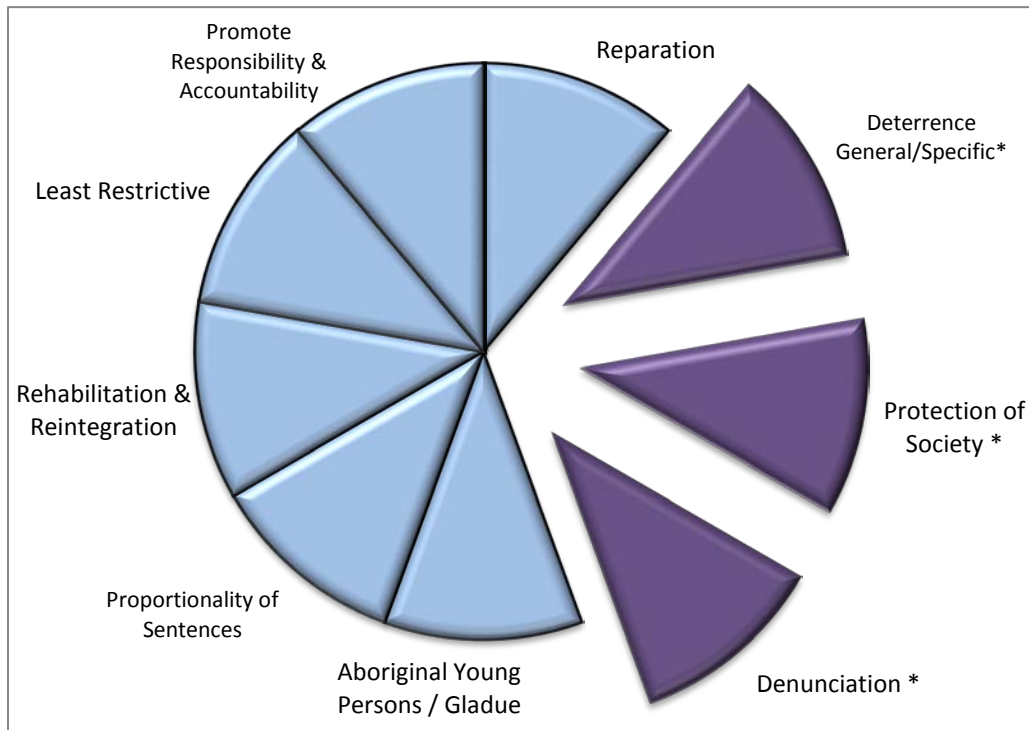
Furthermore, a plethora of research has shown that not only does deterrence fail to reduce recidivism, but in fact, particularly punitive sanctions could *encourage* more antisocial behaviour (Anand, 1999; Bala, 2007; Corrado et al., 2006; Howell, 2003; Nagin, 1998; Winterdyk, 2005). Indeed, “recent research has suggested that the deeper that a young person penetrates into the youth justice system, the less likely he or she is to desist from further offending” (Bala et al., 2009, p. 135). Corrado et al. had similar conclusions, “there is little evidence of a pervasive deterrent impact of custodial sentences” (2006, p. 559).

Finally, amending deterrence into the *Act* will only invite more room for variability among judges, which is precisely what the *YCJA* tried to mitigate considering the judicial processes under the *YOA*. Deterrence will only provide more opportunity for provinces to distinguish themselves and show their “true political colours” in the youth justice arena. For instance, given past practices, it is likely that Quebec judges will use deterrence the least, whereas neighbouring Ontario, and BC to the far west, may go to excess in their use of the sentencing principle. Alarming, despite the consensus in the literature on the role of deterrence in the decision-making process of young offenders, policy makers, practitioners, and politicians support deterrence theory (Corrado, Cohen, Glackman & Odgers, 2003).

In addition to reinstating deterrence and denunciation into the youth justice system, another clause in Bill C-4 seeks to shorten the *Act's* principle of “*long-term protection of the public*” in the Preamble to just “*protecting the public*” which in effect suggests an *immediate* rather than *consequential* objective (Bala et al., 2009). The John Howard Society of Ontario warns that this subtle change will not import a subtle implication, “Bill C-4 thus seeks to dilute and shift the primary focus of the *YCJA*, namely prevention, rehabilitation and long-term goals, towards more punitive goals and the short term protection of the public” (2010, p. 4). This punitive approach is inconsistent with the purposes of the *YCJA*, which is to prevent crime, thereby protecting the public, by addressing the circumstances underlying a young person’s behaviour, rehabilitating young people who commit offences and reintegrating them into society, thereby ensuring that young people are subject to meaningful consequences for offences. This has been considered an “evolutionary” approach to youth crime since it was clear that prior methods (custody under *YOA*) were not working.

Indeed, as can be seen from Figure 2, deterrence, denunciation and protection of society are the three adult sentencing principles excluded from the youth legislation (Corrado et al., 2007). The proposed amendments inadvertently deplete the clear distinction between youth and adult justice systems. Accountability for youth is supposed to be less than for adults, yet this acceptance of adult-oriented sentencing principles only discourages the important differences between youth and adult justice systems.

**Figure 2: Comparing Adult and Youth Sentencing Principles**



\* These principles are not part of youth sentences.  
 Chart derived from Corrado, Gronsdahl, & MacAlister, 2007, p. 104.

The most prominent hazard to heed is “the shift in juvenile justice policy...explicitly seeks to remove developmental considerations...the often heard admonition “adult time for adult crime” says nothing about the age of the offender, except for the fact that it ought to be considered irrelevant” (Steinberg & Cauffman, 2000, p. 380). This is a dangerous gamble considering “punishing a young offender in ways that (potentially) significantly diminish later life changes compromises the essential core of youth-protection policy” (Zimring, 2000, p. 285). Moreover, it raises a profound and powerful question: why have a youth justice system at all?

## **2.4 Youth Should Be Sentenced Differently from Adults: An Age-Old Belief**

“...those who have committed offences, those who have been the victims of offences committed by either adults or other youths, and those who have been victimized and have also harmed others. Whatever their other experiences, and

whatever labels might be affixed to them, they are, first and foremost... children. They are human works in progress; bundles of vulnerability and potential” (Turpel-Lafond, 2010, p. 3).

#### **2.4.1 The Beginnings of “Best Interest of the Child”**

During the mid-nineteenth century, a progressive reform movement emerged, marking the switch from punitive to rehabilitative philosophy (Bell, 2012). During the post-Civil War period, an era of humanitarian concern emerged out of concern for the labour conditions of children working in factories and coal mines, (Cox, Allen, Hanser & Conrad, 2008). These children, as well as those left abandoned, orphaned or even criminally responsible, were a source of compassion and concern by the “child savers”. The child savers movement included philanthropists, middle-class reformers, and professionals who advocated for the welfare of children and believed that children were fundamentally different from adults and thus could be “saved” from a life of crime through rehabilitative interventions, (Cox et al., 2008).

Consistent with this premise, the practice of lumping children with adults in prison produced public dissatisfaction; one of the desired outcomes of the Child Savers was the development of the juvenile court (Bell, 2002 & Cox et al., 2008; Platt, 1969). Ideological changes in cultural conceptions of children and in strategies of social control during the nineteenth century led to the creation of the first juvenile court in Chicago in 1899 (Feld, 1999). Reformers supported positivist theories of criminality, with new ideas about childhood and adolescence, resulting in a social welfare alternative to criminal courts (Feld, 1999). “The idea of adolescence as a distinctive stage of development provided the impetus to legally separate young offenders from criminals and to create a social welfare alternative to respond to criminal and noncriminal misconduct by youths” (Feld, 1999, p. 56).

Neoclassical beliefs of rational choice were shaken by the recognition that youths’ mental, intellectual, and emotional developments are behind those of adults. Furthermore, children are fundamentally vulnerable to the power of adults, and can be

easily influenced by them. Once the argument was made that being a child was a mitigating factor, a procession of further arguments to change the law and establish a separate justice system for youth naturally followed (Platt, 1969). As was illustrated under the synopsis of the *JDA*, the Justice Model was not applicable to children, because it was believed that the criminal act was not based on choice, but instead on circumstances one was born into. There was a socio-legal shift, as the focus on *why* the delinquency was committed trumped the focus of the offence itself. On November 20, 1989 this stance was officiated to international standards with the accession of the *United Nations Convention on the Rights of the Child (UNCRC)* by the General Assembly, which sought to address the diminished moral culpability of youth as well as the need for proportionate penal responses to youth crime.

While there has been a steady evolution of youth justice systems in the last century, the belief in the “sanctity of the child” still holds; however, as has been suggested with Bill C-4, the basis for the separation between youth and adult justice may fade. However, since its inception the *YCJA* appears to have demonstrated its commitment to youth, for its Preamble references the *UNCRC*, as well as the rights and freedoms set out in the *Charter* and the *Canadian Bill of Rights*, emphasizing that young persons be granted special guarantees of their rights and freedoms. In addition, s.3 of the Declaration of Principles emphasizes enhanced procedural protection to ensure that youth are treated fairly, and that their rights, including their right to privacy, are protected, thereby creating a clear distinction between the youth and adult justice systems (emphasis added):

**3. (1)(b)** the criminal justice system for young persons *must be separate* from that of adults and emphasize the following...

(d) *special considerations* apply in respect of proceedings against young persons, and, in particular,

(i) young persons have rights and freedoms in their own right...and young persons have *special guarantees* of their rights and freedoms

Yet, these “moral pledges” for children and youth seem to be holding less and less credence as society pushes for a more Crime Control approach to youth crime. As Feld argues in the American context,

“within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young people. These interrelated developments – increased procedural formality, removal of status offenders from juvenile court jurisdictions, waiver of serious offenders to the adult system, and an increased emphasis on punishment in sentencing delinquents – constitute a form of criminological “triage”, crucial components of the criminalizing of the juvenile court, and **elements of the erosion of the theoretical and practical differences between the two systems...**” (1997, p. 1).

While Feld is making reference to the American youth justice system, it is not far off from our own; if Bill C-4 succeeds, then, as demonstrated in Corrado et al. (2007), the sentencing principles that distinguish the youth justice system from the adult will dissipate.

According to Feld, there should not be a separate youth justice system: “no compelling reasons exist to maintain separate from an adult criminal court, a punitive juvenile court whose only remaining distinctions are its persistent procedural deficiencies” (1997, p. 2). It appears the problems lie in trying to combine the inherent contradictions between welfare and crime control paradigms. Feld’s solution may seem radical, in that he suggests abolishing the juvenile court, because he contends the justice system is not appropriate for treating social welfare needs, and therefore, will never truly reduce youth crime (1993, 1997). Instead, he suggests youth should be tried in the adult court system to ensure enhanced procedural safeguards, but with a “youth discount” to reflect their reduced culpability.

Empirical research has shown two fundamental reasons for having separate youth justice policies: “diminished responsibility due to immaturity and special efforts designed to give young offenders room to reform in the course of adolescent years” (Zimring & Fagan, 2000, p. 277). From a pragmatic, socio-legal perspective, the issue of

maturity speaks to, (a) youth not understanding court procedures and “legal language”; (b) the fact that the system itself can be stigmatizing and it is necessary to minimize these impacts; and (c) that youth who offend are more likely to be in need of special services (Doob & Cesaroni, 2004).

More importantly, it is only intuitive to consider developmental factors when accepting the separation of youth and adult justice systems. A wealth of research has shown that adolescence is a particularly vulnerable period in a person’s development (Loeber & Farrington, 2001; Steinberg & Cauffman, 2000; Steinberg & Schwartz, 2000; Zimring, 2000). In other words, it is a “formative period during which many developmental trajectories become firmly established...other than infancy, there is probably no period of human development characterized by more rapid and pervasive transformations in individual competencies” (Steinberg & Schwartz, 2000, p. 23).

Indeed, Zimring (2009) offers three reasons to credit youth with diminished moral culpability; their lack of fully developed cognitive abilities, their lack of developed control mechanisms, and finally their susceptibility to peer pressure. He points out that adolescence is, in essence, a trial-and-error period that is “mistake prone by design” and submits, “the special challenge here is to create safeguards in the policies and environments of adolescents that reduce the permanent costs of adolescent mistakes” (Zimring, 2009, p. 320). This coincides with the aspirant perspective on youth crime, that young offenders still have a chance to turn their lives around. In other words, adolescent crime can usually be outgrown. Therefore, it is imperative that welfare principles remain intact, while crime control initiatives such as deterrence do not overpower the youth justice system. As von Hirsch emphasizes, “self-control, as other aspects of moral development, is a *learned* capacity, and childhood and adolescence is the period during which it is learned” (2009, p. 326, italics in original).

Furthermore, as much as youth may understand the difference between “right and wrong,” the issue is really that the act of reasoning, foresight, and appreciating the consequences of one’s actions are not processed the same way as adults: “compared to



adults, youth may be less future-oriented, less risk-averse, more impulsive, and more susceptible to the influence of others, and these differences may result in age differences in judgement” (von Hirsch, 2009, p. 23). This is accredited to age being tied to psychosocial maturity, such that the older you are, the more your decisions become less antisocial (Doob & Cesaroni, 2004).

As well, Doob and Cesaroni (2004) contend there are many different domains for which society accepts the idea that youths should be treated differently from adults. For instance, there are age limits governing when a young person can buy alcohol, nicotine, and firearms, the age at which they may drive a car, vote, leave school, consent to sexual activity, or work in certain industries. In this context, it is not surprising that most countries have separate justice systems for youth (Doob & Cesaroni, 2004).

The very existence of separate justice systems is predicated on the premise that there are fundamental differences between youth and adults, and that these differences “are provoked by the normal process of development, age related and legally relevant” (Steinberg & Cauffman, 2000, p. 379). It was a century ago that this premise was first identified and it has guided juvenile justice policy ever since, maintaining a judicial boundary between juvenile and adult court systems. Now, here we are, a century later, still debating the merits of distinctive approaches to youth and adult crime.

#### **2.4.2 Losing the Line in the Sand**

Bill C-4 may be considered to be a reflection of changing times and a more conservative oriented government; there appears to be an on-going shift towards more crime control amendments to the *YCJA*. Despite academic opposition to the sentencing principle of deterrence based on empirical findings, and with the implications of changing the wording regarding the principle of protecting the public, it appears that the justice-model pendulum is swinging to the conservative right. As a result, more and more youth may be subject to punitive and retributive sanctions in the near future.

Of more pertinence, the youth justice system could be at risk of becoming a “scaled-down, second class criminal court for young people” as Feld warns (1997, p. 1). “These changes repudiate juvenile courts’ original assumptions that youths should be treated differently than adults, that they operate in a youth’s best interest, and that rehabilitation is indeterminate and cannot be limited by fixed-time punishment” (Feld, 1993, p. 411). These changes, which will likely result in more severe penalties for youth, come at a time when indeed “the value and efficacy of jail as a punishment remains a live issue among researchers, academics, politicians, and the public at large, “ (Davis-Barron, 2010, p. 344).

Overall, this leaves the crux of the youth justice system at the risk of being compromised. The *YCJA* is designed to emphasize limited accountability of youth as well as recognize their natural vulnerability. However, the more we impose adult sentencing philosophies, the more we confound the sanctity of ‘best interests of the child’.

If this is the case, then it can only be concluded that the *YCJA* has not been such a legislative saviour to Canada’s *YOA*, and this can be accredited to its mixed-model foundation. As Corrado et al. indicated, the fundamental flaws of the *YOA* model arise from the fact that it ...“incorporated mixed and inconsistent principles and objectives. This mixed model resulted in considerable ambiguity and confusion among youth justice decision makers as well as wide disparities in implementation across provincial and territorial youth justice systems” (Corrado et al., 2007, p. 68). Although the *YCJA* has been considered more pragmatic in identifying and articulating its principles, the fact remains that it too is still founded on a mixed model of youth justice. If the enactment of Bill C-4 succeeds, not only will it tilt the pendulum right, but it will add more opportunity for variation in sentencing approaches, arising from varied interpretation, and discretion among judges. This will essentially put the nation back at square one in dealing with its young offenders.

## 3: METHODOLOGY

### 3.1 Method

A content analysis of published court cases was the method employed for this research. Using the *QuickLaw* online legal database, this data was inexpensive to obtain and easily accessible via the Simon Fraser University library. Although there are several Canadian legal databases available, *QuickLaw* was chosen as the only source because while it was Canada's first legal database, it continues to be the most comprehensive, and it is considered to be the market leader in online legal research. Indeed, while collecting legal data for his M.A. thesis, Keenan (2009) established that upon consulting other databases supplemental to *QuickLaw*, they did not provide any additional cases. As well, in her Ph.D. dissertation, Fabian (2010) notes that other databases often generate duplicate results.

Furthermore, an inherent shortcoming of any case law research is that not all judicial decisions get written and published, and therefore, do not get processed into the database; No single legal database purports to provide all adjudicated cases. Furthermore, it is impossible to calculate the *total* number of cases that come before a given court, and therefore impossible to know the ratio of cases that are actually being published. This speaks to the limited generalisability of a published case sample.

As Busby (2000) explained, written judgments are considered a formal process that often happen under special circumstance or precedence. Moreover, inconsistencies arise from province to province, as was established by Krawchuk (2008) while researching for her M.A. thesis. Upon contacting various provincial courts across Canada, she was informed that the decision to write and publish a court case was based on the judge's discretion as well as the judicial procedures of each province. Youth cases were considered to be particularly sensitive due to concerns of privacy, confidentiality,

and publication bans. With these limitations in mind, it is highly likely that certain types of cases are more likely to be reported than others. It may be assumed that cases of substantial importance to the affected parties are more likely to be reported in comparison to cases of lesser import. The decision of a judge to sentence a young person to a period of incarceration surely fits among those cases most likely to result in the judge articulating his/her rationale for that decision. Indeed, s. 39(9) of the *YCJA* requires judges sentencing a youth to a custodial period to provide reasons for doing so. Therefore, published court cases will never fully represent the national distribution of criminal proceedings.

### **3.2 Sample**

The purpose of this study was to ascertain the range of justifications typically advanced by youth court judges who decide to sentence a young person to a period of custody. Accordingly, it was necessary to draw a sample of cases for this purpose.

The initial case law research began in August 2009. *QuickLaw* was accessed to search all youth court cases that resulted in a custodial sentence from June 22, 2006 to June 22, 2009. June 22, 2006 was chosen as a starting point because the Supreme Court of Canada decision of *R. v. B.W.P.* changed the principles of the *Act* from that day forward by banning deterrence as an applicable youth sentencing principle. Therefore, as one of the purposes of this research was to evaluate how judges are utilizing and interpreting the sentencing principles when sentencing young offenders to custody, I thought it would be interesting to see if the decision in *B.W.P.* had a significant impact on judicial decision-making. Furthermore, in surveying youth court judges, Doob (2001) found deterrence to be rated the *second* most important sentencing principle (preceded by rehabilitation). Therefore with the unavailability of this sentencing principle, there was an interest in unearthing any “catch” words that may be used as a guise.

With the use of *QuickLaw*'s Boolean syntax search engine, the terms “custody” and “youth criminal justice act” were queried to filter all potential cases where a youth

was sentenced to custody (see Figure 3). This search yielded a total of 428 cases. However, these results were tantamount to net fishing: after the irrelevant cases were discarded, only 87 cases remained. Yet narrowing the scope by adding any more search terms such as “s. 38” or “s. 39” would risk missing important cases; while most of the cases referred to sentencing principles or ‘gateways’ to custody, not all of them cited the section numbers explicitly.

Figure 3: QuickLaw Screen Shot of Exact Search Terms

LexisNexis® Quicklaw® Cases Search

Start Page | Sign Out | Contact Us | Help  
Helpdesk: 1-800-387-0899

LexisNexis® Quicklaw™

Search | Source Directory | Home | Court Cases | Legislation | Commentary | Journals | International | General | All Search Forms

**Court Cases**

**Court Cases**

- QuickCITE™ Case Citator
- The Canada Digest
- Carlson Personal Injury
- Wrongful Dismissal Notice Searcher
- Related Searches
- Tribunal Cases
- International Cases (Common Law)

How do I...?

- Find a case by party name?
- Find cases using a partial citation?
- Search for cases on a particular topic or issue?
- See if a case has been appealed?

**View tutorials**

**Search terms**

A space between words searches an exact phrase. Show the relation of terms with connectors, e.g., age & discrimination, age or rate, trade / is act. View connectors...

**Search Term Equivalents**

Singular and plural  Masculine and feminine

**Legal topics**

Add topic(s) to search 

**Sources**

**Case name**

**Citation**

**Specify date**

Date is between...    and

**Summary**

**Jurisdiction**

All Jurisdictions

- Federal
- Alberta
- British Columbia
- Manitoba

**Court**

All Canadian Courts

- All Canadian Appellate Courts
- All Federal Courts
- Privy Council
- Supreme Court of Canada

**Judge, Panel or Arbitrator**

Back to top | Clear form

False positives were the reason for many of the deleted cases. For instance, initial cases included: adults who had previously been sentenced under the *YCJA*; bail hearings; police-based custody (arrest / detainment); trials with no sentences issued; *voir dire*s; sentences where the only custody “issued” was credit for pre-trial detention; cases where custody was considered but not imposed; cases surrounding whether open or closed custody was to be assigned; and, appeal cases that had no relevance to the research questions at hand.

It should also be noted that when both provincial and appellate cases were available for the same youth, only the appellate court case was included in the dataset. The provincial case would only be referred to for gathering supplemental information regarding the details of the offence and the reasons for appeal. As well, for those cases which included a co-offender, the cases were duplicated in the dataset so as to represent both young offenders. These duplicates were then coded respectively.

Finally, it is important to note the new sentencing option “deferred custody and supervision order” (DCSO) was excluded from the sample. Following the methods of Doob and Sprott (2005), they argue that a DCSO is in fact a community-based sentence with the “threat” of custody if breached, thus it is not a custodial sentence. This was demonstrated in *R. v. A.D.* (2008) when, after breaching her DCSO conditions, the youth was incarcerated. A.D. appealed her case, which the Nova Scotia Court of Appeal granted, stating, “the judge erred when he concluded that he was left with no choice but to direct incarceration” (Para 32).

Once the 87 cases were extracted, they were uploaded into Nvivo, a software program designed to analyze qualitative data. Attributes (variables) and nodes (themes) were used to code the data. Before starting the coding process, a preliminary list of expected attributes and nodes had been composed. However, as is intrinsic to an inductive approach to research, the lists were modified several times throughout the coding process as new attributes and nodes emerged while others were found to be too inconsistent at identifying the construct under investigation. A constellation of factors

are considered when a judge is imposing a sentence; however, the list of these factors varies from case to case, as do the details and circumstances. Therefore, as the list grew, many of the attributes resulted in a majority of “missing” cases due to their inconsistent application. This may be partially symptomatic of the fact that some cases were simply sentence hearings, in which case few details were provided.

A final list of attributes was composed. The letter before each attribute indicates the category to which it was assigned. *A* is for aggravating factors; *C25* is for the principles of Deterrence and Denunciation which Bill C-25 (now Bill C-4) advocates to bring back into youth sentencing; *D* is for demographics; *J* is for judges’ comments; *M* is for mitigating factors; *O* is for offence details; *PSR* is for information from the pre-sentence report; *S* is for sentencing details; and *SP* is for sentencing principles and gateways to custody. In the end, not all of these attributes were used. The nodes represent the many facets that incorporate the decision to sentence a youth to custody. These nodes essentially comprise chunks of text from cases that were categorized into themes for later analysis.

### **3.3 Analysis**

While Nvivo was the main carrier of data and analysis, a quantitative data analysis software package called the Statistical Package for the Social Sciences (SPSS) was also used as a supplemental tool to essentially turn words into numbers and “paint the picture” of the sample. SPSS was used for strictly descriptive purposes.

Finally, as is inherent with content analysis, it should be noted that my research was somewhat subjective in nature, particularly when it came to coding nodes. Maxfield and Babbie (2006) point out that manifest content which they describe as “visible, surface content” (p. 266) is quite straightforward. This was largely the case when collecting my attributes (for instance, demographics and offence type). However, coding latent content is to search for its “underlying meaning” (p. 266) which permits more room for subjectivity. This was a significant component of coding the nodes.



### **3.4 Ethics**

This study did not use human participants; its sole method of research was content analysis of published court cases. Furthermore, these cases were obtained using a database accessible to the public. Therefore, the research was in accordance with policy R20.01 of the Simon Fraser University Office of Research Ethics.

It is important to note that while this research involved the criminal proceedings of young offenders, their identities have been protected as per s. 110 of the *Act*. Only those youth convicted of presumptive offences have had their names published in the written cases, and often these names were restricted to the youth's surname.

## 4: DESCRIPTIVE ANALYSIS

The following section provides a brief descriptive analysis for the purpose of “painting the picture” of the 87 cases that comprised the sample of custodial dispositions. Beginning with demographics, 75 of the cases (86 percent) involved males while 12 (14 percent) involved females. In accordance with the *YCJA*, the age ranged from 13 to 17 years old, with a mean age of 16.01. Of the sample, 15 cases (17 percent) classified the youth’s ethnicity as Aboriginal. However, 11 cases (13 percent) did not distinguish the youth’s ethnicity, therefore the proportion of Aboriginal youth may be greater.

**Table 1: Demographics**

	%	N = 87	
<b>Gender</b>			
Male	86%	75	
Female	14%	12	
<b>Age</b>			
13	5%	4	<b>Mean: 16.01</b>
14	8%	7	
15	9%	8	
16	24%	21	
17	41%	36	<i>Missing: 13%</i>
<b>Ethnicity</b>			
Aboriginal	17 %	15	
Non-Aboriginal	70%	61	<i>Missing: 13%</i>
<b>Criminal History</b>			
First time offender	33%	29	<i>Missing: 8%</i>
Already serving another sentence at time of offence	41%	36	<i>Missing: 23%</i>
Failure to comply in past	30%	26	<i>Missing: 67%</i>
Violent offence in past	35%	30	<i>Missing: 47%</i>

The offender profile revealed that, surprisingly, a third of youth (33 percent) had been issued a custodial sentence as first-time offenders. However, all of these youth, with the exception of one(whose most serious offence was Break & Enter) had

committed violent offences. Furthermore, six of these youth received adult sentences. Conversely, about a third of the youth had a criminal history that included non-compliance and/or a violent offence. What is especially surprising, but also perhaps in tandem with the type of youth who reach the point of incarceration, is that almost one half (41 percent) of youth had committed the current offence while still serving another sentence. This included community sentences, the community portion of a CSO, and bail/recognizance for a previous offence. While there was a considerable amount of missing data due to the nature of case law as a data source, it was nonetheless deemed informative to include these statistics.

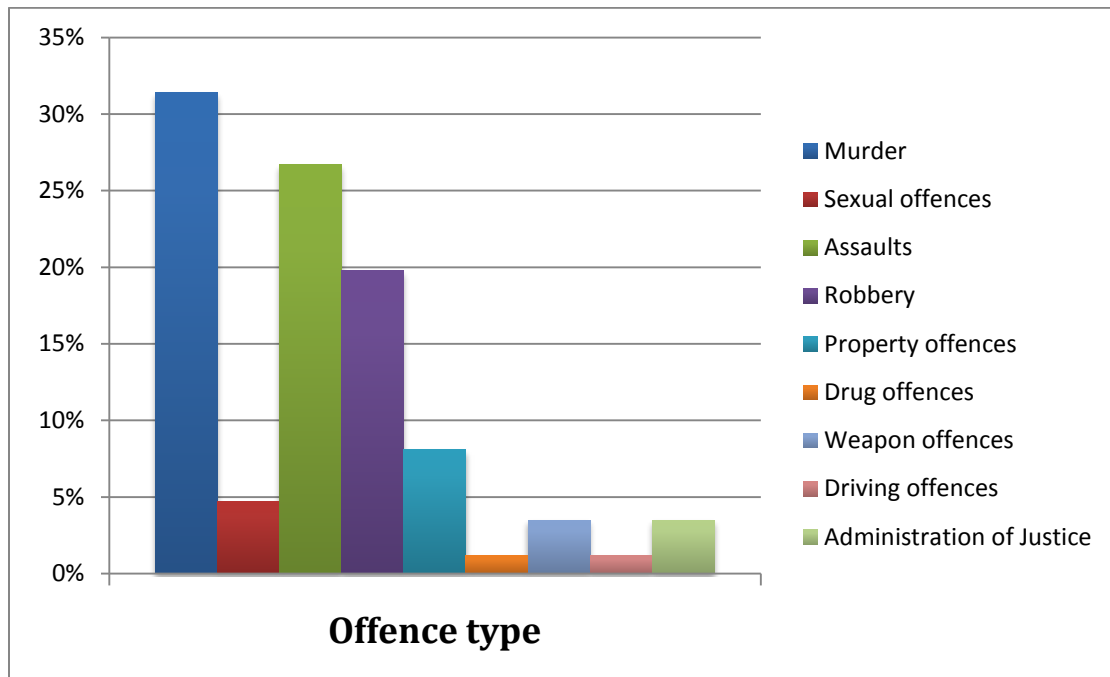
#### **4.1 Offence Profile**

Total number of charges for each youth ranged from 1 to 20, with a mean of 3.8; only the most serious offence was coded<sup>3</sup>. In accordance with the provisions of the *Act*, most offences (83 percent) were violent in nature (see Figure 4). According to Statistics Canada, weapons were present in about 20% of cases for youth violent crimes in 2006, a figure that has remained stable since 2004 but has decreased steadily over time (Taylor-Butts & Bressan, 2008). In this study, a weapon was involved in 65 percent of cases (keeping in mind this sample included only custodial sentences) with a firearm comprising over one third (37 percent) of the weapon of choice. This is double the rate identified in the *Juristat* report, which noted that firearms comprised 14 percent of the weapons used. Consistent with the report, however, is the finding that older youth were most often involved in violent offences where a weapon was involved; youths aged 16 and 17 were involved in 82 percent of cases that involved a weapon. More than half the youth (58 percent) were issued a form weapons prohibition with their custodial sentence.

---

<sup>3</sup> Offences were ranked in accordance with the Serious Index of the Canadian Centre for Justice Statistics. See Latimer, J., & Foss, L. (2004). *A One-day Snapshot of Aboriginal Youth in Custody across Canada: Phase II*. Ottawa: Department of Justice Canada, Research and Statistics Division.

**Figure 4: Reason for Custody: Primary Offence Type**



Interestingly, only one third of youth (33 percent) “worked” alone; 23 percent of youth had a co-offender, and 40 percent of youth were involved in a group offence (3 or more). These numbers speak to the nature of group delinquency; however, the nature of this phenomenon cannot be speculated at this time as it goes beyond the scope of this thesis.

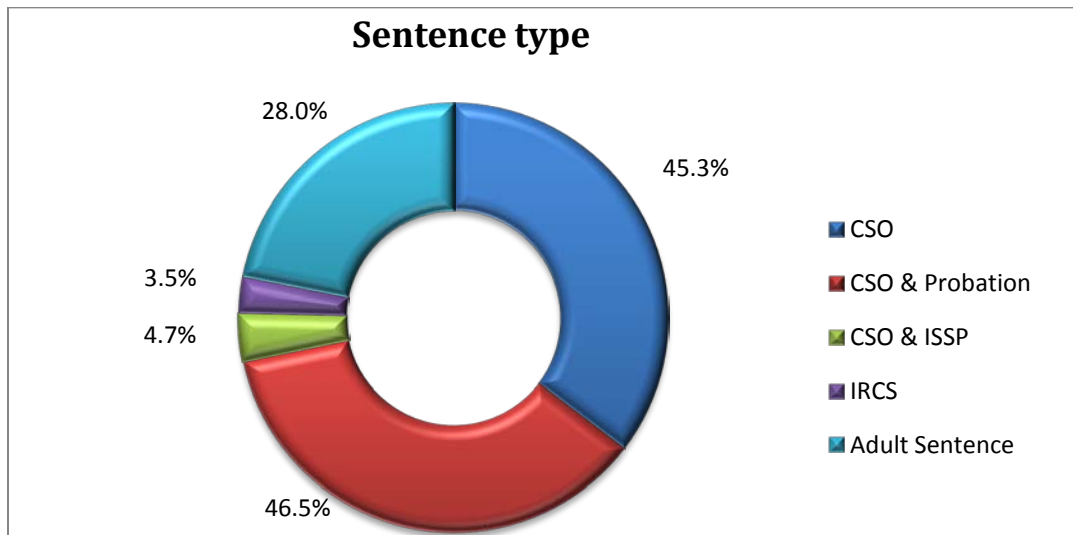
## **4.2 Sentence Profile**

Custody length ranged from 30 to 4380 days, with a mean of 1104.04 days in custody. With such an extreme range it is also important to note the median, which was 540 days in custody. With the minimum sentence being 30 days, which comprised only 2.5 percent of custody length, the sentencing mandates of the *Act* have clearly put an end to the “short, sharp, shock” regime of the flawed *YOA*. This is further established by the fact that sentences of 90 days or less accounted for 8 percent of custody length.

Custody type (open/secure) was not always identified at the time of sentencing; however, cases that did designate custody type revealed a marginally higher proportion of secure custody (26 percent for secure; 22 percent for open).

Despite community supervision incentives inherent in the revamped custodial sentence regime under the *Act*, it appears judges still needed to “lock in” more community supervision by frequently adding a community-based sentence to the CSO. As illustrated in Figure 5, less than half of custodial sentences comprised of a CSO alone. That adult sentences encompassed far more than “the exception” will be further discussed in Chapter 5.

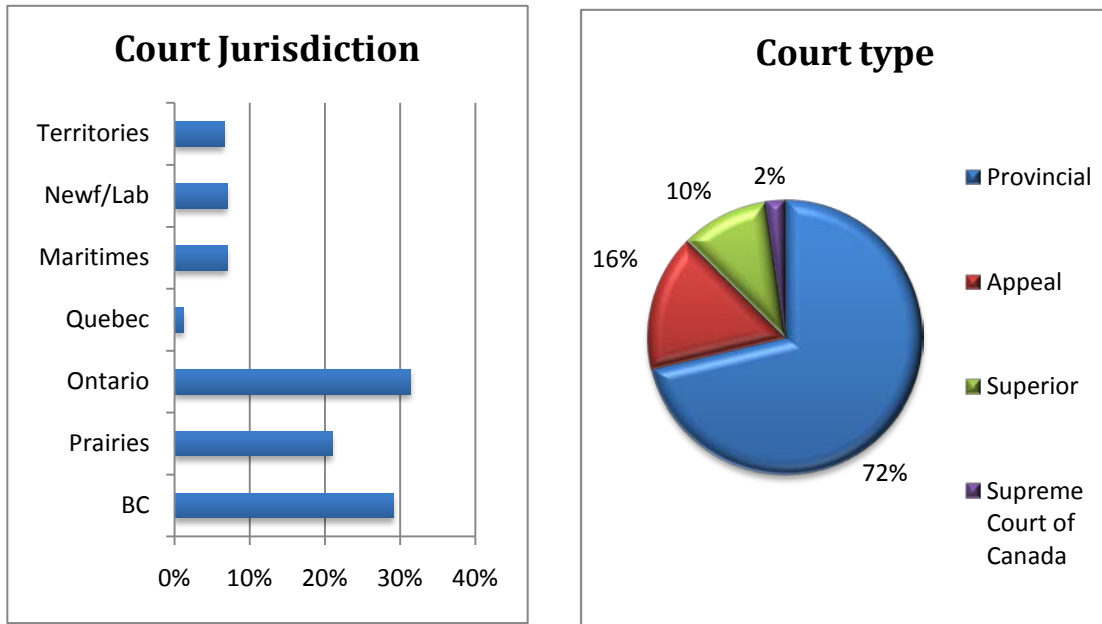
**Figure 5: Sentence Type**



### 4.3 Court Profile

While cases were collected from across Canada, some of the limitations of such data were discussed in Chapter 3; it is notable that the distribution of published cases in *QuickLaw* may not be representative of actual court proceedings per province. Nonetheless, it can be seen in Figure 6 that Ontario and BC comprised the majority of court cases (31 and 29 percent respectively), leaving the Territories and Quebec with a small minority, revealing a combined total of less than 8 percent. The majority of cases were held in provincial court; however, the sample included two cases of utmost precedence – that is, they were decided in the Supreme Court of Canada.

Figure 6: Court Profile



## 5: CASE LAW ANALYSIS

### 5.1 S. 39 (1) A,B,C, and D: The Four Gateways to Custody

Subsection 39(1) of the *YCJA* sets out the four prerequisites for the imposition of a custodial sentence. It reads:

39(1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

- (a) the young person has committed a violent offence;
- (b) the young person has failed to comply with non-custodial sentences;
- (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 under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; 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.

Almost half the cases (43 percent) made reference to s. 39 (1) when imposing a youth sentence. Therefore, at best, about half of the judges made a reference to the statutory provision that serves as the *sine qua non* for custodial dispositions. However, only one third of the total cases (34 percent) made reference to a *specific* gateway to custody. This demonstrates that, for the majority of cases, judges do not feel it is necessary to refer to which gateway they are using to justify a custodial sentence. Furthermore, of those cases that specified which gateway was being exercised, only 28 percent noted that more than one gateway was available, suggesting either that a minority of cases qualified for more than one gateway, or that judges felt it was sufficient to impose a custodial sentence through a single-gateway justification.

The following is an examination of each gateway, and a discussion of whether or not the data in this study was in accordance with the limitations set out in s. 39(1)(a-d).

### **5.1.1 39 (1)(a): A Violent Offence**

The *YCJA* provides a definition of a “serious violent offence” in s. 2 (1) of the *Act*; an offence is designated a serious violent offence if “a young person causes or attempts to cause serious bodily harm.” One significance of this definition is that, if a youth receives two serious violent offence designations, then the third designation would be considered a presumptive offence for which an adult sentence may apply.

Surprisingly, the *Act* does not provide a definition for a “violent offence” in regard to the gateway established in s. 39 (1)(a), and as a result, there has been some debate in the case law regarding the meaning of the term “violent offence.” However, that debate was resolved a few years after the *Act*’s inception by the Supreme Court of Canada in *R. v. C.D* (2005). According to the Supreme Court, a violent offence is “an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm.”

It is important to note that this conclusion was reached, in part, as an official recognition of Parliament’s mandate to lessen the use of custody as a sentencing option for young offenders:

“While it is clear that ‘violence’ has a spectrum of meanings and that it can be applied to property as well as to persons, in the context of the *YCJA*, the term ‘violent offence’ should be narrowly construed. The object and the scheme of the *YCJA*, and Parliament’s intention in enacting it, all indicate that the *YCJA* was designed, in part, to reduce over-reliance on custodial sentences for young offenders... A narrow interpretation of ‘violent offence’ means that the definition must exclude pure property crimes. Otherwise, the gate-keeping effect of s. 39(1)(a) would be severely diminished” (Intro).

Further to that, the Supreme Court chose a harm-based definition of “violent offence” as opposed to a force-based definition, for the reasons that while a force-based definition focuses primarily on the violence that was exerted, a harm-based



definition identifies violence by the harm that has been suffered. This is preferred because it will ensure that all “serious violent offences” are also “violent offences”, which in turn will ensure more consistency within the *Act*. Finally, it was articulated that the meaning of a “violent offence” should not include offences where bodily harm was merely intended, because criminal punishment can only be imposed when more than just a guilty mind is established. It is for this reason the Supreme Court allowed the appeal on behalf of C.D. and C.D.K.; the youths were charged with various property, weapon, motor vehicle, and administrative offences, and on the basis that an offence cannot be classified as “violent” based on the *potential* for harm, the Supreme Court quashed the custodial sentences for both youth.

In terms of the case sample for this research, 84 percent of youth were facing charges for violent offences. Interestingly, *all of the youth who were specifically sentenced via this gateway were first time offenders*, but they all committed violent offences. Perhaps this particular result speaks more to the justification of imprisoning first-time offenders as opposed to judges explaining their reasons for imposing a period of custody. Nevertheless, despite the previous debates about what constitutes a violent offence, the judges’ deliberations suggest that exercising this particular gateway was the most straight-forward; “Committal to custody based on s. 39(1)(a) is self-explanatory” (*R. v. D.E.C.*, 2008, Para 69).

### **5.1.2 39 (1)(b): Failure to Comply with Non-Custodial Sentences**

While there have been no appellate court rulings as to how s. 39(1)(b) should be interpreted, Richard Barnhorst (2004), for The Department of Justice Canada, stipulated in his report that there must be at least two prior non-custodial sentences with which the youth did not comply. As *R. v. I.C.* (2007) further elaborates, “a young person can only be given a custodial sentence under paragraph 39(1)(b) if he has failed to comply with more than one non-custodial sentence. Multiple failures to comply with one non-custodial sentence are not enough, but at least two failures to comply with two separate non-custodial sentences are sufficient” (Para 21).

Based on discrepancies in cases with what constituted failing to comply, *R. v. J.A.B.* (2008) takes it one step further to clarify that s. “ 39(1)(b) refers to a young person who ‘has failed to comply with non-custodial dispositions.’ It does not refer to young people who have been charged with and found guilty of an offence of having failed to comply with a non-custodial disposition” (Para 29). Likewise, the sentencing judge in *R. v. A.M.* cites another case to make her point, “[t]he key to G.M.S. is that the young offender in that case had failed to comply with only one probation order. It is the number of probation orders breached that G.M.S. mandates a consideration of rather than the number of offences...” (Para 30).

In regard to the data at hand, 30 percent of cases deemed that the youth had failed to comply with non-custodial sentences in the past. Judges did not specify if these youth had actually been charged with failure to comply, or if their past behaviours demonstrated a failure to comply with past sentences or conditions.

In regard to the youth who were sentenced to custody with specific reference to this gateway, all of them had failed to comply with non-custodial sentences in the past, and in fact, all of these youth *were already serving another sentence* when they committed the crimes at hand for which they were being sentenced. In fact, it is a bit of a shock to note that almost half (42 percent) of youth were already serving another sentence when they committed the crimes at hand for which they were being sentenced.

### **5.1.3 39 (1)(c): Indictable Offence and History that Indicates Pattern of Guilt**

The sample of cases for this study happened to include *R. v. S.A.C.* (2008), a Supreme Court case that helped to define this gateway. The issue here is not what constitutes an indictable offence, but what constitutes a history that indicates a pattern of findings of guilt. In *R. v. S.A.C.*, the youth pled guilty to property and administrative offences and was sentenced to a 300 day CSO. The youth argued that a custodial sentence could not be imposed under any of the gateways. The main issue on appeal

was the interpretation of s. 39 (1)(c); specifically, whether there was a discrepancy in the English and French versions in regard to the date as of which prior findings of guilt must be found, and as to what constituted a pattern of findings of guilt. The Supreme Court decided that a shared meaning between the bilingual statutes could be found, but acknowledged that the French version was more clear and *restrictive* on the former issue, whereas the English version was more clear and *restrictive* on the latter issue. Justice Deschamps concluded:

“the only findings of guilt to be considered for the purposes of the provision were ones that were entered **prior to the commission of the offence** for which the young person was being sentenced. Furthermore, to show a pattern of findings of guilt, the Crown was required to adduce evidence of **a minimum of three prior convictions**. However, the prior findings of guilt did not need to relate to similar - or to indictable – offences” (Intro).

It is encouraging to note that when the Supreme Court chose to define this gateway, they did so in such a way that was favourable to youth. This principle of statutory interpretation clearly caters to Parliament’s mission to reduce the youth incarceration rate and demonstrates a commitment to the purposes and principles of s. 38.

In respect to the data at hand, almost two thirds of the sample was comprised of youth who had a criminal record. Furthermore, of those youth, the majority of them had committed violent offences in the past (60 percent). Consistent with the objective of this particular gateway, all of the youth who were specifically sentenced to custody via s. 39 (1)(c) had criminal records that revealed at least three prior convictions, and had committed at least one indictable offence.

#### **5.1.4 S. 39 (1)(d): The “Exception” to the Rule**

The exceptional case gateway can only be utilized in those very rare cases where the aggravating circumstances of the offence are such that a non-custodial sentence would not be appropriate. As quoted in *R. v. D.J.B.* (2007), when the judge was choosing to impose a custodial sentence via s. 39(1)(d), “In *R. v. C.D.J.* (2005), 205 C.C.C. (3d) 564,

the Alberta Court of Appeal held that what ‘constitutes an “exceptional” case in this sense is not an abstract principle. It depends on the circumstances and aggravating factors of each individual case’” (Para 23). Further attempts have been made to define the parameters of this gateway; in *R. v. D.B.* (2007), the judge cited *R. v. R.E.W.* (2006) for support and stated “I accept that the most important phrase in the paragraph is ‘exceptional circumstances’ and that the dictionary meaning of ‘exceptional’ (Oxford English 2<sup>nd</sup> ed.), contemplates something that is ‘out of the ordinary course, unusual, special’” (Para 10).

Case law suggests that the court must focus exclusively on the aggravating circumstances of the offence when determining whether an offence is sufficiently “exceptional” to merit a custodial sanction; “Section 39(1)(d) can be invoked only because of the circumstances of the offence, not the circumstances of the offender, or the offender's history” (*R. v. R.E.W.*, *Supra*, Para 44). This is illustrated in *R. v. N.R.* (2005) (as cited in *R. v. D. J. B.*, 2007, Para 23) where the Appeal judge found that the “the trial judge failed to identify the aggravating circumstances of the offences that would bring the offender within paragraph (d).”

The data appears to show some consistency with the principles of this gateway in the sense that, of the cases that issued a custodial sentence via s. 39(1)(d), the youths were facing *at least* three charges, which could lend support to what constitutes “exceptional” circumstances. Furthermore, of the entire sample, the maximum number of charges that a youth accrued was 20; only one youth achieved this number of charges, and he received a custodial sentence through this gateway.

What is also interesting to note, is that, of the entire sample, only two cases involved youth who were first-time offenders *and* did not commit violent offences. Both of these youths were sentenced to custody through this gateway. The following is a brief examination of each case.

*R. v. K.G.S.* (2009) – In this case a sixteen year old Aboriginal troubled youth from Nunavut pled guilty to 20 property-related offences that were committed in order

to access alcohol and drugs. While he did not have a criminal record, the youth had been diverted in the past for his offences, and had been deemed uncontrollable by his parents. Some of the current offences occurred while he was released on a recognizance.

Since gateways (a), (b)&(c) were not available to the judge, he instead chose to follow the Crown's request to impose a sentence of custody for these many offences as an "exceptional" sentence under s. 39(1)(d). The rationale for this conclusion was two-fold. Firstly, the judge found that the interpretation of s. 39(1)(d) requires the court to consider the offences globally, in which case the judge found that, given the number of indictable property-related offences, and the circumstances in which they were committed, these offences collectively qualified as being exceptional. Secondly, and deplorably, the judge noted that Nunavut does not have the non-custodial alternatives required to implement the philosophy of the *YCJA*, and therefore, "[i]f this Court adopts the very narrow interpretation of the 'exceptional category'... Nunavut's isolated communities would not be protected by the *YCJA*" (Para 30). The youth was subsequently sentenced to eleven months of a CSO followed by one year of probation.

*R. v. M. J.*(2007) – In this case a seventeen year old black youth from Toronto pled guilty to three weapon-related offences under the *Criminal Code*. The youth explained that his reasons for carrying the weapon were as a means of protection following an incident where he was waiting at a bus stop and four shots were fired at him. The judge then made reference to the gun violence in Toronto and the growing epidemic of people taking matters "into their own hands."

In justifying his decision to impose a custodial sentence under s.39(1)(d), the judge stated that the aggravated circumstances were such as to make this an exceptional case. These circumstances included, as listed by the judge: (a)the offender's degree of participation - he was the principal and only player in the offence; (b)the seriousness of the offence - possession of a loaded firearm with its serial numbers scratched off, with the young person being found with sandpaper and a knife, all being

extremely aggravating facts; –(c)the possession and transportation of the loaded gun with his unsuspecting grandfather beside him demonstrated a high degree of risk-taking and threatened the community's need for safety - if M.J. had felt he needed to use the gun, members of the public would have been in extreme danger; –(d)the potential for harm was reasonably foreseeable - even though M.J. was 17 years old at the time, he was capable of knowing that possession of a loaded firearm was inherently dangerous, and the potential for violence significant. In light of these aggravating circumstances, M.J. was subsequently sentenced to one year of a CSO followed by one year of probation.

Some cases were such that more than one gateway to custody was available. For instance, in *R. v. D.E.C.* (2008), the seventeen year-old first-time offender pleaded guilty to manslaughter in respect to a drunken night where he ended up being a co-accused in the beating of a relative. The judge stated that both (a)&(d) were relevant. He went on to express that gateway (a) was self-explanatory, given the violent circumstances of the offence. However, he also included gateway (d), explaining “D.E.C. committed the indictable offence of manslaughter with a number of aggravating factors and the imposition of a non-custodial sentence would not be consistent with the purpose and principles of sentencing” (Para 53).

The “risk” with this gateway is that “exceptional circumstances” will be used in a broader sense than Parliament intended, thereby undermining Parliament’s intention to reduce custodial sentencing rates. This appears to have been the case in *R. v. D.B.* (2007), although the judge blames Parliament’s construction of this section: “[t]he legislation is not helpful. It is so broadly crafted as to make it difficult to interpret in these circumstances” (Para 9). Perhaps it was indeed difficult to interpret, because this judge chose to exercise this gateway in regard to a thirteen year old youth who was a co-offender in a series of break and enters at various schools, two of the break ins involving arson. What makes this sentence appear especially punitive in nature, is that the sentencing judge for the co-accused felt a non-custodial sentence was appropriate, whereas the sentencing judge for D.B. disagreed with this:

“Counsel for the accused urged upon me the notion that **my colleague Judge Spracklin heard the case involving the sister who pleaded guilty to these charges**. The sister is two years older and in both cases was the more active principal person involved in the arson charges. **Judge Spracklin concluded that these cases were not so exceptional as to invoke the provisions of s. 39(1)(d). I am not bound by this decision, and while it is always desirable that rulings should be consistent in similar cases at the same level of court, it is possible for reasonable people to disagree**. This is such a case” (Para 20).

Unlike the other three gateways, the risk with gateway (d) is that it is in the judge’s discretion to decide what constitutes an exceptional case. Therefore, with this gateway lies more an enhanced likelihood of subjectivity, which in turn, always leads to more variance within case law. This is problematic considering Parliament’s remedy to the broad discretionary regime of the *YOA* was the more stringent guidelines of the *YCJA*.

## 5.2 Policy and Principles

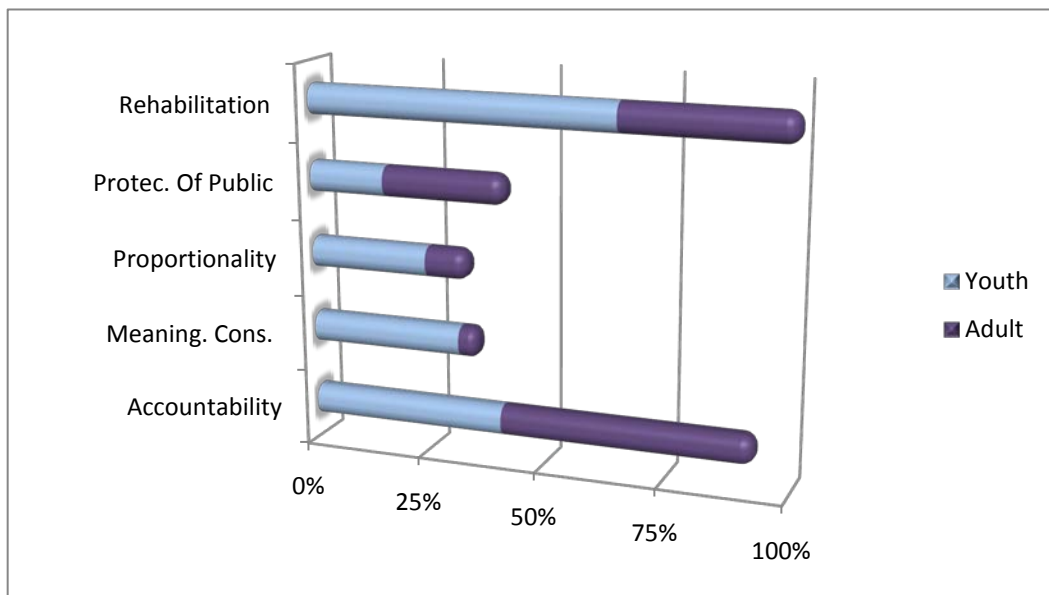
Section 38 of the *YCJA*, states the following:

*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** into society, thereby contributing to the long-term **protection of the public**.*

It is evident that judges are acknowledging and utilizing the purposes and principles of the *YCJA*; 80 percent of judges from all the cases in this sample made reference to s. 38 when weighing their options for sentence. However, this was often by way of focusing on one or two specific principles from the entire section. Considering how the main thrust of the *YCJA* is to emphasize *rehabilitation*, it is no surprise that this sentencing principle was most commonly applied for both youth and adult sentences. Judges referred to *rehabilitation* as a sentencing principle in approximately 65 percent of cases with a youth sentence and 57 percent of cases with an adult sentence.

*Accountability* was the second most frequent principle for both youth and adult sentences, at 41 percent and 52 percent respectively. Interestingly, the least frequently applied common sentencing principle for youth sentences was *protection of the public* (16 percent). For adult sentences, *meaningful consequences* was the least frequently identified sentencing principle (4 percent), followed closely by *proportionality* at 9 percent. This appears to demonstrate that adult sentences are coming from a more punitive perspective, whereas youth court judges who administer youth sentences are very cognizant of the purposes and principles of the *Act* by less frequently considering the Protection of the Public principle (see Figure 7).

**Figure 7: Sentencing Principles for Youth versus Adult Sentences**



The following is an examination of each sentencing principle and an illustration of how each is employed in the case law. As mentioned above, it seems the principles listed in s. 38 provide an array of options from which judges may pick and choose, as opposed to establishing an all encompassing approach to selecting a disposition as Parliament appears to have intended. Judges may single out and incorporate certain principles over others if they deem them to be more relevant to the case before them.

Numerous principles are set out in s. 38; however, they are not always applied in unison with each other as stated in s. 38. Instead, the provision is applied almost like an



all-you-can-apply buffet, wherein principles are picked or ignored at the discretion of the sentencing judge. As a result, certain principles take partial, or even complete, precedence, over others. It appears that the principles come from a vast spectrum of sentencing rationales, which results in a wide range of stances from which judges choose in crafting a sentence. As the Ontario Court of Appeal noted in *R. v. A.O.* (2007), the principles set out in s. 38 could apply in an individual *and* a societal sense, but keeping in mind these are principles governed by the *Act*, they should be applied in an “offender-centric” approach,

“ ...when the statute speaks of ‘accountability’ or requires that ‘meaningful consequences’ be imposed, the language expressly targets the young offender before the court: ‘ensure that *a young person* is subject to meaningful consequences’ (s. 3(1)(a)(iii)); ‘accountability that is consistent with *the greater dependency of young persons and their reduced level of maturity*’ (s. 3(1)(b)(ii)); ‘be meaningful *for the individual young person* given his or her needs and level of development’ (s. 3(1)(c)(iii)). Parliament has made it equally clear in the French version that these principles are offender-centric and not aimed at the general public” (Para 43, emphasis in original).

This is consistent with the approach to sentencing promoted by the Supreme Court of Canada in *R. v. B.W.P.* (2006). However, as will be demonstrated, this is not always the case. While it seems only natural that adult sentences will attract adult principles, these are still youthful offenders who are being sentenced by the court.

### 5.2.1 Proportionality

Proportionality as a sentencing principle serves as a deontological measuring stick for sentences. Specifically, s. 38(2)(c) of the *YCJA* dictates that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence. As one Ontario Court of Appeal judge interpreted, “[i]n the context of the *YCJA*, **proportionality must be seen as providing an upper limit on the sentence that can be imposed on the offender**” (*R. v. A.O.*, 2007, Para 44).

Within the case law, proportionality was the least-applied sentencing principle for adult sentences, and second-lowest for youth sentences. However, of all the Appeal cases that discussed sentencing principles, proportionality was the most common principle up for debate. Interestingly, all of these Appeal cases resulted in a reduction in the length of the original custodial sentence.

For instance, in *R. v. T.W.T* (2008), the 15-year-old youth appealed his 7 year CSO following his guilty plea to second degree murder. The sentencing judge had administered the maximum available youth sentence for this offence, and the youth argued that only the aggravating circumstances had been considered. The Alberta Court of Appeal allowed T.W.T's appeal on the grounds that the sentencing judge failed to give weight to the mitigating circumstances, and as such T.W.T.'s sentence was reduced to a 5 year CSO. The Appeal judge stated: “[I]n imposing the maximum sentence, it appears that the trial judge completely discounted the weight of the mitigating circumstances she identified...**it is not appropriate to start out with the maximum sentence, and then see if there are any mitigating factors that might reduce the sentence below that**” (Para 6). Therefore, the Appeal court concluded that “neither the crime nor the appellant rise to the level of gravity or culpability that would justify the maximum sentence. The reasons of the trial judge disclose errors of principle, and the sentence is demonstrably unfit” (Para 8).

In *R. v. J.S.* (2006), the 16-year-old first-time young offender appealed his sentence of a 2 year CSO plus 44 days of pre-trial custody following his conviction for robbery and using an imitation firearm in the commission of an indictable offence. J.S. argued that the sentence was harsh and excessive. The Ontario Court of Appeal allowed the appeal, stating the sentencing judge “ignored the *YCJA* and **focused almost entirely on the gravity of the crime and the need to protect the public**” (Para 19). While the Appeal judge agreed that a non-custodial sentence would be inconsistent with the principle of proportionality, the sentence was effectively reduced to a 15 month CSO.

In *R. v. C.S.U.* (2006), the 16-year-old Aboriginal youth appealed his 24 month CSO following his guilty plea on 14 charges, the most serious being sexual assault. The Saskatchewan Court of Appeal allowed his appeal on the basis that the sentencing judge made several errors and ultimately found the sentence to be excessive, thereby reducing it to an 18 month CSO. In acknowledging that despite the youth's chaotic and abusive upbringing, as well as his diagnoses of ADHD and partial fetal alcohol syndrome, he had a close relationship with his grandmothers who cared for him. The Appeal Court expressed **"a real concern with the length of the sentence imposed**, particularly as it has the effect of a prolonged separation of this young person from the family and community supports so necessary to his eventual rehabilitation and reintegration into the community" (Para 13).

Thus, the case law suggests that when it comes to the principle of proportionality, the higher courts have been required to "dial down" sentences that have breached this principle and reiterate that youth have a diminished level of maturity and moral culpability. This judicial clarification was required because it seems that when proportionality was applied in the case law, it has been to justify a more punitive response. For instance, in *R. v. A.M.* (2007), the 14 year old youth pled guilty to 10 counts of breaching probation and one count of theft. A.M. had never been sentenced to custody before; however, the Newfoundland judge declared, "the imposition of a non-custodial sentence would fail to hold A.M. accountable and it would, **because of the number of offences involved and the number of occasions upon which they occurred, fail to constitute a proportionate sentence,** " (Para 35). As a result, A.M. was issued her first CSO, to be served for 3 months.

#### **5.2.1.1 Proportionality with an Edge**

While proportionality could perhaps be considered to be the most straightforward sentencing principle, it encompasses a certain edge. In deciding between administering a youth or an adult sentence, at the very basic level the decision

comes down to proportionality. Has a youth committed such a serious violent offence that it warrants a punitive “upgrade” to an adult sentence?

In *R. v. L.A.B.* (2007) the judge balanced the principle of proportionality in reference to an adult sentence. In this case, L.A.B. was 14 years old when she smothered her 3-year-old foster brother to death, at her foster parents’ home. She pled guilty to second degree murder. Before issuing a youth sentence, the judge considered an adult sentence, as per the Crown’s recommendation. In the end, the judge decided against one because “in my view an adult sentence of life imprisonment, **although clearly proportionate to the gravity of the offence, would be disproportionate to the moral culpability of this young person**” (Para 72), and accordingly, L.A.B. was issued a 7-year CSO.

### 5.2.2 Protection of the Public: In What Sense?

Protection of the public (POP) was another principle that appeared to be applied in two different ways, and therefore may have either a more punitive or a more rehabilitative impact on sentencing. For instance, in *R. v. C.G.R.* (2006), the youth was charged with aggravated assault, B & E, and theft of a vehicle. He was sentenced to an 18-month CSO. The judgment was very brief, and the sentencing judge had little more than this to say in his reasons, “You keep acting like that, either you or somebody else is going to get seriously hurt or even killed, so you have to be kept in jail for a while for your safety and the safety of the public” (Para 1). A similar inference was made by the judge in *R. v. S.G.F.* (2007). S.G.F. pleaded guilty to sexual interference of a four year old girl, as well as breaching probation, following two incidents arising from when he was babysitting and asked the child to touch his penis. S.G.F. was sentenced to a 6 month CSO, followed by a 12-month ISSP order, and the judge stated “I am convinced that no sentence in the community would properly protect the community...Until his impulsivity is dealt with, **the community has a right to be protected** from this young person's criminal and often violent outbursts” (Para 20-21). The statements of each judge suggest that POP was the only real rationale for imprisoning these youth.

While the two above-noted cases dealt with incidents of varying seriousness, individual youth are still being treated differently. When it comes to youth, POP is not intended to be interpreted in a literal sense as it is for adults (see: s. 718(c) of the *Code*). In fact, s. 50 of the *Act* specifically excludes, with certain exceptions, the fundamental sentencing principles in Part XXIII of the *Code*. Therefore, POP is to be attained through the application of the other sentencing principles; “the protection of the public is to be achieved, not by the separation of the Young Person from the public but by the imposition of meaningful consequences that educate the Young Person as to the nature and gravity of his actions” (*R. v. Z.J.L.*, 2007, Para 17).

In *R. v. J. S.* (2006), the Ontario Court of Appeal was adamant in making this distinction. In this case, the 16 year old first-time young offender appealed his sentence of a 2 year CSO plus 44 days of pre-trial custody following his conviction for robbery and using an imitation firearm in the commission of an indictable offence, arguing that it was overly harsh and excessive. The Ontario Court of Appeal allowed the appeal, stating the sentencing judge “ignored the *YCJA* and focused almost entirely on the gravity of the crime and the need to protect the public” (Para 19), and the sentence was effectively reduced to a 15 month CSO. The Appeal Court critiqued the sentencing judge for relying on *R. v. Wilmott*, (1967) which held that the primary purpose of sentencing is the protection of society. *Wilmott*, however, “involved an adult offender, not a young person. Moreover, it **predates both the statement of the purposes and principles of sentencing for adults now found in s. 718 of the *Criminal Code* and the new regime for dealing with the sentencing of young persons introduced through the *YCJA***” (Para 17). It is astounding that a youth court judge could even make reference to such an outdated case. Only punitive measures could be expected to come of that trial judge’s approach to the protection of the public.

Unfortunately, this misinterpretation of POP is even more prevalent with adult sentences for youthful offenders, which often altogether exclude reference to the *YCJA*’s intended implementation of POP. In *R. v. Bird* (2008), the 17 year-old Aboriginal female was sentenced as an adult to 12 years incarceration for manslaughter,

aggravated sexual assault, and kidnapping. The judge held, “at this time Miss Bird must be separated from society for the protection of the public” (Para 91).

Even when judges have good intention to encompass all of the principles in s. 38, POP still gets interpreted the wrong way. For instance in *R. v. D.R.H.* (2006), the judge stated “at first blush it would appear that the young person should be placed in custody for a lengthy period of time - that would most certainly protect the public ...However, that is not the sole purpose of sentencing...a young person” (Para 22-23). So, while the judge is correct in asserting that other principles need to be considered, his application of POP is incorrect. In *R. v. A.J.D.* (2009), the judge was weighing the imposition of a youth or adult sentence, and upon reviewing ss. 38 and 72, decided, “the main difference between the two sentences would be that A.J.D. would be under a longer period of community supervision once released on parole under the proposed adult sentence. That is certainly a factor which one can consider for the long-term protection of the public” (Para 50). While in this case, the judge does not consider incarceration as the way to guarantee POP, the literal adult interpretation is implied because A.J.D. would be under supervision for a longer period, which the judge took to mean would thereby extend the public’s protection. Like accountability, POP is an ambiguous principle that may either promote a more punitive sanction or a more rehabilitative sanction. What makes this troublesome is the two interpretations of POP embody differing and conflicting approaches, as reflected in the continuum of youth justice models (see Figure 1). Depending on which approach is adopted, the court tilts significantly towards Crime Control or towards a Welfare-based rehabilitative approach depending on how POP is interpreted. This discrepancy will only create more variability rather than uniformity among sentences, especially considering how the two interpretations of POP lie at opposite ends of the continuum.

### **5.2.3 Meaningful Consequences: Deterrence in Disguise?**

While deterrence will be discussed in the next chapter, it is necessary to address it here because it can be argued that the sentencing principle of meaningful

consequences (MC) is sometimes used as a guise for deterrence. In *R. v. B.W.P.* (2006), the Supreme Court of Canada ruled that deterrence is an adult sentencing principle that should not be considered as a factor in youth sentencing.

When considering the principles set out in s. 38, it has been asserted that while they are to be applied collectively, each one has its own purpose, “Parliament has used the different terms and is presumed to have intended different meanings” (*R. v. A.O.*, 2007, Para 45). With that being said, the Ontario Court of Appeal in *R. v A.O.* (supra) distinguished MC from other sentencing principles, “One obvious point is that meaningful consequences cannot be synonymous with rehabilitation and reintegration” (Para 45). This implies that the purpose underlying MC is more punitive in nature since it does not serve the purpose of rehabilitation and reintegration. Indeed, as has been demonstrated in the data, MC often serves as the principle that will justify a proverbial “wake up call” used to show a youth there are serious consequences for their actions. MC implies that these consequences will have meaning, in that they will hopefully resonate with the youth in such a way as to discourage (or deter?) the youth from committing criminal acts in the future. These consequences are often referred to as “messages” that need to be communicated to the youth, and as the data shows, such “messages” are also imposed for adult sentences for youth, but via the principle of deterrence. The question then becomes, is MC simply deterrence in disguise?

According to the Supreme Court of Canada case *R. v. B.W.P.* (2006), deterrence is defined as “the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct” (Para 2). Despite the Supreme Court’s conclusion that deterrence is an inappropriate sentencing principle under the *Act*, the Supreme Court did not rule out the possibility that a sentence under the *Act* may have a deterrent effect. That being said, the purpose of MC is similar to that of deterrence. In fact, as one judge for the Alberta Provincial Court so bluntly put it, “**if the principle of specific deterrence is dealt with at all then it would have to be found in the words “meaningful sanctions”**” (*R. v. Z.J.L.*, 2007, Para 14). However, the Alberta Court of Appeal attempted to soften this interpretation in *R. v. M.L.M.* (2008):

“While the term ‘meaningful consequences’ is notionally similar to the concept of specific deterrence, there is a distinction between these two concepts. ‘Meaningful consequences’ seemingly requires that a sentence be based on the young person's past conduct, while specific deterrence is intended to discourage future conduct considered to be inappropriate. Although **there may only be a thin line between imposing a "meaningful consequence" and creating a deterrent effect**, a sentence will be appropriate so long as it is intended to ensure the long-term protection of the public by focusing on the rehabilitation of the young person, without regard to any consequential deterrent effect such a penalty may have” (Para 14).

The mere fact that there has been judicial debate about these two sentencing principles concedes there are parallels between MC and deterrence. In fact, in some cases they are used in a completely synonymous fashion. In *R. v. I.C.* (2007), the judge cited a case from 2006 where the Alberta Court of Appeal determined “Some custody is also important to teach this respondent some **consequences**, and so offer some measure of individual **deterrence**” (Para 20).

However, the majority of cases do not establish such a blunt connection. Instead, judges refer to MC to instil a “lesson”, and custodial sentences are used to drive their point home. The British Columbia Court of Appeal established that sometimes this is necessary. In *R. v. R.I.R.M.* (2008), the Court of Appeal dismissed the accused’s argument that, contrary to the Supreme Court Decision in *R. v. B.W.P.* (2006), deterrence could still be considered a central factor in sentencing.

“The sentencing judge talked directly to the appellant when sentencing him. This was a lecture intended to bring home to him the need to modify his behaviour and contained warnings of what unwanted consequences awaited him as an adult offender, which he was soon to become, if he did not change his ways. I am unable to see in any part of the reasons that the judge was doing anything other than attempting to ‘ensure that the [appellant] is subject to meaningful consequences for his ... offence’ in accordance with s. 3(1)(a)(iii) of the *Act*. His remarks clearly have that purpose” (Para 10).



In *R. v. K.C.R.* (2006), the youth was a first-time offender who pleaded guilty to assault with a weapon, and was sentenced to a 30 day CSO followed by one year of probation. K.C.R. and six other youth swarmed and struck the victim with glass beer bottles, resulting in lacerations to the victim's ears and neck. Upon weighing a custodial sentence, the judge deliberated, "a non-custodial sentence will not be a meaningful consequence for K.C.R....K.C.R. continues to minimize his responsibility, continues to exhibit violent, aggressive and intimidating behaviour, and lacks remorse for his actions. He appears to have **little appreciation for consequences** of his actions" (Para 23). Likewise, the judge in *R. v. M.A.H.* (2006) stated, "It is our view that these principles dictated a long term custodial sentence in this case, to accomplish the task of **bringing the seriousness of the offence to the respondent's attention**, and provide meaningful consequences **to reinforce societal values...**" (Para 11).

This is even more apparent when judges are using s. 39(1)(b) as a gateway to incarceration where youth are repeatedly failing to comply with court orders or non-custodial sentences. In justifying his decision for a custodial sentence, the judge in *R. v. S.K.* (2007) cited a 2006 case from Manitoba's Court of Appeal which chose to increase a youth's sentence. "When the sentence imposed is compared to the prior sentences the young person had previously received, **we have to question how it could be seen to have meaningful consequences for him. It was a proverbial 'slap on the wrist' and clearly unfit**" (Para 17). The judge in *S.K.* was clearly addressing what he considered to be "an ongoing difficulty which the Court faces on a regular basis, i.e., what is the appropriate sentence to be imposed upon a young offender who refuses to comply with the Court's orders?" (Para 3). Similarly, in *R. v. M. (S.A.)* (2007), the judge decided that, after multiple failures to comply with non-custodial sentences, it was time for the 14 year-old youth to serve a custodial sentence. In sentencing *M. (S.A.)* to a 30 day CSO, the judge stated, "I felt that the imposition of a short period of closed custody would **bring the message to this accused that the risks cause further consequences in the future** should he continue to breach his probation orders and I sentence the accused

accordingly, as indicated above” (Para 16). This statement is resonant of the “short, sharp, shock” so many judges were issuing under the YOA.

Where the line between MC and deterrence appears to get blurred is when judges speak of sending youth a “message” about the repercussions of their actions, and as a result a custodial sentence is issued. For instance, in *R. v. T.F.* (2008) the 14-year old Aboriginal male was sentenced to an 8 month CSO for sexual assault after twice having sexual intercourse with the 13-year old complainant. The judge stated, “the punishment must reflect the seriousness of the offence committed by T.F. ...I believe that if I were to impose anything less than custody, I would not be adequately addressing the need for...meaningful consequences. I think that I would be **sending T.F. the wrong message**” (Para 31). Similarly, in *R. v. K.G.S.* (2009), the 16-year old Aboriginal youth was sentenced to an 11 month CSO after pleading guilty to 20 property and administrative offences. The judge concluded, “the need to impose meaningful consequences – demands that consideration be given to the use of a custodial sanction in the circumstances of this case. These objectives cannot be met by the imposition of probationary measures and community work service alone. **Such a sentence would send the wrong message** to K.G.S.” (Para 36).

The parallels between MC and deterrence only become more apparent when one examines how judges send a “message” for adult sentences for youth. In *R. v. B.C.F.* (2008), a seventeen year old youth was sentenced as an adult to nine years incarceration upon pleading guilty to attempted murder. The judge stated “BCF’s crime **calls for a resounding message**” and then elaborated, “in saying this, I mean that B.C.F.’s sentence must unmistakably reflect the factors of denunciation and deterrence” (Para 43). Similarly, in *R. v. Lights* (2007), the seventeen year old gang member was sentenced as an adult to eight years incarceration for aggravated assault, break and enter of a dwelling house, robbery, use of a firearm, breach of recognizance and breach of probation. Upon making reference to deterrence, the judge stated “**sentences must send the message that this type of behaviour will not be tolerated** and will be met with stiff sentences when offenders are apprehended” (Para 56). These cases illustrate that

“sending a message” invariably has a deterrent connotation to it. The difference is that, for youth sentences, judges appear to be veiling this connotation under MC. This is not to say that punitive measures cannot be used for youth, or that the *Act* excludes any penal effects. The message is simply that MC is a loaded term, and can be used in a way that is synonymous with deterrence, or at the very least, in a manner that can be expected to convey a deterrent effect.

Moreover, in numerous cases, MC was used to justify, or support, a custodial sentence. As one judge stated, “the deprivation of one’s liberty is generally the most meaningful of consequences possible” (*R. v. Z. J.L.*, 2007, Para 17). While this is true, justice is only intact if these custodial sentences are not being imposed for solely punitive purposes, as the Supreme Court of Canada has clearly stated in *R. v. B.W.P.* that deterrence will always serve to increase the penalty or make it harsher.

#### **5.2.4 Accountability: A Loaded Principle**

Accountability is a central concept in the sentencing of young offenders. Section 3(1)(b) of the *YCJA* recognizes a clear intention on the part of Parliament, and a primary objective and purpose of the *YCJA*, is to create a separate justice system regime for youths which is founded on the notion that youth, because of their age, have “heightened vulnerability, less maturity, and a reduced capacity for moral judgment which entitles them to a presumption of diminished moral blameworthiness or culpability” (*R. v. D.W.*, 2009, Para 31).

However, because age, and therefore maturity and development, occur on a continuum, the sentencing principle of accountability can act as the controlling factor when judges are contemplating whether to administer a youth or adult sentence. As the judge stated in *R. v. A.J.D.*, “It follows that personal accountability of the young offender is identified to have a more specific role under s. 72, than it might in other sentencing decisions”(2009, Para 29).

While adult sentences will be discussed further on, it is still noteworthy to look at accountability as a sentencing principle, and identify the fine line that it presents when it comes to youth, considering their greater dependence and reduced level of maturity. In *R. v. D. B.* (2008), the Supreme Court of Canada found s. 72 (1) of the *Act* to be unconstitutional. That provision placed the onus on youth to prove that an adult sentence for a presumptive offence was *not* warranted. The court ruled that this was a violation of the principles of fundamental justice considering the presumption of diminished moral culpability to which youth are entitled as per s. 3(1)(b)(ii) of the *Act*. Although in this case the Supreme Court was not tasked to formulate a definition of accountability, assessing the concept as it relates to youth was an important aspect of the judgment. The Supreme Court stated: “Young people who commit crimes have historically been treated separately and distinctly from adults. This does not mean that young people are not accountable for the offences they commit. **They are decidedly but differently accountable**” (Para 1).

One appeal case from the sample aided in clarifying the definition of this principle. In *R. v. F. M.* (2008) the two youths, F.M. aged 15 years and T.J.S aged 13 years, were charged jointly for second degree murder, robbery, and aggravated assault. The trial judge acquitted the youths of second degree murder but instead convicted them of manslaughter and sentenced F.M. as an adult to 6 years imprisonment and T.J.S. as a youth to a 3 year CSO. On appeal from the acquittals, the Crown argued that the trial judge erred in law on a number of factors regarding the foreseeability and intent of these youth. The British Columbia Court of Appeal dismissed the Crown’s appeal for the following reasons. The appeal court conceded that the trial judge did not refer to young people’s lesser capacity to form intent in a generalized way so as to apply to *all* young people *carte blanche*, but instead, he tailored his statements to youths such as F.M. and T.J.S.. “Here, it cannot be forgotten that the accused were 13 and 15 years of age at the time of the offence. The lack of life experience and the relative inability to foresee serious consequences accompanying an act are hallmarks of youth. These considerations convince me that it is inappropriate to apply the inference the Crown

urges to conclude these two actually knew they were likely to cause Mr.Thandi's death”  
(Para 16, emphasis added by Appeal judge). This emphasis was given in order to demonstrate that

“Just as it is common knowledge that intoxication can affect the ability of persons to foresee the consequences of their actions, **it is common knowledge that lack of life experience affects the level of maturity and can affect the ability of youths to foresee the consequences of their actions.** This is not to say, however, that youths by virtue of their age alone have diminished capacity. Rather, their age and level of maturity are relevant considerations for the trial judge in determining whether or not it is appropriate to draw the common sense inference that they actually intended the natural consequences of their actions in the circumstances of a given case. Whether or not the inference is ultimately drawn will depend on the evidence before the trial judge” (Para 24).

In other words, age does not serve as an automatic “immunity card” for taking responsibility. Maturity develops on a continuum, and the more it can be demonstrated that a youth was able to foresee and comprehend the consequences of their actions, the more a youth will have to be held accountable for them.

Other attempts to define accountability have been made in the case law. For instance, in *R. v. A.O.* (2007), the Ontario Court of Appeal drew a parallel between accountability and the adult sentencing principle of *retribution*:

“In our view, for a sentence to hold a young offender accountable in the sense of being meaningful it must reflect, as does a retributive sentence, "the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct". We see no other rational way for measuring accountability” (Para 47).

The risk with this interpretation is its punitive connotation. For instance, following this statement, the appeal judge quoted a passage from the sentencing judge when rebutting A.O.’s argument that the sentencing judge incorporated the adult sentencing principle of denunciation through applying accountability, contrary to the Supreme Court Decision in *R. v. B.P.N.* (2006),

“Society in general expects an element of punishment or retribution in almost every sentence for crimes, including for offending behaviour of young persons. The *YCJA* also acknowledges retribution as a factor in the youth criminal justice system - see various subsections of sections 3 and 38. Accordingly, while the protection of the public through effective rehabilitation and reintegration into society is the most important element when considering young persons' accountability to society in general, it is not the only consideration. **The court must also consider whether society in general would view the sentence as providing appropriate punishment or retribution for the young person's offending behaviour.**

**It is this approach to accountability that I have applied** in considering the Crown's application for adult sentences for [A.O.] and [J.M.]” (Para 51).

Immediately following this statement, the appeal judge admitted that “some of the language in this passage would better have been avoided”, but concluded that the sentencing judge “principally had in mind the normative character of the appellants' conduct when he was considering how society might view the sentences and when he adverted to accountability to society in general” (Para 52). Indeed, the case of A.O. addressed the imposition of an adult sentence, and a pattern seems to have emerged from the case law that suggests accountability is typically interpreted in a more punitive way when imposing an adult sentence.

*R. v. D.E.* (2008) was another case that imposed an adult sentence; the 17 year old youth and some of his friends attended a party for the victim, and the accused youth ended up stabbing the victim six times with a folding knife, which resulted in the death of the victim. The accused was charged with second degree murder and issued an adult sentence of life imprisonment with no chance of parole for 7 years. In his judgment, the judge stated, “both the seriousness of the offence and the accused's role in it rise to such a level that a youth sentence would not in the Courts view be of sufficient length to hold him accountable” (Para 43).

In *R. v. Lights* (2007), the youth was 17 years old when, acting as a gang member, he participated in a home invasion which resulted in the near fatality of a man whom he shot. Lights pleaded guilty to aggravated assault, break and enter of a dwelling house,

robbery, use of a firearm, breach of recognizance and breach of probation. He was sentenced as an adult to 8 years in prison less 2 years credit for time spent on remand. In choosing an adult sentence, the judge declared, “Given Mr. Lights' record, including a recent custodial sentence for another home invasion robbery in which he pointed and then hit someone with a loaded handgun, a youth sentence would trivialize Mr. Lights' serious pattern of offending. **Far from holding Mr. Lights accountable for his actions, a youth sentence would largely absolve him of responsibility**” (Para 48).

Before coming to this conclusion, the sentencing judge in *R. v. Lights* cited the past interpretation of accountability in the context of retribution and further added “This notion of retribution or accountability is also reflected in the principle of proportionality, recognized as the paramount sentencing principle in s. 718.1 of the *Criminal Code*” (Para 44).

The application of accountability appears to take on a more forgiving tone, however, when it comes to the provision of a youth sentence. Most cases recognize the diminished moral culpability of youth, as well as the troubled backgrounds they so often come from. For instance, *R. v. K.V.* (2009) involved a 17 year old female with an extensive criminal record in which she pled guilty to three counts of aggravated assault and one count of uttering threats. Despite her negative track record, the judge chose to focus on K.V.'s troubled upbringing, which involved an alcoholic mother, a violent father, and the instability of many foster homes. The judge stated, “when sentencing a seriously misguided young person **it is crucial to maintain balance and not become unduly focused on those negative aspects of the young person's behaviour which are so painfully obvious because they constitute the central reason why the young person came before the Court in the first place**” (Para 20). Similarly, in *R. v. J.A.P.* (2008), the youth was charged with first-degree murder in the killing of his own mother, and still the judge emphasized “this offence was very much a product of the dysfunctional family background and the defendant's dependency and reduced level of maturity. The defendant was very young, even in the context of age parameters of the *YCJA*” (Para 31). Finally, in *R. v. A.J.D.* (2009) the Nova Scotia Supreme Court of Justice held that “I

am bound to assess accountability in a manner that is consistent with the greater dependence of young persons and their reduced level of maturity. As I stated previously, A.J.D. was functioning at a low level of maturity when he committed the present offences” (Para 50). In each case, the sentencing judge referred to accountability, but not as a justification for elevating a penalty. Accountability was found to be tempered by a consideration of the background factors present in the offender’s history.

Moreover, when it comes to youth sentences, accountability may be perceived as being achieved in a manner conducive to rehabilitation. For instance, in *R. v. C.S.* (2008) the judge stated “I am strongly of the view that accountability is to be determined not only by the length but also by the rehabilitative intensity that a sentence may provide” (Para 66). Similarly, in *R. v. Ferriman* (2006), the sentencing judge affirmed “to hold a young person ‘accountable’ the sentence must achieve two objectives. It must be long enough to reflect the seriousness of the offence and the offender's role in it, and it also must be long enough to provide reasonable assurance of the offender's rehabilitation to the point where he can be safely reintegrated into society” (Para 38). The sentencing judge sought support for this approach in the judgment of the Ontario Court of Appeal in *R. v. A.O.* (2007, Para 55), as well as the Nova Scotia Court of Appeal in *R. v. Smith* (2009, Para 39), among others.

Clearly, accountability is a loaded term in the sense that, depending on whether it is being applied to a youth or adult sentence, it will hold a different meaning. As the Supreme Court of Canada held in *R. v. B.W. P.* (2006), the principle of accountability under the *YCJA* mandates an approach to sentencing that is "offender-centric", whereas it has been illustrated above, and will be elaborated further on, adult sentences expand the principle of accountability to a more “offence-centric” meaning, effectively reducing the immunity that the *YCJA* provides.



### 5.2.5 Rehabilitation: The Bottom Line

It is no surprise that many of the youth being held in custody battle a constellation of underlying problems. Judges often acknowledged this dilemma in their judgments when discussing the youth's situation. For instance, in *R. v. D.J.B.* (2007), the Newfoundland judge stated, "As with most young offenders, many of DB's problems and the underlying causes of his criminal activity can be traced back to his family circumstances. Family poverty and substance abuse have had an ongoing impact upon him as it does with most young people. **A consequence of such an upbringing is proceedings such as this one**" (Para 52). In *R. v. K.V.* (2009), the British Columbia judge echoed these sentiments, "KV's chaotic upbringing is no doubt **a significant contributing factor not only to her emotional imbalance and her problems with substance abuse, but also help to explain her difficulties complying with the criminal law**" (Para 6), as did the Nunavut judge in *R. v. K.G.S.* (2009), "Many of the youth in conflict with the law come from disadvantaged backgrounds. They struggle with crushing poverty and very limited means of social or economic advancement. **Many of these youth come from chaotic, dysfunctional homes where there is no consistency, little discipline and few role models**" (Para 21).

Therefore the *YCJA* puts the principle of Rehabilitation at the forefront, the initiative being that youth are just that, youth, and they have the potential to change as the cement is not yet quite dry: "Youth is a factor in mitigation because it holds the best possibilities for reform" (*R. v. B.C.F.*, 2008, Para 41). As the Supreme Court of Canada has emphasized, "Parliament has specifically and expressly directed how preventing the young offender from re-offending should be achieved, namely by addressing the circumstances underlying a young person's offending behaviour through rehabilitation and reintegration..." (*R. v. B.W.P.*, 2006, Para 39). Thus, the driving force of rehabilitation should be to treat youths' underlying issues so as to redirect their lives before becoming adults.

When examining the case law, Rehabilitation was the most commonly applied sentencing principle for both youth and adult sentences (65 percent and 57 percent respectively). This poses as a promising indication that the *YCJA* is being implemented as Parliament had intended. However, it was not a straightforward application; rehabilitation was sliced in several different ways when applied to a custodial sentence.

As will be illustrated, rehabilitation was perceived to be both hindered by and fostered by, time in custody. As well, despite the *YCJA*'s strong precedence of rehabilitation for youth, this principle was at times debated in terms of a youth's *rehabilitative potential*. Moreover, in some instances, even the importance of rehabilitation itself was up for negotiation.

#### **5.2.5.1 Custody: When Efforts to Promote Rehabilitation in the Community Fail**

One of the main mandates of the *YCJA* has been to reduce the rate of custodial sentences among youth, however as the case law demonstrates, there are instances when custody is necessary to secure rehabilitative measures. This often becomes the consensus when community-based efforts to promote rehabilitation have failed. For instance, in *R. v. K.G.S.* (2009), the judge employed gateway 39(1) (c) (exceptional circumstances) in laying the justification for a custodial sentence, despite the fact that KGS did not have a criminal record, nor had he been found guilty of a violent offence for the case at hand. The judge stated, "The youth has not responded to early attempts at diversion. The youth has not responded to the Court's attempts to provide supervision and control through structured release conditions. Absent some willingness to respect a court order, **probation cannot effectively provide the structure that is needed to turn this young life around**" (Para 33).

Similarly, in *R. v. M.A.H.* (2006), the 17 year old youth was found guilty of armed robbery involving a gun. This was his seventh sentence, and his second sentence for a violent offence. Some of his offences were committed while serving previous sentences. The Saskatchewan Court of Appeal judge stated, "The inescapable conclusion is that at present **this young person cannot be controlled and cannot receive the treatment**

**programs he clearly needs in a non-custodial setting. While in custody...he has been able to complete a number of academic credits”** (Para 6).

*R. v. M.B.* (2007) was another case marked by an escalation of unlawful conduct, to the point where the pre-sentence report read that MB was “beyond parental control” (Para 17). M.B., a 16 year-old female, was sentenced to a 6-month CSO and 12 months of probation for mischief and five counts of failing to comply with probation orders. The Newfoundland judge declared:

“The preferred approach to the sentencing of young offenders in most instances is to seek their rehabilitation through a community based sanction. However, as this case illustrates, this is not always a realistic option. **Some young offenders require a more structured environment for rehabilitation to have a plausible likelihood of success...** It is clear that the only realistic chance of rehabilitation for her resides in a custodial setting and in a sentence of sufficient length to allow the means employed in custody to encourage rehabilitation an opportunity to succeed” (Para 22).

In *R. v. D.G.J.* (2008), the 17-year-old youth was sentenced to a 30-month CSO for multiple charges of aggravated assault and a series of firearm offences. The judge made mention of the youth’s stable and supportive family upbringing as well as his positive behaviour while on remand and held, “his behaviour and attitude towards legitimate authority has improved since the time he has been at Brookside. He is a person of great potential, heretofore wasting. **Incarceration will ensure that potential will be well on its way to being fully realized by the time he is released”** (Para 12).

Therefore, not only is custody necessary when community-based sentences fail to rehabilitate youth, but custody can provide the structure required to assist in putting youth on the right track. Therefore, for particularly troubled and chronic young offenders, “**meaningful progress in counselling and education can only be achieved in a custodial setting**” (*R. v. M.A.H. supra*, Para 12). Furthermore, there comes a point when even the most stable of homes cannot cope with the challenges of young offenders, and custody becomes viewed as necessary to provide the discipline and resources needed to give these youth a chance to re-route their delinquent paths.

### 5.2.5.2 Custody: An Escape from Outside Influences

Custody is also viewed as fostering rehabilitation by separating youth from the negative influences (peers, gangs) that affect their choices and behaviour. Sometimes these negative influences include a youth's parents. In, *R. v. D.J.B.* (2007), the youth was a troubled 14 year old who, born into a family of mental health and addictions issues, had been found to have traces of narcotics in him at the time of his birth which resulted in him being incubated to control his withdrawal symptoms. In that case, D.J.B. was sentenced to an 8-month CSO for two charges of escaping lawful custody and three charges of failing to comply with probation orders. The Newfoundland judge concluded, "DB's rehabilitation cannot be achieved in the community... **DB requires extensive professional intervention and counselling over an extended period of time**" (Para 56).

In *R. v. S.N.G.* (2007), the 17-year old youth was diagnosed with Asperger's Syndrome at a young age and was raised in a household of domestic violence, gambling addiction, and possible alcoholism by both parents. Despite having no previous criminal record, S.N.G. was sentenced to an 18-month CSO for committing, *along with his father* and two other men, a break and enter, an assault causing bodily harm, and possession of a weapon for the purpose of committing an indictable offence. The Nova Scotia Court of Appeal judge stated,

"The period of custody has to be of a length that is meaningful enough to ensure that Mr. G. receives the programs of rehabilitation that I know can be made available to him at the Youth Centre in Waterville. The IWK team is...on-site to provide one-on-one and group assistance to Mr. G. that he is not going to get in the community and - to be perfectly blunt about it - that he's not going to get inside his father's home (Para 12)...**leaving the appellant with his father would be detrimental to the appellant's rehabilitation** (24) ...the appellant's rehabilitation called for a custodial sentence" (Para 26).

In the case of *R. v. J.H.* (2006), a group of older peers were a negative influence for the youth. J.H. was sixteen years old when he and an adult co-accused committed a home invasion and shooting. Charges for J.H. included breaking and entering, attempted murder of one of the occupants, robbery, and discharging a handgun intending to

wound. J.H. was found guilty of all the charges but for attempted murder and issued a 15 month CSO followed by a 9 month ISSP order. In discussing the custodial portion of the sentence, the judge stated, “J.H. **needs to remain separated from the young men, with whom he has committed very serious crimes in the past**” (Para 37). Furthermore, the pre-sentence report noted that during his time on remand, J.H. had “done exceptionally well in all areas of the custodial setting including life skills, recreation, programming, school, and counselling” (Para 36).

Thus in some cases, judges are of the view that custody can be considered beneficial to a youth’s rehabilitation by providing supervised and structured programs, and also by providing a more isolated environment that will separate youth from their negative influences.

### **5.2.5.3 Custody Culture Going against the Grain of Rehabilitation**

While custody can grant the benefit of separating a youth from their negative influences, the reality is that there is a certain custody culture that exists, and very much like adult prison, the “bigger fish” can provide a whole new opportunity for youth to learn about criminal activity, including gang membership. It cannot be ignored that custody can have a variety of negative effects such as institutionalization, victimization, and negative peer influence as one tries to assert themselves in the custody culture.

In deciding whether to issue a sentence of open or closed custody in *R. v. K.V.* (2009), the judge considered,

**“KV is already aware of the place which she now holds in the institutional hierarchy**, having been a resident of the same facility for a year. It seems to me that to allow her to continue to circulate freely amongst the general population in the facility would, in the circumstances, not only risk the safety of others but also jeopardize the progress which KV herself appears best capable of making when working on her own, especially in her academic endeavours” (Para 43).

Similarly, in *R. v. D.V.* (2007), the judge was considering an adult sentence based on D.V.'s lengthy and violent criminal history. In the case at hand, D.V. pled guilty to robbery while using a firearm. The judge noted,

“In custody his behaviour has been problematic...there have been 18 disciplinary infractions noted. Eleven of them involve assaults by Mr. D.V. on other youths or by other youths at his direction. **These assaults have been motivated by Mr. D.V.'s desire to be the 'top dog' in the institution** and a number of them were very significant assaults” (Para 20).

Finally, in *R. v. A.J.D.* (2009), the 16-year-old youth was on release from remand for charges that included robbery when he purchased some knives, went to a school dance, and stabbed four security guards. While on remand for the current charges, A.J.D.'s behaviour was actually deemed to be quite good, to the point where he was serving as a positive role model for younger inmates. The judge noted, “**inmates charged with a serious offence such as attempted murder automatically acquire a 'certain status' at institutions such as NSYF. They are often looked up to by younger or lesser offence inmates**” (Para 12). However, in this case A.J.D. was not taking advantage of such status, and instead had been described as a model inmate. Unfortunately, positive examples such as these among serious violent young offenders are more the exception than the rule.

#### **5.2.5.4 Custody: Rehabilitation versus Reintegration?**

While Custody may provide the necessary structure to enforce rehabilitative measures, it is still not considered the most ideal approach for rehabilitation due to the very real effects of institutionalization. This makes for a delicate balancing act between rehabilitation and reintegration.

Parliament recognized this dilemma by having crafted s. 94 of the *YCJA*, which provides judges with some flexibility when administering a CSO. If a youth has demonstrated significant progress in custody, then s. 94 permits an early release from custody into the community, thereby altering the “two thirds, one third” formula for a

CSO. As the judge in *R. v. C.S.* (2008) considered s. 94 she stated, “a 2 year custody and supervision order could result in **the majority of the sentence being served in the community, thereby addressing the concerns regarding institutionalization**” (Para 68). While C.S. had participated in a group attack on a female victim, she was only 14-years-old at the time of the offence, and the judge was concerned for this troubled young offender in respect to time spent in custody resulting in the judge considering the role of s. 94:

“one must be mindful of striking a balance between accountability and socialization but also **taking care to avoid institutionalizing C.S. during formative years when there is opportunity to challenge and re-structure her antisocial attitudes.** As a general premise, **the longer someone stays in an institution the greater the erosion of their social skills**” (Para 38).

Reintegration is not always compatible with custodial rehabilitative measures based on the simple effects of removing youth from the community and transplanting them into a prison-like environment. For instance, in *R. v. C.S.U.* (2006), the appeal judge stated, “we have a real concern with the length of the sentence imposed, particularly as it has **the effect of a prolonged separation of this young person from the family and community supports so necessary to his eventual rehabilitation and reintegration** into the community” (Para 13). As a result, C.S.U.’s CSO sentence was reduced by 6 months.

Similarly, in *R. v. B.B.* (2007), the judge observed “The...custody portion of a 12 month sentence would fall within the middle of a school term and effectively ruin his educational advancement for that half year at a time when he is already running behind as a result of his absences last year” (Para 25). He continued on to say, “[i]t is, in my view, important for Brandon B. to be able to reintegrate into the regular school stream as soon as circumstances permit” (Para 26). As a result, B.B. was issued a 6-month CSO in order to conserve his educational endeavours and be released from custody in time for the next school term to begin.

In *R. v. D.B.* (2007), the 13-year old had been on remand for two months for breaking and entering six schools and committing mischief and arson with two other youth. At the time of sentencing, the Crown was asking for an additional 3-4 months in custody. The judge acknowledged that D.B. was not the principal offender, and instead a lesser party, and given his young age, concluded, “[i]n view of his limited previous record, and his prospects for rehabilitation, I am of the view that such a period of custody may well now be counter-productive to his rehabilitation” (Para 21). As such, D.B. was granted a 2:1 credit ratio for remand and sentenced to 4 months custody time served as well an additional 18-month ISSP order. The judge in *R. v. Bird* (2008) echoed these sentiments, “...the sentence imposed on a youthful first offender should not be so long that it extinguishes any realistic prospect for rehabilitation” (Para 90).

Thus, the catch-22 is that rehabilitation and reintegration do not always align; sometimes efforts at “rehabilitation” may in effect be a detriment to reintegration. However, for the most serious violent young offenders, there comes a point where, despite the risks of institutionalization, the potential benefits outweigh those risks, for these troubled youth require maximum intervention in treating their underlying issues.

#### **5.2.5.5 Does Rehabilitation Have the Final Word?**

While the *YCJA* has clearly made rehabilitation an uncompromising priority for young offenders, some of the case law suggests that this commitment is not perceived to be the definitive guiding principle. In some instances, rehabilitation came across as being a negotiable principle. For instance, in *R. v. B.B.* (2007), the judge stated, “in my view **he is entitled to have priority placed on his rehabilitation and reintegration into society by virtue of his status as a first offender** and the good efforts that he has been making at school since his arrest” (Para 25). Similarly, in *R. v. Z.J.L.* (2007), the judge concluded, “**I am satisfied that the sentencing principles to be weighed in formulating an appropriate disposition in this matter are the rehabilitation and reintegration of the Young Person into society**” (Para 9). In these examples, rehabilitation is almost *awarded* the status of a primary sentencing principle.



On the other side of the bargaining table, some judges diminished its prominence with their tone. In *R. v. A.M.* the judge stated, “it is important to understand that though rehabilitation is the prime concern of the *YCJA* and the primary principle of sentencing to be applied, **it is not the only principle of sentencing set out in the *YCJA***” (Para 20). The judge in *R. v. C.H.C.* asserted, “**the *YCJA* does not require that the sentence imposed on a young person be sufficient to secure his or her rehabilitation** in the sense of ensuring the outcome, as in most cases, this would be virtually impossible to predict” (Para 84).

Taken a step further, it would appear that when judges administered adult sentences for youth, the role of rehabilitation took a back seat. This notion is supported in the numbers; the case law indicated that just over half (57 percent) of judges made reference to Rehabilitation when imposing an adult sentence. In *R. v. Kenworthy* (2008), the judge chose to cite a statement from *R. v. Vickers* (2007), which involved *an adult offender*: “While rehabilitation cannot be overlooked, **it is of secondary importance in dealing with a case of this kind**” (Para 71). Similarly, in imposing an adult sentence, the judge in *R. v. G.D.S.* (2007) held, “while rehabilitation is an important factor to be considered, **it is not a fundamental requirement for the dispensation of justice**” (Para 13).

These interpretations are concerning, because they threaten the essence of a youth justice system in that they undermine the notion that youth have a propensity for change. If troubled youth are not treated, if their underlying issues are not addressed, then how are they expected to reform themselves in time to become model adult citizens? In the recent Supreme Court of Canada decision of *R. v. D.B.* (2008), Justice Abella emphasized, “Rehabilitation, rather than suppression and dissuasion, must be at the heart of legislative and judicial intervention with young persons” (Para 32, emphasis added by SCC) when citing the Quebec Court of Appeal’s four principles of fundamental justice<sup>4</sup>. In that case, this was applied in the context of determining whether s. 72(1) of

---

<sup>4</sup> The Quebec Court of Appeal case of *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003),

the *YCJA* was a violation of S. 7 of the *Charter*. It makes the point that youth are still youth, even when they are issued adult sentences.

While rehabilitation was the most commonly applied sentencing principle in the case law, it was not found in an overwhelming majority of cases. This suggests that, while rehabilitation is being applied, it is also competing with other important, and sometimes conflicting, principles. Furthermore, as custody is essentially the punitive deprivation of liberty of youth, to attempt to use it as a mechanism for rehabilitation poses as serious question as to its suitability.

Rehabilitation should always be at the forefront of judicial decisions pertaining to offences committed by youth, regardless of whether a youth or an adult sentence is being imposed. Because, as one Ontario judge put it, “nowhere has the separation between youth and adult systems been more manifest than in their respective sentencing regimes. Put simply, **youth sentencing has always included sentencing provisions that are far more restorative than what is ordinarily available to a similarly situated adult**” (*R. v. E.F.*, 2007, Para 63).

### 5.2.6 Keeping the Principle of Principles Straight

As was illustrated with the application of sentencing principles in the case law, each principle could be interpreted and administered in different ways. When the principles are considered together as a whole, they are addressed more so with conflict than harmony. It appears that, not only do some principles contradict each other, but the order in which they are granted precedence also proves to be up for judicial debate. For instance, one judge stated, “With regard to s. 38, it is apparent that the overriding objective is the long-term **protection of the public**” (*R. v. A.J.D.*, 2009, Para 56).

---

175 C.C.C. (3d) 321 identified four fundamental principles of justice which it used to assess whether the onus provisions violate s. 7. These were: (a). Young offenders must be dealt with separately from adults; (b). Rehabilitation, rather than suppression and dissuasion, must be at the heart of legislative and judicial intervention with young persons; (c). The justice system for minors must limit the disclosure of the minor's identity so as to prevent stigmatization that can limit rehabilitation; (d). It is imperative that the justice system for minors consider the best interests of the child.

Whereas, another stated, “It seems to me that the Act establishes the word **"accountability"** as perhaps the central theme in the sentencing of young persons” (*R. v. K.V.*, 2009, Para 22).

This struggle for balance and clarity of the sentencing principles have been addressed in the case law as these principles were put to work. As one Quebec judge put it, “...**misunderstanding** of sentencing principles is **often present** and as everywhere else, a sentence in similar matters, can always **raise criticism in link with fundamental values of each individual**” (*R v. LSJPA*, 2007, Para 33). This suggests that there is room for subjectivity when interpreting the principles, much to which lies with the personal perceptions of each judge. An Ontario judge conceded, “Part 4 of the Act deals with sentencing. Its **provisions are lengthy and complex, in keeping with the general purposes and principles of sentencing**, and the factors to be considered, which are set out in s. 38” (*R. v. J.S.*, 2006, Para 42).

There is no question that the principles may conflict, as they represent various markers along the continuum from welfare to crime-control models of justice. This is clear when judges are trying to apply them all at once. For instance, in *R. v. C.W.W.* (2006), the judge quoted a past case to highlight, “to hold him accountable means that the **sentence is not only long enough to reflect the seriousness of the offence and the accused's role in it, but long enough to provide reasonable assurance of the accused's rehabilitation** where he can be safely re-integrated into society” (Para 6). The Ontario Court of Appeal judge in *R. v. A.O.*(2007) elaborates this point, “**even if a long sentence were deemed necessary to rehabilitate the offender and hold him or her accountable, the sentence still must not be longer than what would be proportionate to the seriousness of the offence and the offender's degree of responsibility**” (Para 44). It starts to sound like a game of “crazy eights” where one principle can always trump another. Moreover, these trump “cards” will not always be in favour of the youth, nor will they necessarily recognize the notion of reduced culpability. The conflict lies with the fact that these principles represent the entire continuum of justice models

On the other hand, some judges make a generic reference to s.38 without articulating how the sentence is encompassing the principles: “In this case, a period of custody is the only sentence for the two escapes from lawful custody committed by DB which would be consistent with the principles of sentencing set out in section 38 of the *YCJA*.” (*R. v. D.J.B.*, 2007, Para 26). For some judges it may be simpler to make a general reference to s. 38 when implementing a sentence.

As has been demonstrated, for the most part judges are focusing on select principles when crafting their sentences, and they put precedence on the ones they employ. Moreover, it has been shown that some principles allow for more than one interpretation, and thus more than one manner of being applied to a sentence. This is problematic because interpretations such as protection of the public represent different ends of the continuum, and therefore, have very different implications. While the *YCJA* has certainly reduced the rates of custody, its sentencing principles represent a mixed model approach to youth justice as did the *YOA*. As such, variance and ambiguity will continue to exist when implementing sentences for young offenders, custody included.

### **5.3 Deterrence: The Wild Card Re-Surfaces**

The Supreme Court of Canada’s decision in *R. v. B.W.P.* (2006) that the *YCJA* mandates an approach to sentencing that is “offender-centric”, and which excludes the adults sentencing principle of deterrence, effectively conserved the *Act* within a mixed-model of youth justice. Punitive principles such as deterrence will only serve to increase variability in sentencing as judges have the option to “crack down” on youth, an approach with adverse consequences that contributed to the demise of the *YOA*.

Thus, the potential enactment of Bill C-4 to amend the *YCJA* to include deterrence and denunciation will only serve to increase the likelihood, and length, of custodial sentences, thereby going against one of the primary sentencing mandates of the *Act*. Furthermore, the enactment of Bill C-4 would completely disregard the plethora of academic literature which indicates that deterrence does not have a significant effect

on young offenders. All theories of youth crime share a central tenet: impulsivity. As rational choice theory stipulates, impulsivity hinders the intended effects of deterrence since deterrence necessitates the aptitude to make calculated decisions.

Even judges are acknowledging the wealth of empirical research that denounces the principles of deterrence: “There is, moreover, evidence suggesting that as a result of this reduced judgment and maturity, young persons respond differently to punishment than adults, and that **harsher penalties do not, by themselves, reduce youth crime**” (*R. v. A.J.D.*, 2009, Para 64).

The case law illustrated a general adherence to the SCC decision in *B.W.P.* Almost all youth sentences excluded the principles of deterrence and denunciation. Furthermore, 40 percent of youth cases actively ruled against deterrence as an applicable sentencing principle for youth, and made reference to *B.W.P.* in doing so. For instance, in *R. v. Z.J.L.* (2007), a 14 year old youth and his friend engaged police in three high-speed pursuits with a stolen vehicle. In her submission, the Crown urged the sentencing judge to consider deterrence when suggesting a two-year CSO. The judge quashed her argument by stating: “The Supreme Court of Canada has stated that deterrence is not a principle to be considered in imposing a youth sentence” (Para 13). While denunciation was not directly addressed in *B.W.P.*, it has been added as an additional punitive sentencing principle in Bill C-4. Denunciation appeared to be the lesser concern in the case law; one quarter of youth cases actively rejected this sentencing principle for youth. On the contrary, almost half (48 percent) of adult sentencing cases advocated for the use of denunciation; deterrence was approved in two-thirds of the adult cases, as will be discussed below.

### **5.3.1 Appellate Courts: Paving the Road after *B.W.P.***

As the Supreme Court decision to exclude deterrence was made official, three cases provided clarification via appeal courts which ironed out the mandate set down in *B.W.P.*

In *R. v. S.N.G.* (2007), the 17-year old youth appealed his sentence of an 18-month CSO to the Nova Scotia Court of Appeal. SNG had pled guilty to break and enter, assault causing bodily harm, and possession of a weapon for the purpose of committing an indictable offence. In his appeal, the youth argued that the sentencing judge's sentence was excessive, and also that the judge placed too much emphasis on a concept equivalent to deterrence. Interestingly, it was the principle of *rehabilitation* that was claimed to be applied in a deterrent way. The sentencing judge cited the excerpt of *R. v. B.W.P.* at paragraph 38, "**...this does not mean that sentencing under the YCJA cannot have a deterrent effect.** The detection, arrest, conviction and consequences to the young person may well have a deterrent effect on others inclined to commit crime" for which the sentencing judge then elaborated, "what the court was saying there was that **the appropriate emphasis on rehabilitation and reintegration will ultimately, depending upon the nature of the offence, serve as a model to send the appropriate message of deterrence to the community**" (Para 37). This interpretation could be argued to be slightly suggestive, as it implies that rehabilitation as a principle is punitive. However, other principles are more appropriate to be described as such, for instance accountability and meaningful consequences. Nevertheless, the appeal judge *rejected* the youth's appeal, stating, "**[b]y noting that Charron J. had observed that sentencing under the YCJA may have a consequential deterrent effect on others, the judge did not take deterrence and denunciation into account in imposing sentence on the appellant**" (Para 38).

In *R. v. M.A.H.* (2006), the Crown appealed the 6-month CSO of a 17-year old youth to the Saskatchewan Court of Appeal. M.A.H. pled guilty to robbery after conspiring with 2 adults to rob a pizza deliveryman at gunpoint. As this case took place mere months after the Supreme Court decision in *B.W.P.*, it appears the sentencing judge erred on the side of caution when imposing a custodial sentence, "for fear of inappropriately premising a sentence on the principle of deterrence" (*R. v. M.L.M.*, 2008, Para 16). In response, the Appeal court felt,

"the learned **sentencing judge's conclusion that the decision in *B.W.P.***

**virtually ruled out custodial sentences for young persons under the *Youth Criminal Justice Act* was unwarranted.** The gist of that decision is that under the *Act*, the principle of general deterrence is not a factor to be taken into account and cannot be used to justify a sentence harsher than the circumstances of the offender and the offence would warrant. Nor is specific deterrence to be considered as a separate factor” (Para 9).

Furthermore, while it was determined that the sentencing judge was correct in his application of the sentencing principles of s. 38, the appeal court judge stated, “it is our respectful view that **in attempting to apply these principles he was distracted by the perceived limitations arising from the decision in *B.W.P.***, and failed to consider what length of sentence would in this case respect those principles and accomplish the goals in question” (Para 11). As a result, the appeal court *granted* the Crown’s appeal and issued MAH an 18-month CSO in addition to the 90 days of the original sentence that he already served in closed custody, thereby *increasing the original sentence by 13 months*.

In *R. v. M.L.M.* (2008), the 17-year old youth appealed his 26-month CSO to the Alberta Court of Appeal. MLM pled guilty to 11 drug-related offences. In his appeal, MLM argued that the sentencing judge placed too much emphasis on his criminal record, “**such as to constitute punishment based on deterrence**” (Para 13) – he had a record of 45 convictions, mostly for theft, driving offences, failure to obey court orders and possession of narcotics. He also argued that credit should have been given to his guilty pleas.

As was discussed in the principles chapter, the appeal court judge drew parallels to the principles of deterrence and meaningful consequences, but concluded that:

“Although there may only be a thin line between imposing a ‘meaningful consequence’ and creating a deterrent effect, **a sentence will be appropriate so long as it is intended to ensure the long-term protection of the public by focusing on the rehabilitation of the young person, without regard to any consequential deterrent effect such a penalty may have**” (Para 14).

The appeal judge then went on to cite the above noted case, *R. v. M.A.H.*, reiterating, “the Court of Appeal considered a lengthy custodial sentence to be necessary so as to achieve a ‘meaningful consequence’. **The court did not perceive any conflict between the imposition of a significant custodial sentence and the Supreme Court's comments in *B.W.P.***” (Para 16). Furthermore, the judge stated,

“In these remarkable circumstances, we conclude that the criminal record was deserving of significant weight. It, and the appellant's unrelenting determination to continue a life of crime, even while on bail, demonstrates that, at least for the time being, only actual custody will keep him from re-offending. **The reasons of the sentencing judge do not suggest that the sentence was motivated by deterrence; any such attempt would be futile as the appellant has shown that he is completely resistant to specific deterrence.** Clearly, a lengthy custodial sentence was required to impose meaningful consequences and to facilitate, if possible, his rehabilitation” (Para 20).

While it was established that the Supreme Court of Canada case decision to exclude deterrence was not meant to eliminate long custodial sentences, the appeal judge *granted* MLM'S appeal and *reduced his sentence by 8 months*, making it an 18-month CSO. The appeal judge agreed that no credit was given to the youth's guilty pleas: “We find merit in this position...it appears the guilty pleas were not the result of a plea bargain and the appellant was entitled to some meaningful credit for that” (Para 23).

### **5.3.2 British Columbia: Home of the Outliers**

Despite the Supreme Court's decision in *B.W.P.*, and the absence of deterrence and denunciation in the recognized sentencing principles under the *YCJA*, the case law revealed four separate cases which continued to employ the principles of deterrence and/or denunciation. Interestingly, all four cases were from British Columbia. Furthermore, the most recent case derived from 2009, suggesting that this judicial approach has continued to be a problem.



In *R. v. J.H.* (2006), a BC Provincial Court judge in Vancouver issued the 17-year old youth a 15-month CSO after finding him guilty of various offences arising out of a home invasion. The judge stated, “In my view, **there is denunciation of a kind in youth sentencing.** Section 3(1)(c)(i) of the *YCJA* requires a **sentence** which communicates a symbolic statement and reinforces respect for societal values **to the young person being sentenced**” (Para 15). While this may seem like a mild reference to denunciation, the court preceded this statement with an excerpt from a 1996 Supreme Court of Canada case in which an *adult* was being sentenced. It could be argued that the sentencing judge in JH was trying to put a positive “spin” on denunciation so as to expand the mandate of Section 3(1)(c)(i) in a more punitive direction.

The three remaining cases were much more overt in their references to deterrence and denunciation. In *R. v. A.J.Y.* (2007), the BC Provincial Court in Kamloops issued A.J.Y. a one-year CSO for pleading guilty to sexually assaulting his younger brother when A.J.Y. was 17 years old and his brother was 13 years old. In rendering his decision, the judge stated “Justice is often mistaken for revenge, but it is not about revenge. **It is about a careful balancing of factors including deterrence, denunciation, retribution, rehabilitation and protection of the public** with a view to the aggravating and mitigating factors specific to each case” (Para 7).

While the judge did not explicitly say that he was applying deterrence and denunciation to the sentence, he never made reference to *B.W.P.* following this statement, so as to suggest this was his reference point in formulating an appropriate sentence. Furthermore, it appears that while AJY was 22 years old at the time of sentencing, and despite the fact that he was being sentenced under the *YCJA* as a youth given his age at the time of the offence, the judge was erroneously applying adult sentencing principles in light of AJY’s current age.

In *R. v. S.R.G.* (2008), the BC Provincial Court in Abbotsford issued the female youth a 90-day CSO following her guilty plea to assault, along with a co-accused, another teenaged female. Upon considering the sentencing provisions for custody, the

judge noted, "...S.R.G. has no prior criminal record, but I question whether she is genuinely remorseful about this offence and I also think **there is a need in our community to denunciate this type of conduct, both for specific and general deterrence**" (Para 20). Once again, no reference was made to *B.W.P.* following this statement, or at any other time throughout the judgment.

Finally, in *R. v. S.G.Z.* (2009), a BC Provincial Court judge in Kamloops issued the youth a 26-month CSO, less 4 months credit for time served, upon finding him guilty of assault with intent to steal. In referring to the random attack that S.G.Z. and a co-accused made on the victim with the intent to rob him, the judge stated, "I do consider all of these factors, though, as proper considerations under s. 38(3)(d) when I determine the appropriate sentence. As to the sentence itself, **the offence is grievous and warrants the strongest deterrence**" (Para 41).

### **5.3.3 Adult Sentences: the Green Light for Deterrence and Denunciation**

While deterrence was explicitly excluded from the list of applicable sentencing principles to youth sentences, particularly in light of *B.W.P.*, courts have taken a different approach in regard to adult sentences for youth. The case law demonstrates that adult sentences provide access to the adult sentencing principles in 718.1 of the *Code*, which include deterrence and denunciation. This is stipulated in s. 74 (1) of the *Act*. However, seeing as to how adult sentences are supposed to be the "exception" it was surprising to see that they comprised over one quarter (28 percent) of the case law in this study. Deterrence was employed in two-thirds of adult sentences (65 percent), leading to the inference that judges were using the opportunity to impose adult sentences as a "gateway" to deterrence and denunciation. For instance, in imposing an adult sentence, the judge in *R. v. B.C.F.* (2008) stated, "[w]ith reference to section 718 of the *Criminal Code*, there must be a very strong element of denunciation and deterrence" (Para 39). There was little hesitation for judges to unleash deterrence and denunciation once s. 718.(1) was triggered.

Ironically, while only British Columbia courts continued to apply deterrence and denunciation after the Supreme Court of Canada decision in *B.W.P.*, it was also the British Columbia appellate and superior courts that provided clarification on whether the preamble of the *Act* was still to be considered when administering an adult sentence. The B.C. Court of Appeal was the first to make this distinction in *R. v. Pratt* (2007), **“the effect of s. 74 is to bring into the sentencing of a young person the principles of s. 718 which are otherwise not applicable, such as specific and general deterrence, and not to exclude the general principles set out in s. 3”** (Para 55). The BC Superior Court elaborated in *R. v. F.M.* (2007),

“The major significance of adult sentencing of a young person when compared with sentencing under the Youth Criminal Justice Act is that **although s. 3 of the Youth Criminal Justice Act continues to have application, the sentencing provisions of ss. 718 and 718.1 of the Criminal Code are directly engaged. Accordingly, such Code provisions as denunciation and general deterrence need to be considered** along with the intention expressed in the Youth Criminal Justice Act” (Para 12).

The appeal judge in *R. v. Nguyen* (2008) left no room for doubt when he granted the Crown’s appeal to set aside the youth’s adult sentence of a 20-month conditional sentence for a 514-day custodial adult sentence. The Appeal judge held,

“while the sentencing judge correctly noted that s. 3 of the Youth Criminal Justice Act applied when a youth was being sentenced as an adult, **he also stated, erroneously, that regard had to be had to the sentencing principles and factors set out in s. 38** of the Act. Section 38 only applied to youth sentences imposed under s. 42 of the *YCJA*, and not to adult sentences imposed under s. 73 of the Act. **Emphasis was placed on general deterrence and denunciation.** This case required the court to send a strong and unequivocal message about the consequences of participating in group violence” (Intro).

Therefore, *Nguyen* not only establishes the ground rules for balancing both the sentencing principles of the *Act* and the *Code*, but it also demonstrates how **“deterrence...will always serve to increase the penalty or make it harsher; its effect is never mitigating”** (*R. v. B.W.P.*, 2006, Para 36). This punitive effect was also

demonstrated in *R. v. Bird* (2008). In deciding that a suitable adult sentence lay between an 8 to 12 year range, the Alberta judge concluded, “I am satisfied that the nature of the offence and **the need to emphasize denunciation and deterrence requires a sentence at the maximum end of the range, 12 years...**” (Para 93).

Thus, as can be seen with adult sentences and their application of deterrence and denunciation, the adoption of Bill C-4 would only serve to further swing the *YCJA* towards a Crime-Control model of youth justice. Furthermore, and as will be discussed in the Adult Sentences section, the integration of deterrence and denunciation will all but dissolve the distinction between youth and adult justice systems, which then raises the question, why have a youth court at all?

#### **5.4 Aboriginal Youth Are Different**

**“...the circumstances of aboriginal offenders differ from those of the majority** because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover...aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions” (Supreme Court of Canada, *R. v. Gladue*, 1999, Para 68).

The *YCJA* has crafted a mandate to recognize the unique challenges of Aboriginal youth through its Declaration of Principles, “within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should, *respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons...*(s. 3(c)(iv)).

This judicial commitment is even more important for today’s Aboriginal youth, for according to the last Census, this vulnerable population is growing. Almost half of Canada’s Aboriginal population is under the age of 24: “The Aboriginal population, as a result, is younger than the non-Aboriginal population, and being young has been

identified as one of the strongest risk factors for delinquent or criminal behaviour” (Calverly, Cotter & Halla, 2010, p. 11).

Of the 87 cases in this study, 15 cases (17 percent) classified the youth as being Aboriginal, while 11 cases (13 percent) did not distinguish the youth’s ethnicity; therefore, the proportion of Aboriginal youth in the sample may be greater than 17 percent. Nevertheless, even this number establishes an over-representation of incarcerated Aboriginal youth, as reflected in the academic literature. As of 2006, the population of Aboriginal youth in Canada still only accounted for about six percent of the overall youth population (Calverly et al., 2010). Furthermore, while custody rates have decreased overall since the enactment of the *YCJA*, statistics from the latest *Juristat* show that the proportion of Aboriginal youth in custody is in fact *increasing*. Caverly et al.’s analysis of official data revealed that in 2008/2009 Aboriginal youth comprised 36 percent of youth sentenced to custody.

With these numbers in mind, it is interesting to note that when it came to examining sentencing principles, the principle of rehabilitation proved to be most pertinent for Aboriginal youth. Almost three quarters (73%) of Aboriginal cases referred to the principle of rehabilitation when imposing a sentence, whereas just over half (55%) of non-Aboriginal cases applied rehabilitation as a sentencing principle. No other sentencing principles showed disproportionate application for Aboriginal compared to non-Aboriginal sentences. Perhaps this speaks to the more precarious and vulnerable situations in which Aboriginal youth find themselves, and efforts by judges to recognize these disadvantages and apply this principle in an effort to address these circumstances. Cases from Quebec, Manitoba, Nunavut, Nova Scotia and British Columbia alike made reference to the unfortunate reality that, Aboriginal youth are different from non-Aboriginals.

In *R. v. D.E.C.* (2008), the Aboriginal youth was 17-years old when he and another youth assaulted a man to the point where the victim died of his injuries. At the time of the offence, D.E.C was impaired by alcohol. This was his first offence. He pled

guilty to manslaughter and was sentenced to a nine month CSO followed by one year of probation. In taking into account the factors which led D.E.C. to that tragic event, the Manitoba judge addressed his background,

“...His parents were raised on reserves in impoverished conditions, which may have affected parenting skills and may have contributed to their ongoing alcohol issues. **D.E.C. has been exposed to alcohol, poverty and lack of opportunities within the communities he has lived.** His grandmother who raised him, attended residential schools” (Para 37).

In *R. v. A.J.D.* (2009), the 16-year-old Aboriginal youth pled guilty to attempted murder and aggravated assault. This was just one of a number of violent incidents in which A.J.D. was recently involved. In an effort to intercept this downward spiral, the Nova Scotia judge imposed a three year IRCS sentence. In coming to this decision, the judge stated,

“Because of A.J.D.'s aboriginal ancestry, a Gladue report dating back to 2007 as well as the update were filed with the Court. These reports reflect positively on A.J.D. and the support and programs available to him, both when he is in custody at any youth, provincial or federal institution and after he is released into the community under supervision. The support and programs available are not only the aboriginal traditions and mentoring and guidance from elders in the native community, but there is also assistance for housing, if necessary. Angelina Amaral, of the Mi'kmaw Legal Support Network, the author of the Gladue reports, testified that they are prepared to work with the IRCS team for A.J.D.'s reintegration into society,” (Para 23).

In the case of *R. v. LSPJA 074* (2007), the 17-year-old youth pled guilty to manslaughter and assault causing bodily harm. He shot and killed a person while he was severely intoxicated from alcohol, and also shot and injured a second person. After spending two years in pre-trial detention, the youth was subsequently sentenced to an 8-year CSO. In acknowledging the youth's Aboriginal background, the Quebec judge stated, “when the Court faces a native offender, special attention must be given to that parameter before concluding an analysis on the nature of the sentence to be rendered.

Mainly in order to avoid, over representation in detention centres of native persons, in regards to their social and economic difficulties arising from historical factors” (Para 69).

Prior to that, however, the judge discussed the particular hazards impinging on many northern communities such as the one in which this youth resided,

“The community has a high rate of unemployment and traditional activities of hunting to build food supplies are exercised by a large portion of the population. Consequently, the availability of firearms is evident and these firearms are in the majority of the cases, kept in the residences, not in accordance with federal storage regulations. Put together, **alcohol abuse and availability of firearms constitute the necessary and sufficient ingredients that lead to explosive situations. As what took place in the present matter.**

All of the above, **in a community where the population under 18 is extremely significant**, percentage wise, in a community where the cost of living is extremely high given the necessary transportation of food and where drugs and alcohol are sold at prices that transform bootlegging and drug dealing in attractive businesses that permit not only survival but prosperity and social standing. Inuits pay federal and provincial income taxes and given the high costs of living up north, they, contrary to the Crees have more difficulties to have both ends meet, even if they live in the same environment and face the same prices” (Para 25-26).

The sentencing judge in *R. v. K.G.S.* (2009) echoed these sentiments. Referring to the youth’s conviction for manslaughter, the judge explained, “**It is also the ultimate result of excessive alcohol intake combined the incredible facile access to firearms, a social problem in many northern communities**” (Para 30).

As will be discussed further, small northern communities pose unique challenges and make for a different set of circumstances for judges to employ the various sentencing principles and options in the *YCJA*. Furthermore, that many Aboriginal people inhabit these areas calls for even more vigilance when sentencing youth.

The important acknowledgement of Aboriginal status was also addressed for adult sentences. Perhaps this distinction should be more prominent in this context given the punitive ramifications of adult sentences. *R. v. Pratt* (2007) was an Appeal case

which resulted in the reduction of an adult sentence. The Aboriginal youth was 16 years old when he consumed 20 beer, stole a car with a friend, and while fleeing a gas station, ran over the attendant and dragged him to his death. Prior to this incident, Pratt had two convictions, one for mischief and one for possession of a stolen vehicle. In this case, he pleaded guilty to manslaughter.

In concluding that the sentencing judge imposed an excessive sentence, the British Columbia Court of Appeal reduced the adult sentence from 9 years to 7 years, one ruling being that the sentencing judge did not place enough emphasis on the youth's Aboriginal heritage,

“s. 3(1)(c)(iv) of the **Act** is specific direction as to the attention that must be given to the aboriginal background of a young person. Here Parliament has said to the courts that they must respond to the needs of aboriginal young persons that come before them, while maintaining a standard of fair and proportionate accountability. **It is a consideration that, if it has any consequence, can only lead to mitigation of sentence, either in duration or as to its terms.**

In this case, the sentencing judge addressed the issue of Mr. Pratt's aboriginal background:[42] *The defence points out Mr. Pratt's aboriginal status and the supportive community he derives from it, but concedes that **it will have little bearing in the sentencing of an offender who has committed a serious violent offence. ...*** (Para 81-82).

The more violent the offence, the less bearing aboriginal status may have on sentencing. However, in the case of a young aboriginal person before the courts, as was the case with Mr. Pratt, and the presence of a history of a broken family, accompanied by lack of guidance and an absentee parent, as again was here the case, **“the Act requires greater attention to this circumstance than was accorded by the sentencing judge...”** (*R. v. Pratt*, Para 82-83)

In another set of tragic events, *R. v. Bird* (2008) involved a 17-year old female who pled guilty to manslaughter, aggravated sexual assault, and kidnapping. She had no prior criminal record. Bird was an accomplice to a pre-conceived plan to select a victim from a mall and take her somewhere else for the purpose of killing her. While Bird



withdrew her involvement in the middle of the commission of these offences, she had initially been a willing participant. Despite her first-time offender status, her unfortunate background and her diagnosis of FASD, Bird was sentenced as an adult to 9 years in prison, after credit for 3 years of pre-trial detention. In citing an excerpt of the *Gladue* case which discussed background factors that figure prominently in the causation of crime, the Alberta judge asserted,

“These factors clearly featured in Miss Bird's background while she was with her biological parents. Although Miss Bird was taken out of this context when she came to live with her guardians at age five, these factors continued to have an effect. For example, Miss Bird was likely abused as a very young child and suffers from FASD that resulted from her mother's abuse of alcohol; these factors had a negative effect on her behaviour, which in turn had a negative effect on her relationship with her guardians, culminating in a rupture in that relationship. At the time of the offence, **Miss Bird certainly fit the profile described by the Supreme Court of Canada**. She had little education, was unemployed, was abusing substances, was isolated from any community other than that of the negative peers she fell in with, and certainly had a severe lack of opportunities and options. Today, these factors continue to have an influence on her as she presents to this court. As commented on by the psychiatrists who examined her, **her FASD symptoms make rehabilitation more challenging** and the fact that she has no community support contributes significantly to concerns about her risk to reoffend” (Para 67).

The irony of this case was that the sentencing judge was initially considering the lower range of an 8-12 year sentence in light of her youth. However, in the end, combined with her 3 years in remand credited as time served, Bird was issued the maximum sentence in what the court found to be the appropriate range. While this may have been because the adult sentencing principles of deterrence and denunciation were applied, the judge did refer to her FASD as a “challenge” to her prospects for rehabilitation. Therefore, Aboriginal status may not always serve youth as a mitigating factor, but instead could serve to have no effect on the outcome.

#### 5.4.1 Justice for All?

Ironically, as much as rehabilitation proved to have a major thrust when sentencing Aboriginal youth, the reality is that many of the communities in which these youth reside fail to provide many alternative programs, thereby limiting sentencing options that might otherwise be available under the *YCJA*.

Parliament has demonstrated its commitment to target the over-representation of Aboriginal youth both with s. 3(c)(iv) of the *YCJA*'s Declaration of Principles, and also with the *Act*'s Sentencing Principles: "*all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;*" (38(1)(d)).

However, the reality is that if there are no resources to implement the many community-based sanctions available under the *YCJA*, then judges are left with very few options other than custody. Therefore, the dilemma lies in that "it is the existence of these alternatives to custody that allows this legislation to limit the use of custody by a Youth Court" (*R. v. K.G.S.*, 2009, Para 17).

The Nunavut sentencing judge in *R. v. K.G.S.* devoted a great deal of this case to articulating this problem,

**"There are no practical alternative sanctions to custody in the circumstances of this case, and in this Territory, to provide the structure needed by this youth to thrive and mature ... In Nunavut, the only sanction that can realistically achieve this is a sentence of custody in the territory's only youth institution. There are no other non-custodial sentencing options in this jurisdiction that are sufficient to meet this constellation of needs"**(Para 33-38).

**"The *YCJA* again assumes that these "other measures" will be available where and when necessary to address the needs of youth in this jurisdiction. Such an assumption may well be valid in the south. The provinces enjoy a wealth of resources that are simply not available in Canada's remote northern communities.**

In Nunavut, apart from a sentence of probation with some community service work, there are very few structured programs and services available to youth in the communities. **The sad reality is that many of the alternatives to custody**

**contemplated by the YCJA do not exist” (Para 36-38).**

**“Ontario has the non-custodial alternatives that are necessary to implement the philosophy of the YCJA. Nunavut does not” (Para 31).**

He then went on to discuss one of the major problems affecting youth crime in the north: alcoholism.

**“A growing number of youth suffer from serious drug and alcohol dependencies. K.G.S. falls into this category. Much of the property-related crime is driven by the young addict's desire to continue his or her dependency. There is no residential treatment facility for substance abuse in this territory.**

**In Nunavut, for want of any other resources, the RCMP cell is used as a stopgap measure to detoxify youth... It is folly to think that this "treats" the underlying cause of this self-destructive drinking behaviour” (Para 23-24).**

The Maritimes are another region in Canada where resources are known to be lacking. As one judge stated in R. v. C.S. (2008), **“...we must be mindful that no treatment options have been made available to C.S. to date. The court was told there is no full-time psychologist at the NSYF, nor has there been one for the past 4 years. Resources, have simply not been available” (Para 35).**

Thus, many remote towns simply do not have the resources to adhere to the sentencing philosophy of the YCJA. This issue warrants attention. Failure to provide the necessary funding for resources simply leaves the mandate of the YCJA as nothing more than a pipe dream in a wealthy world.

What passes for “justice” for youth becomes determined by wealth and resources, which in effect only perpetuates the desolate environments in which many of these troubled youth find themselves. Because these youth do not get the proper treatment they require, there is little chance that they will break away from their delinquent paths: **“As growing numbers of ‘untreated’ youth move into adulthood, the pressure upon Adult Corrections and its limited facilities continues to increase. This is to be expected” (Para 48).**

## 5.5 Adult Sentences: The “Exception” to the Rule

“...it is a **fundamental principle of justice that young persons must be treated separately, and not as adults because they are not adults** ...That principle is not undercut if, in individual cases, it is shown that a young person should be treated as an adult. But the norm must be youth sentencing and **adult sentencing must be the exception...**” (*R. v. C.K.*, 2006, Para 40).

The case law was quite telling about those youth who were found warranting an adult sentence. Firstly, such a sentence was hardly the “exception”; more than a quarter (28 percent) of youth were sentenced as adults. It is important to reiterate that it is serious cases such as these that are more likely to get published, and therefore this statistic should not be taken as a definitive proportion of youth cases that are actually allotted an adult sentence. The youngest youths to receive such a sentence were 15 years old, although they were only three in number. As would be expected, as age increased, so did the number of youths sentenced as adults; 8 youths were 16 years old and 13 youths were 17 years old. All but two youths in this group were male. The proportion of aboriginal youth exceeded non-aboriginal youth: 33 percent compared to 28 percent. All youths were sentenced for presumptive offences that ranged from first-degree murder to aggravated assault. It is interesting to note that of the entire 87 cases, five resulted in guilty findings for first-degree murder, yet only two such cases imposed an adult sentence. Over one quarter (26 percent) of adult sentences were for first-time offenders.

Finally, four youth were issued a life sentence. The youngest of the four was 16 years old, receiving a sentence of life without parole for 10 years for first-degree murder. Another 17-year old received the same sentence for the same offence. The other two 17-year old youths received life without parole for 7 years for second-degree murder. All four youth were non-Aboriginal males.

### 5.5.1 A Question of Accountability

Section 72 of the *Act* dictates the judicial process for administering an adult sentence. It is essentially a test to determine the threshold of accountability for which to hold a youth. As one Ontario Court of Appeal judge put it, “...accountability... is the **central feature of the decision whether to impose an adult sentence...**” (*R. v. A.O.*, 2007, Para 39). However, the test is not whether an adult sentence holds a youth more accountable, but instead is whether a youth sentence *fails* to hold them sufficiently accountable. At the same time, judges must keep in mind that, “the application of the principle of accountability must recognize the deficiencies in maturity of the young person and his or her greater dependency as that may be revealed in the evidence before the court” (*R. v. Pratt*, 2007, Para 58).

To illustrate, in *R. v. C.W.W.* (2006), the Crown submitted an application for an adult sentence in response to the 16 year-old youth’s guilty plea for robbery and possession of a dangerous weapon. In weighing this option, the Alberta judge stated, “the essence of the application is the determination of whether after considering the sentencing provisions of the *YCJA*, **the sentence would be of sufficient length to hold the young person accountable** for his offending behaviour”(Para 6). In electing an adult sentence, the judge concluded, “... the Crown has met the onus of satisfying this court that **a youth sentence would be of not sufficient length and therefore order that an adult sentence be imposed**” (Para 44).

This approach was reiterated in *R. v. A.J.D.* (2009), “**whether a youth sentence** imposed in accordance with the purpose and principles of sentencing set out in subpara. 3(1)(b)(ii) and s. 38 **would have sufficient length to hold the young person accountable for his offending behaviour; as required by ss. 72(1) and (1)(a)** of the *YCJA*. Our Court of Appeal in *R. v. Smith*...has approved **this as one of the first steps in the analysis of a youth versus an adult sentence**” (Para 49). However, in the end, the Alberta judge decided a youth sentence was of sufficient length to hold AJD accountable.

While the question of accountability has shown to be seemingly straightforward in the case law, s. 72's role in presuming adult sentences for certain serious offences has been altered since the inception of the *Act*. Initially, a youth found guilty of a presumptive offence was deemed to be deserving of an adult sentence, absent proof by the youth that an adult offence was inappropriate in the circumstances. Accordingly, the onus was put on the accused to convince the courts that in fact a youth sentence would be sufficient. Among the 87 cases reviewed here was the Supreme Court of Canada decision in *R. v. D.B.* (2008) which found this onus to be unconstitutional in light of s. 7 of the *Charter*. Justice Abella stated,

**“...the onus provisions in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that determines how he or she should be sentenced. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based age. By depriving them of this presumption because of the crime and *despite* their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice”** (Para 76).

As such, the effect of s. 72 was altered and the onus has now been placed on the Crown to justify an adult sentence over a youth sentence. Interestingly, the case law presented this same judicial debate in *R. v. G.D.S.* (2007), however, the Nova Scotia court found that because the onus on the youth did not need to be proven *beyond a reasonable doubt*, that the provision did not infringe on his rights. As such, the youth's application to challenge the constitutionality of the *Act* was rejected and his adult sentence was upheld.

### **5.5.2 The Road to an Adult Sentence: Where the *Code* Meets the *Act***

Once it has been decided that an adult sentence is to be imposed, then in light of s. 74 of the *Act*, the question becomes: is a youth being issued an adult sentence, or does the youth still get sentence mitigation in light of their youth? There is a difference. A few of the cases that imposed adult sentences shed some light on this dilemma. In *R.*

*v. Pratt* (2007), the BC Court of Appeal clarified the boundaries within which the *YCJA* and the *Criminal Code* operate when sentencing a youth as an adult. On appeal, the youth sought to have his adult sentence reduced on the grounds that the sentencing judge erred in administering of an adult sentence. The Appeal judge accepted the appeal, determining that while the principles set out in Part XXIII of the *Code* were available to judges, the Declaration of Principle in s. 3 of the *YCJA* was also to be considered, thus creating a sort of hybrid sentence between the *Code* and the *Act*. In other words, **“an adult sentence pursuant to s. 74, such as the one imposed on Mr. Pratt, remains a sentence under the Act. ... the effect of s. 74 is to bring into the sentencing of a young person the principles of s. 718 which are otherwise not applicable, such as specific and general deterrence, and not to exclude the general principles set out in s. 3”** (Para 55). The appeal judge concluded that failure to consider s. 3 of the *Act* resulted in an excessive sentence. As such, he reduced Pratt’s sentence from 9 years to 7 years.

The BC Court of Appeal further clarified the distinction made in *Pratt* in *R. v. Nguyen* (2008). The appeal judge concluded that the sentencing judge made an error in principle when he stated that when imposing an adult sentence, that regard must also be made to the sentencing principles and factors set out in s. 38 of the *Act*. In concluding that the sentencing judge misread *Pratt*, the Appeal judge held **“...s. 38 only applies to youth sentences imposed under s. 42 of the Youth Criminal Justice Act and not to adult sentences imposed under s. 73 of the Act**. It was, accordingly, an error in principle for the judge to have had regard to s. 38 in sentencing Mr. Nguyen” (Para 34).

This distinction was reflected in *R. v. Kenworthy* (2008), where, in electing to impose an adult sentence, the BC judge stated: “I have specifically directed my mind that Mr. Kenworthy committed this offence as a young person but is being sentenced as an adult and **although Section 3 of the YCJA continues to have application, the sentencing provisions of Section 718 and 718.1 of the Criminal Code are now applicable”** (Para 78).

Despite the BC appellate court's resolution of the boundaries between the *Act* and the *Code*, a Saskatchewan judge in *R. v. B.C.F.* (2008) had a different interpretation.

**“Much is at stake for young persons moved out from under the protective umbrella of the Y.C.J.A.** However, regardless of youth, the Supreme Court has said that the presumption is rebuttable. **The protection it affords can indeed be lost...**it is my respectful interpretation that **something very profound occurs when an order for an adult sentence is made.** What occurs is the loss of the protection of presumed diminished moral culpability reflected in the Preamble, Declaration of Principle and sentencing regime of the *Y.C.J.A.* The significance of this loss is why the test in section 72 is so crucial and why the onus properly rests with the Crown. **If nothing profound occurred and all the provisions of the Y.C.J.A. reflecting diminished moral culpability still applied, what purpose would the definition of adult sentence, section 72 and section 74 of the Act serve?** Case commentaries regarding *R. v. D.B.* suggest one might conclude as the presumption of diminished moral culpability is established as a *Charter* principle, it advances with an individual throughout the proceedings and even the possibility of adult sentencing becomes unconstitutional. However, the Supreme Court did not find this. **The Supreme Court found the presumption of diminished moral culpability to be rebuttable.** Young persons can lose the protection of the presumption and their entitlement to sentences imposed pursuant to the sentencing provisions of the *Y.C.J.A.*” (Para 36).

Upon reading this passage, *R. v. D.B.* (2008) was re-read to see if there had been some kind of misinterpretation. It was indeed found that Justice Abella regarded youths' presumption of diminished moral culpability to be rebuttable: **“Like all presumptions, it is rebuttable”** (Para 45). However, it was also determined that the Supreme Court found this presumption to be a principle of fundamental justice. Furthermore, the dissenting Justice Rothstein clarified that while the presumption of reduced moral culpability was a principle of fundamental justice, this did not mean that there should be a presumption in favour of a youth sentence. He noted, “What constitutes a *youth sentence* as opposed to an *adult sentence* depends on the particular legislative sanctions in force at the relevant time. Further, there may be much overlap between the range of sentences that can be imposed on a young person and that which can be imposed on an adult offender for any given offence” (Para 130).



Thus, it appears Justice Rothstein is saying that the choice to impose an adult sentence is largely dictated by the desirability of the different range of sentence that is available. It also permits for the imposition of a life sentence. However, youth will always have aspects of the *YCJA* to protect them, in that even adult sentences will have a presumption of reduced moral culpability:

**“...the interests of the young offender continue to be recognized even when an adult sentence has been imposed.** Section 76(2) *YCJA* specifies that if the offender is under 18 years of age at the time of sentencing, the adult sentence shall be carried out in youth custody unless it is not in the youth's best interest or it would be unsafe to do so. Young offenders serving adult sentences are allowed to stay in youth custody until they reach 20 years of age, and even then the court has the discretion to extend the stay in the youth facility (s. 76(9) *YCJA*).

It is important to note that **even when an adult sentence for manslaughter, aggravated sexual assault or a third conviction for a serious violent crime is imposed, the young person also benefits from unique treatment under the *Criminal Code*.** The fundamental principle of sentencing, as set out in the *Criminal Code*, is that **a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender**(s. 718.1 *Cr. C.*). The youth justice court must also consider all relevant **circumstances relating to the offence and to the offender**(s. 718.2(a) *Cr. C.*). These provisions ensure that when young offenders are sentenced as adults for these offences, **their presumed reduced moral blameworthiness is considered before the imposition of a sanction.**

**Even young offenders serving adult sentences for first or second degree murder are given special recognition under the *Criminal Code* and benefit from significantly reduced parole ineligibility periods (ss. 745.1, 745.3 and 745.5 *Cr. C.*)”** (Para 151-153).

While the Supreme Court has clarified the ways in which a youth's reduced moral culpability is applied when imposing an adult sentence, there remains ambiguity regarding whether these provisions imply that a youth still benefits from “the protective umbrella of the *YCJA*” (*per* Rothstein J., dissenting in *R. v. D.B.* (2008)). Nevertheless, in the words of the Appeal judge in *R. v. Pratt* (2007), there seems to be a general consensus that “the adult sentence imposed will **not necessarily be lock-step with the**

**sentence that would be imposed upon an adult** in circumstances that are identical except for the offender's age" (Para 57).

### 5.5.3 Adult Sentences: Offence-Centric?

While the Supreme Court in *R. v. B.W.P.* established the scope of accountability by requiring it to be "offender-centric" in accordance with youths' diminished moral culpability, the case law revealed a consistent theme among judges who imposed adult sentences that made frequent reference to the severity of the crime.

For instance, in *R. v. C.W.W.* (2006), the Alberta judge argued against a youth sentence: "the maximum sentence available under the Youth Criminal Justice Act would not be of sufficient length to hold the young person accountable - - **It would not reflect the seriousness of the offence** and the accused's role in such..."(Para 71). Similarly, in *R. v. D.V.* (2007) the Ontario judge stated, "...**robbery while using a firearm in particular requires a four year minimum sentence for an adult offender**. While counsel were not aware of authorities on the issue of whether this minimum would apply to a youth who has been ordered to be sentenced as an adult, **I am prepared to find that it does**" (Para 27). Also, in imposing a life sentence following a manslaughter conviction, an Ontario judge held, "**Any lesser disposition would be inadequate to reflect the seriousness of the offences...**"(*R. v. Ferriman*, 2006, Para 59).

This notion was more concerning when the youth's level of maturity was deemed less than average, yet the seriousness of the offence trumped all other sentencing considerations. For instance, in *R. v. Bird* (2008) the Alberta judge acknowledged that, "her level of maturity should be considered as well as her chronological age. I have already reviewed the evidence in this regard and concluded that she had a **reduced level of maturity, which justifies treating her as somewhat younger** than her chronological age" (Para 64). Nevertheless, in imposing an adult sentence of 12 years, which was the maximum available in this case, the judge

concluded, **“Society's condemnation of the offence must be expressed in very strong terms”** (Para 91).

In *R .v. M.B.W.* (2007) the youth was sentenced to life without parole for 10 years after pleading guilty to first-degree murder. It was established that, “M.B.W.'s cognitive ability has been tested many times. He has tested in the low average to borderline level. While he was chronologically 17 years of age when this occurred, it is **agreed by experts and others who knew him that he was and is immature for his age”** (Para 54-55). Nevertheless, the Alberta judge noted that, **“he committed this horrendous brutal crime”** (Para 123). What makes this case even more paradoxical is the judge’s next statement: **“M.B.W. cannot be held accountable until that piece of his mental health is restored. That will take years if at all”** (Para 128). On the one hand the judge regarded MBW as *unaccountable*, yet he issued this youth the *maximum life sentence* available. This certainly appears to demonstrate how the “offender-centric” philosophy gets lost in the cracks of adult sentencing.

#### **5.5.4 Swimming with the Sharks**

Concerns about youth sharing prison space with adults have been expressed in the literature as well as the media. Before continuing on with this theme, it is important to note that not all adult sentences are to be served in adult correctional institutions; s. 72 provides the judicial test for electing an adult sentence whereas s. 76 dictates the placement of a youth upon the imposition of an adult sentence. Once an adult sentence has been established, a youth may serve their sentence in a youth custody facility until the age of 18 (if they are not already 18 at the time of sentencing), up to a maximum of 20 years old, as per s. 76 (9) of the *Act*.

Nevertheless, a theme which emerged from these cases was the concern regarding the possibility of youth serving time in adult penitentiaries. In one respect, adult penitentiaries have been labelled “universities of crime”, where youth will only become more hardened criminals as they learn from the ‘bigger fish’ in prison. The

other concern stems from victimization; as Gilles Duceppe of the Bloc Quebecois noted, putting youth in adult prisons would be feeding ‘fresh meat’ to sexual predators or paedophiles in the institution (Dougherty, 2008). This concern was a palpable theme in the case law. Nevertheless, it did not always have a significant effect on judges deciding whether to impose an adult sentence.

For instance, in *R. v. Ferriman* (2006), while the Ontario judge justified an adult sentence, as previously noted above, he stated “...**sending Kevin Madden at age nineteen to the penitentiary for life, is tantamount to "writing him off"**...the evidence of Mr. Riel, the Federal Corrections expert, offers scant reason for optimism that Mr. Madden will not be **left to fend for himself among violent recidivists much older and physically stronger than himself**” (Para 48). Similarly, in *R. v. Kenworthy* (2008), the BC judge noted, “I am aware that **the adult correction system has a relatively harsh and expletive environment**” (Para 74). Even the Supreme Court in *R. v. D.B.* (2007) acknowledged this risk, “...societal as well as his personal needs could best be met by keeping D.B. in the juvenile justice correctional system **rather than exposing him to more hardened criminals**” (Para 99); accordingly, in that case D.B. was issued a youth sentence.

Much of the concern stems from youths’ intrinsic vulnerability due to their age and maturity. For instance, in *R. v. Lights* (2007), the Ontario judge noted, “Mr. Lights is “on the cusp” of meeting all of the criteria for an anti-social personality disorder, which is **more likely to crystallize or solidify in the adult system**” (Para 32). In *R. v. Nguyen* (2008), the BC appellate judge stated that, “he is a young man who lacks maturity, and is **highly susceptible to peer influences, particularly in an anti-social peer environment. In light of this, there is a likelihood that placing him in an adult institution would have an adverse affect on his rehabilitation**”(Para 63). In *R. v. D.E.* (2008), the Alberta judge noted: “Defence further argued that his maturity is still developing and **the adverse influences of being in with criminals in an adult system weighs against an adult sentence and would be counter productive**” (Para 75).

Despite this, judges often concede that “a youth sentence ...is neither long enough to reflect the seriousness of the offence and the accused’s role in it, nor long enough to provide reasonable assurance of rehabilitation and safe reintegration back into society” (*R. v. D.E., supra*, Para 75), and such, concerns regarding the adverse effects of the pains associated with adult incarceration are set aside. On the other hand, those cases which considered an adult sentence but elected for a youth sentence concluded that rehabilitation and reintegration would be better provided within the youth justice system. For instance, the judge in *R. v. A.J.D.* (2009) concluded, “An adult sentence served in a penitentiary setting would place the long-term protection of the public at greater risk than a youth sentence because of the potential negative consequences for AJD’s rehabilitation” (Para 57). Once again, it becomes apparent that arguments for youth sentences are more offender-centric, whereas those judges endorsing adult sentences focus more on the seriousness of the offence.

#### **5.5.5 The Cement is Not yet Quite Dry**

Despite the seemingly “offence-centric” perspectives that emerged from adult sentences, another relevant theme was discovered: the cement is not yet quite dry. This is to say that youth are on a continuum of maturity and moral development, which is critical to understand when considering what type of sentence should be imposed on an offender because of their potential to “re-route” their antisocial ways. In other words, “**Youth** is a factor in mitigation because it **holds the best possibilities for reform**” (*R. v. B.C.F.*, 2008, Para 57).

With this in mind, there was a protective element in judges’ opposition to an adult sentence. The benefits for retaining young offenders within the walls of the youth justice system were considered. For instance, in *R. v. C.S.* (2008), the judge expressed concern with the Crown’s application for an adult sentence: “The fact that she is still quite young (only recently turned 15) bodes well in that one would expect that **her personality, values and attitudes are still evolving and should be amenable to change**” (Para 24). Furthermore, “it is also noteworthy that **the next several years of C.’s life can**

**be pivotal in terms of defining the attitudes and values that direct her behaviour”**

(Para 64). Finally, in electing a youth sentence, the judge held,

“The ability to redirect C.S. by challenging her attitudes and beliefs supported by the implementation of intensive support and supervision, and the prospect of funding for an intensive treatment plan leads me to conclude that **a youth sentence of two years duration is preferable to a lengthier adult sentence that has less to offer in terms of intensive support and supervision or an intensive treatment plan**....a lengthier adult sentence, in and of itself, will not necessarily result in greater accountability. In fact, there may be less accountability” (Para 72-73).

Similarly, the judge in *R. v. K.V.* (2009) considered an adult sentence to be detrimental to her rehabilitation, “...it is clear that the essential challenge which the Court faces is to make this young person accountable for her deplorable behaviour in a meaningful way, while at the same time **channelling her potential for the future benefit of society rather than crushing it out of existence”** (Para 20). While the judge in *R. v. K.G.S.* (2009) elected for a custodial sentence, rehabilitation was a main driving force in light of K.G.S.’s youth: “Absent some willingness to respect a court order, probation cannot effectively provide the structure that is needed **to turn this young life around”** (Para 33).

Such sentiments also emerged when youth were issued an adult sentence, however these arguments were often made by defence counsel, such as in *R. v. D.E.* (2008): “...**Defence further argued that his maturity is still developing** and the adverse influences of being in with criminals in an adult system weighs against an adult sentence and would be counter productive” (Para 38). Indeed, youth status mitigates the circumstances due to their undeveloped maturity. So when does the court decide that such development has “come to fruition”?

### **5.5.6 Older Youth or Little Adults? It’s a Gray Area**

As stated above, the number of youths who were issued adult sentences increased with age. There was an apparent merging effect as youths approached the

age of adulthood, creating a sort of grey area between the boundaries of youth and adult sentences. As the BC appellate judge in *R. v. Pratt* (2007) put it, “The presumption of maturity is a distinguishing factor between youth and adult criminal law. However, it is not a black and white situation. **The YCJA recognizes that maturity develops progressively, while dependency gradually diminishes, until a youth reaches the stage of full accountability**” (Para 54). Thus in terms of administering an adult sentence, “[o]nly as the age of the offender approaches the cut-off age in the definition of ‘young person’ is that result more likely. In other words, the fact of youth creates a discount' from the adult tariff of sanctions” (Para 57).

That youth were on the cusp of adulthood was a common theme among the rationales underlying adult sentences. For instance, in *R. v. D.E.* (2008) the judge held, “The accused was 17 years and 2 months old at the time of the offence (i.e. **10 months short of being an adult for the purposes of the law**)” (Para 17). Similarly, “[a]t the time of the offences, the accused was **18 days from adulthood** (*R. c. X.*, 2007, Para 76); “[h]e acted alone when **he was four months shy of his 18th birthday**” (*R. v. Smith*, 2009, Para 41); “Miss Bird was **less than six months away from the cut-off age of 18** at the time of the offence” (*R. v. Bird*, 2008, Para 64)

This gray area also referred to a youth’s maturity level. For instance in *R. v. D.E.* (2008) the judge pointed out, “as one member of the IRCS assessment team put it “he is 17 going on 23” (Para 74). Similarly, in *R. v. Quintana* (2008), the BC judge stated, “Quintana does not appear to lack maturity. He is close to the cut-off age for the YCJA” (Para 101). In *R. v. Kenworthy* (2008) the BC judge held, “I have no hesitancy in concluding that **Mr. Kenworthy is mature beyond his years**, that he is physically fit and that he has been engaged in a lifestyle of criminal activities for approximately 5 years” (Para 27). In *R. v. Green* (2007), the BC judge spoke to the maturity level of both accused in the case: “both of the accused are **close in age to the upper age limit of those dealt with under the Y.C.J.A. and both were analyzed as being within the coping skills of their chronological age category**” (Para 61).

As illustrated, there seems to be a tendency among judges, when considering an adult sentence, to point out how “close” an offender is to reaching the legal adult age, as though the judge in essence is trying to justify the imposition of an adult sentence. It is as if to say “well, they’re close enough to the cut-off point, might as well bypass them into the adult category.” This approach is suggested by a Saskatchewan judge: “I mean that B.C.F.’s sentence must unmistakably reflect the factors of denunciation and deterrence...They must be even further tempered by the fact that **he was approaching his 17th birthday on the offence date and only now approaches his 18th birthday**”(R. v. B.C.F., 2008, Para 43).

On the other hand, it appears that youth on the younger side of the age spectrum benefit from a buffer against adult sentences. In R. v. J.A.P. (2008), the accused was charged with first-degree murder for shooting his mother. He was 14 years old at the time of the offence, and the judge concluded that a youth sentence was sufficient considering “This offence was very much a product of the dysfunctional family background and **the defendant’s dependency and reduced level of maturity...the defendant was very young**, even in the context of age parameters of the YCJA” (Para 31). Similarly, the 14-year old female in R. v. C.S. (2008) was found guilty of aggravated assault; however, in light of her young age the judge dismissed the Crown’s application for an adult sentence. As articulated in R. v. L.A.B. (2007), “an adult sentence of life imprisonment, although clearly proportionate to the gravity of the offence, would be **disproportionate to the moral culpability of this young person, who was 14 at the time of the offence**” (Para 72).

So, there appears to be a spectrum of moral culpability in alignment with the spectrum of age and maturity. As such, “[t]he criminal law for adult offenders presumes maturity. In contrast, the Act recognizes that a young person's maturity, like their physical stature, increases progressively, as, too, their dependency diminishes gradually, until he or she reaches the stage of full accountability” (R. v. Pratt, supra, Para 54). However while the presumption of maturity in reference to youth and adult criminal law is indeed not black and white, the contrast is more striking at the younger end of the



spectrum, and as age progresses towards the adult cut-off, this distinguishing feature becomes a gray area.

## 6: CONCLUSION

Canada has stepped down from the dubious position of world leader in youth incarceration rates since the enactment of the *YCJA*; custodial sentences have been on a steady decline since its inception. This mandate has proven successful. The four gateways to custody have provided the judiciary with strict guidelines for the imposition of a custodial sentence. As well, the preamble and principles of the *Act* have undoubtedly been navigational tools when crafting a sentence for young offenders.

However, the fact remains that the *YCJA* is founded on a modified model of youth justice, calling for an amalgamation and harmonization of principles from across the continuum of justice approaches. While the *YCJA* is much more articulate in its mandates than its predecessor, and despite the complex trifurcated process it establishes, the *Act's* mixed model foundation has not avoided the common dilemma of conflicting principles.

While the decrease in the number of custodial sentences can be largely attributed to the application of the four gateways, the case law has revealed that other than abiding by these criteria for custody, there has not been clear conformity to principle in making the decision to incarcerate a young offender. It has been demonstrated that the application of s. 38 and s. 39 by judges has been inconsistent. For instance, while almost half the cases (43 percent) made reference to s. 39, only a third of the cases (34 percent) emphasized a *specific gateway* when imposing a custodial sentence. More often than not, the crime itself (seriousness of the offence) served to reflect the reasons for custody. Moreover, the decision to impose a CSO was often precluded by a generic statement that *the imposition of a non-custodial sentence would not be consistent with the purpose and principles of sentencing*. Absent a clear judicial explanation of the rationale for a sentence, it is inevitable that variability of application

will arise. In effect, this breaches s. 39(9), which requires judges to provide reasons for *why* non-custodial options are inadequate to achieve the principles set out in s. 38(1).

The general principles set out in s. 38(1) were applied more often than the specific gateways set out in s. 39, with 80 percent of cases doing so. Yet, herein lies the challenge of balancing diverse principles. As much as the principles set out in s.38 were worded clearly, they remain open to interpretation either in their order of precedence or in their meaning. It was apparent that the listed principles were taken to be a proverbial 'all-u-can-judge buffet', where picking and choosing emerged in the case law. Judges would often focus on one or two principles when crafting a sentence instead of referring to all the principles collectively, which Parliament intended. This suggests a mixed model *Act* is still difficult to administer, no matter how clear each principle is stated. As one judge stated, **"it is a difficult process, balancing the principles of sentencing and the declaration of principle modified by the *Act*"** (*R. v. Z.Q.P.*, 2006, Para 13).

Furthermore, variability also existed in interpreting the meaning of the principles, such as protection of the public. As Campbell asserts, "if 'protection of the public' is presumed to be a consequence rather than a goal in itself, the judges should be focusing on the actual principles of sentencing rather than trying to be a crime-fighter" (2005, p. 233).The problem is that protection of the public was applied from *both* perspectives, thus proving to be capable of justifying both rehabilitative and punitive outcomes; these interpretations represent both Welfare or Crime-Control approaches. Meaningful consequences was another multi-purpose principle, although it was often applied as a "wake-up call", and appeared to carry an even more punitive implication than "protection of the public." At times it was being used synonymously with deterrence. As one judge noted, **"if the principle of specific deterrence is dealt with at all then it would have to be found in the words "meaningful sanctions"**, (*R. v. Z.J.L.*, 2007, Para 14). This implies "hidden meanings" can be drawn from the various principles enunciated in the *Act*, depending on the position of the justice model continuum one is looking from, which is precisely the problem with building mandates

on a mixed model of youth justice. Each principle will be interpreted, deduced, perceived, and applied from different philosophies of youth justice, depending on the preferences of the sentencing judge.

Finally, in regard to the principle of deterrence, it was argued in Corrado et al. (2006) that if deterrence is still being applied despite the Supreme Court decision in *R. v. B.W.P.* (2006), then it demonstrates mixed models of youth justice are conflicting. Mixed model laws allow for flexibility by offering all fundamental approaches along the continuum to be “tapped into” by judges. For instance, if a judge endorses more crime-control oriented initiatives, a mixed model will cater to this by making crime-control interpretations or applications possible. It was illustrated in the case law that not only was deterrence covertly accessed under the guise of other principles, but in cases as recent as 2009, it has still been blatantly applied. These findings as a whole suggest that, as clear as the *Act* may be, mixed models of youth justice produce mixed results.

## **6.1 Mandates in Motion**

“The asymmetry between Canadian youth justice philosophy and practice has been accentuated in recent years...” (Davis-Barron, 2010, p. 428).

The potential reinstatement of deterrence into Canada’s youth justice legislation via Bill C-4 will only serve to tilt the *Act* towards the Crime-Control end of the justice continuum. Furthermore, the availability of deterrence will undoubtedly increase the likelihood of disparity in sentencing, as was demonstrated under the *YOA*, which is completely contrary to one of the main mandates of the *Act*. As Bala warns:

“Seldom, if ever, are any of the possible negative effects of longer sentences mentioned by proponents of the “get tough” approach. For some adolescents, the probability for reoffending may increase as a result of longer sentences, especially in more brutal adult correctional environments where they may be revictimized and/or ‘trained’ to commit more serious crimes” (Bala et al., 1994, p. 88).

Of most concern, modifying the *Act* through the potential passage of Bill C-4 will possibly trigger an erosion between youth and adult justice systems by introducing the three remaining sentencing principles that maintain a distinction between the two systems: deterrence, denunciation, and protection of the public. For the aforementioned reasons, this potential change seems completely counter intuitive considering the *Act's* Declaration of Principles “**recognizes a clear intention of Parliament and a primary objective of the *YCJA* to create a distinct youth justice regime separate from that used for adults**” (*R. v. D.W.*, 2009, Para 31).

The premise behind having a separate youth justice system is entrenched in the belief that youth have a diminished level of maturity and moral culpability as well as a heightened vulnerability. To the extent that treating them separately from adults is considered a principle of fundamental justice, legislative modification that breaks down differential treatment is to be avoided. It is for this reason that cases which have come before the Supreme Court of Canada since the *YCJA's* inception have rendered decisions which reflect and advocate these beliefs. For instance, *R. v. B.W.P.* (2006) established deterrence as inapplicable to youth sentences. Such a principle only serves to make penalties harsher. As well, the principle of deterrence operates on the concept of rational choice, which youth are much less capable of exercising. *R. v. D.B.* (2007) altered the onus provisions for adult sentences, highlighting the conclusion that placing the onus on youth to prove why an adult sentence would *not* be necessary for presumptive offences is a clear *Charter* violation to the extent that it is a breach of fundamental justice. It “clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age” (Para 76). *R. v. C.D.* (2005) and *R. v. S.A.C.* (2008) refined the wording in the four gateways so as to maintain restricted access to custodial sentences in accordance with one of the *Act's* main mandates: to reduce custody rates.

What has changed since the enactment of the *YCJA*? If the enactment of Bill C-4 succeeds, not only will it swing the pendulum to the crime control end of the continuum, but it will add more opportunity for varied approaches to sentencing,

diversity in the interpretation of case situations, and disparity among judges in their sentencing practices. Essentially, this will put the nation back at square one in dealing with its young offenders. Furthermore, it will lose its distinction as having a clear and principled approach to youth justice, and resemble what Feld has referred to as a “scaled-down, second class criminal court for young people” (1997, p. 1). The judge in *R. v. E.F.* (2007) reminds the Ontario court of these important differences:

**“There are distinct advantages to young persons sentenced under the Act not available to adults sentenced under the Code.** For instance, the objectives of sentencing described in s. 718 of the Code include **denunciation**, general and specific **deterrence**, and the **separation of offenders from society where necessary... Consideration of those objectives under the Code may, in a given case, give rise to a more severe sentence**”(Para 64).

Ultimately, the passage of Bill C-4 will threaten the balanced approach to youth crime which has been the basis of the *YCJA* since its inception: “These changes repudiate juvenile courts’ original assumptions that youths should be treated differently than adults, that they operate in a youth’s best interest, and that rehabilitation is indeterminate and cannot be limited by fixed-time punishment” (Feld, 1993, p. 411).

## **6.2 The *YCJA*: “Only for *Most* Young Persons *Most* of the Time”**

“Permitting adult sentences for young persons in *any* circumstance is, in the eyes of some, a fundamental digression from the principles of the *United Nations Convention on the Rights of the Child*...it remains for Parliament and the Supreme Court of Canada to give texture and precise definition to the meaning and the boundaries of a separate youth criminal justice system within a modern and enlightened Canadian state” (Davis-Barron, 2010, p. 428-429, italics in original).

The most striking results that emerged from the case law were the number of adult sentences imposed on youth; As the Ontario judge in *R. v. C.K.* (2006) contended, “the norm must be youth sentencing and **adult sentencing must be the exception...**” (Para 40). However, a total of 24 cases, that is, 28 percent of the sample, resulted in an

adult sentence. Taking an adult approach in almost one third of the cases seems to be far from the exception.

Some judges affirm that certain situations would warrant an adult sentence: “There may be fact situations which require a young person to be dealt with as an adult, for example, to receive an adult sentence to ensure the protection of the public” (*R. v. G.D.S.*, 2007, Para 16). As a result, “while rehabilitation cannot be overlooked, it is of secondary importance in dealing with a case of this kind” (*R. v. Kenworthy*, 2008, Para 71). Indeed, “Parliament recognized that certain circumstances could render youth sentences imposed pursuant to sections 3 and 38 insufficient. It specifically provided the avenue of adult sentencing to deal with those cases” (*R. v. B.C.F.*, 2008, Para 35).

Nevertheless, the proportion of adult sentences in this study is problematic on at least two levels. Firstly, considering one of the *YCJA*'s main mandates has been to reduce custodial sentences, it would appear, given the number of adult sentences in this study, that this has become a standard option among judges. In reference to s. 72, which dictates and directs the judicial test for electing an adult sentence, an Alberta judge stated, "...the onus is on the Crown to satisfy this Court that a youth sentence would not be of sufficient length to hold the accused accountable for his actions. **The onus is not a heavy one**" (*R. v. D.E.*, 2008, Para 74). Facilitating an adult sentence through diminishing the extent of the onus on the Crown completely undermines the overall mandate of the legislation. Furthermore, it undermines the protections afforded to youth as a principle of fundamental justice: “It is imperative that the justice system for minors consider the best interests of the child” (As cited in *R. v. D.B.*(2008) of the Quebec Court of Appeal, Para 32). If custodial sentences under the *YCJA* are supposed to be a last resort, then what does this imply for *adult* sentences?

Secondly, David-Barron argues that adult sentences generate contradiction and disconnect between youth justice philosophy and practice. While Canada has positioned itself in support of the *UN Convention on the Rights of the Child* in upholding a justice system for youth as a consideration of their heightened vulnerability, lesser maturity

and reduced capacity for moral judgment, “the Canadian state has a **separate youth justice system only for *most young persons most of the time***” (2010, p. 427, italics in original). Canada has reserved itself from the application of provisions in the Convention that require maintaining a separate system for children in all cases (Freeman & van Ert, 2004). David-Barron argues this undermines the values held regarding “sanctity of the child” in that if a seriousness enough crime is committed, a youth’s lessened level of accountability becomes obsolete; “In such cases, the state has traditionally reserved the right to **subject them to the same penalties adults could receive for the same crimes. But, as critics argue, their age and level of maturity has not changed**” (p. 427).

Thus, the seriousness of the offence does not reflect maturity level, at least not in the way that judges seem to perceive those upon whom they impose an adult sentence. This suggests “bigger offences” are perceived to warrant “bigger sentences” because “bigger kids” commit them. Certainly, “a young person's maturity, like their physical stature, increases progressively, as, too, their dependency diminishes gradually, until he or she reaches the stage of full accountability” (*R. v. Pratt*, 2007, Para 54). However, is it not in essence a youth justice system because they *have not yet reached full accountability*? And is it not a central tenet that the criminal law for adult offenders *presumes maturity*?

The option to sentence youths as adults and essentially remove their age as a significant mitigating factor is controversial: “Much is at stake for young persons moved out from under the protective umbrella of the *Y.C.J.A.* However, regardless of youth, the Supreme Court has said that the presumption is rebuttable. The protection it affords can indeed be lost. The loss could potentially extend to the imposition of the same sentence received by an adult” (*R. v. B.C.F.*, 2008, p. 36). Thus David-Barron makes a very interesting point. The Canadian youth justice system does not provide absolute protections to youth. What is philosophically considered a principle of fundamental justice, is accompanied by a conditional fine print in practice.



We have ended up with a polarized youth justice system – one that recognizes and acknowledges the diminished maturity and culpability of youth, managing them under the umbrella of the *YCJA*, and a parallel system that disregards the principles of having a separate youth justice system, electing instead to impose adult sentences. A mixed model of youth justice allows those judges who are proponents of the crime-control approach to choose adult sentences, eliciting deterrence or denunciation as sentencing principles, making “the exception” that much more appealing. After all, the option to “upgrade” to an adult sentence has always been an option for judges since the establishment of the Canadian youth justice system a century ago (David-Barron, 2010).

Ironically, “The unfortunate reality is that those youths who commit the most serious and senseless crimes are precisely those who lack foresight and judgment, and who will not be deterred by adult sentences”(Bala 2006, as cited in Corrado et. Al., 2006, p. 568). Indeed, contrary to the notion that serious offences warrant serious punishments, it could be argued that the most serious young offenders are also precisely those who require the most intensive rehabilitative intervention, treatment and care.

For instance, in *R. v. M.B.M.* (2007) the youth was sentenced to life in prison after a swarm attack on a victim resulted in charges of sexual assault, sexual assault with a weapon, aggravated sexual assault and kidnapping. M.B.W. was described as having significant antisocial and psychopathic traits. The reason for a life sentence was that “a youth sentence would not have sufficient length of time to provide meaningful and appropriate skilled assistance to M.B.W. to help him make progress in overcoming his **life long, almost 20 years, of mental health issues...**” (Para 137). Similarly, in *R. v. Lights* (2007), the youth was sentenced as an adult for offences that included robbery and aggravated assault. This youth was described as “**on the cusp of meeting all of the criteria for an anti-social personality disorder, which is more likely to crystallize or solidify in the adult system**” (Para 32). Nevertheless, an 8-year adult sentence was imposed. In *R. v. B.C.F.* (2008), the youth was issued a 9-year adult sentence for

attempted murder. His actions were explained by “**a disturbance in personality, development and relationship functioning**” (Para 24).

Yet, as stated by the Quebec Court of Appeal, “Rehabilitation, rather than suppression and dissuasion, must be at the heart of legislative and judicial intervention with young persons.” This has been considered a principle of fundamental justice (as cited by the Supreme Court in *R. v. D.B.*, 2008). However, parallel to the previous adult sentences, the B.C. judge in *R. v. Pratt* (2007) addressed this notion with the following:

“I would not say, given the language in s. 3 of the **Act**, that this means that a sentence that otherwise fits the crime will always be reduced to take account of rehabilitation and reintegration, **as the extent of the opportunity for rehabilitation and reintegration will be individual to the character and circumstances of the offender**” (Para 58).

Thus, it is clear the philosophical underpinnings of the *YCJA* are not always in tandem with the practice. Furthermore, the very youth who are managed under the *Criminal Code* via adult sentences are arguably the very youth, who, in addressing the reasons for treating youth separately from adults, most require a youth justice system. A system that can act as a stop gate to youth crime as opposed to pushing the most chronic youth through into the adult justice system where there is greater risk of perpetuating the “downward spiral” appears to be a better approach.

Of course the youth justice system alone is not capable of handling the constellation of problems that most chronic young offenders exhibit: “A reduction in serious violent offending cannot be achieved by a “legislative quick fix,” but rather requires a resource intensive combination of preventative, enforcement and rehabilitative services” (Bala 2006, as cited in Corrado et al., 2006, p. 568). Indeed, a collaborative effort among different social agencies is required. However, the *YCJA* is administered on a provincial basis and largely under a provincial budget, and although judges are now equipped with many more sentencing options under the *Act*, they are still limited by the resources of the community and can only impose alternative or

community-based sentences that are available. This is particularly prevalent in northern or isolated communities where resources are often most needed.

For instance, the promising IRCS sentence, which is treatment intensive and highly costly to administer, has frequently proven to override an adult sentence *when presented as an option to judges*. Such was the case in *R. v. A.J.D.* (2009) and *R. v. L.A.B.* (2007). Thus, it would seem logical to prioritize resources towards more aggressive treatment and intervention options so as to encourage those youth most at risk for future offending to be stopped in their tracks: “Adolescent safety, health, education, peer connections and other outcomes are significantly related to preventing criminal behaviour. Canada needs a rigorous and comprehensive set of measures if we are to promote the best outcomes for our children and youth” (Turpel-Lafond, 2010, p. 17). The bottom line is, **“if the YCJA cannot adequately handle them then it by default fails the most serious chronic offenders among our youth”** (*R. v. Kenworthy*, 2008, Para 95).

The question then becomes, has the YCJA, with its mixed model foundation, with its rhetorical rather than realistic delivery of new sentencing options, with its paradoxical application of adult sentences, and with the potential forthcoming amendments from Bill C-4, already failed many of the youth today?

## WORKS CITED

- Anand, S. (1999). Preventing youth crime: what works, what doesn't and what it all means for Canadian Juvenile Justice Policy. *Queen's Law Journal*, 25,1-37.
- Anand, S. (2003). Crafting youth sentences: The roles of rehabilitation, proportionality, restraint, restorative justice, and race under the *Youth Criminal Justice Act*. *Alberta Law Review*, 40, 943-963.
- Bala, N. (1997). *Young Offenders Law*. Toronto: Irwin Law.
- Bala, N. (2007). Responding to Young Offenders: Diversion, Detention & Sentencing Under Canada's Y.C.J.A., *Queen's Univ. Legal Studies Research Paper No. 07-10*.
- Bala, N. & Anand, S. (2004). "The first months under the *Youth Criminal Justice Act*: A survey and analysis of case law." *Canadian Journal of Criminology & Criminal Justice*, 46 (3), 251-272.
- Bala, N. & Anand, S. (2009). *Youth Criminal Justice Law*, 2<sup>nd</sup> Edition. Toronto: Irwin Law.
- Bala, N., Hornick, J., McCall, M. & Clarke, M. (1994). *State Responses to Youth Crime: A Consideration of Principles*. Department of Justice Canada.
- Bala, N., Carrington, P. & Roberts, J. (2009). Evaluating the *Youth Criminal Justice Act* after five years: a qualified success. *Canadian Journal of Criminology and Criminal Justice*, 51 (2), 131-167.
- Bala, N. & Roberts, J. (2009). Restraining the Use of Custody for Young Offenders: The Canadian Approach. In A. von Hirsch, A. Ashworth & J. Roberts,(Eds.), *Principled Sentencing: Readings on Theory and Policy*, 3<sup>rd</sup> Edition. Oxford: Hart Publishing.
- Barber, J. & Doob, A. (2004). An Analysis of Public Support for Severity and Proportionality in the Sentencing of Youthful Offenders. *Canadian Journal of Criminology & Criminal Justice*, 46 (3), 327-342.
- Barnhorst, R. (2004). "The *Youth Criminal Justice Act*: New Directions and Implementation Issues." *Canadian Journal of Criminology & Criminal Justice*, 46 (3),231-251.
- Bell, Sandra. (2012). *Young Offenders and Juvenile Justice*,4<sup>th</sup> Edition. Toronto: Nelson.

- Brodie, S. (2005). *Changes in custody following the enactment of the Youth Criminal Justice Act*. M.A. Thesis, Simon Fraser University.
- Busby, K. (2000). Third Party Records Cases Since R. v. O'Connor. *Manitoba Law Journal*, 27, 355-390.
- Calverly, D., Cotter, A., & Halla E. (2010). Youth Custody and Community Services, 2008/2009. *Juristat*, Vol. 30, No. 1. Ottawa: Statistics Canada.
- Campbell, K. (2005). *Understanding Youth Justice in Canada*. Toronto: Pearson Prentice Hall.
- Cesaroni, C. & Bala, N. (2008). Deterrence as a principle for youth sentencing: no effect on youth, but a significant effect on judges. *Queen's Law Journal*, 34, 447-481.
- Corrado, R. (1983). Introduction in R. Corrado, M. Le Blanc, & J. Trépanier, (Eds.), *Current Issues in Juvenile Justice*. Toronto: Butterworths.
- Corrado, R. (1992). Introduction in R. Corrado, N. Bala, R. Linden, & M. Le Blanc, (Eds.), *Juvenile Justice in Canada: A Theoretical and Analytical Assessment*. Toronto: Butterworths.
- Corrado, R., Cohen, I., Glackman, W. & Odgers, C. (2003). Serious and Violent Offenders' Decision to Recidivate: An Assessment of Five Sentencing Models. *Crime & Delinquency*, 49 (2), 179-200.
- Corrado, R., Gronsdahl, K. & MacAlister, D. (2007). "The Youth Criminal Justice Act: Can the Supreme Court of Canada Balance the Competing and Conflicting Models of Youth Justice"? *Criminal Law Quarterly*, 52, 1-66.
- Corrado, R., Gronsdahl, K., MacAlister, D. & Cohen, I. (2006). "Should Deterrence be a Sentencing Principle Under the Youth Criminal Justice Act?" *Canadian Bar Review*, 85, 539-568.
- Corrado, R., Gronsdahl, K., MacAlister, D. & Cohen, I. (2010). "Youth Justice in Canada: Theoretical Perspectives of Youth Probation Officers". *Canadian Journal of Criminology and Criminal Justice*, 52, (4), 397-426.
- Cox, S., Allen, J., Hanser, R. & Conrad, J. (2008). *Juvenile Justice: A Guide to Theory, Policy, and Practice*, 6<sup>th</sup> Edition. Thousand Oaks, California: Sage Publications.
- David-Barron, S. (2010). *Canadian Youth & the Criminal Law: One hundred years of youth justice legislation in Canada*. Markham, Ontario: Lexis-Nexis.
- Department of Justice Canada. (2003). *YCJA Explained*. Available Online: <http://canada.justice.gc.ca/en/ps/yj/repository/>.

- Dougherty, K. (2008, September 24). Harper crime plan delivers 'young flesh' to prison paedophiles: Duceppe. *National Post*. Available online: <http://network.nationalpost.com/np/blogs/posted/archive/2008/09/24/dueppe-says-harper-crime-plan-delivers-young-flesh-to-prison-pedophiles.aspx>
- Doob, A. (2001, May). *Youth Court Judges' Views of the Youth Justice System: The results of a survey*. Report to the Department of Justice Canada.
- Doob, A. & Cesaroni, C. (2004). *Responding to Youth Crime in Canada*. Toronto: University of Toronto Press.
- Doob, A., Marinos, V. & Varma, K. (1995). *Youth Crime and the Youth Justice System in Canada: A Research Perspective*. Toronto: Centre of Criminology, University of Toronto.
- Doob, A., & Sprott, J. (2005). *The Use of Custody Under the Youth Criminal Justice Act*. Department of Justice Canada.
- Fabian, S. (2010). *"I'll Be Watching You": A Social-Legal Analysis of Judicial Decisions in Canadian Criminal Harassment Cases, 1993-2006*. Ph.D. Dissertation, Simon Fraser University.
- Freeman, M. & van Ert, G. (2004). *International Human Rights Law*. Toronto: Irwin Law.
- Geigen-Miller, M. (2008). *Submission on Bill C-25: An Act to Amend the Youth Criminal Justice Act*. Defense for Children International Canada. Available online: <http://www.dci-canada.org>
- Harris, P., Weagant, B., Cole, D. & Weinper, F. (2004). "Working 'in the Trenches' with the YCJA." *Canadian Journal of Criminology & Criminal Justice*, 46 (3), 367-390.
- Hartnagel, T. (2004). The Rhetoric of Youth Justice in Canada. *Criminal Justice*, 4 (4), 355-374.
- Howell, J.C. (2003). *Preventing and Reducing Juvenile Delinquency: A Comprehensive Framework*. Thousand Oaks, California: Sage Publications.
- John Howard Society of Alberta. (2007). *Justice for Young Offenders*. Available online: <http://www.johnhoward.ab.ca/pub/youngoff/youngoff.pdf>
- John Howard Society of Alberta. (1999). *Harsh Reality of the Young Offenders Act*. Available Online: <http://www.johnhoward.ab.ca/pub/pdf/C9.pdf>

- John Howard Society of Ontario. (2010). *Submission to the Standing Committee of Justice and Human Rights of the Government of Canada Regarding C-4: An Act to Amend the Youth Criminal Justice Act and to Make Consequential and Related Amendments to Other Acts*. Available online: <http://www.johnhoward.on.ca/pdfs/Bill%20C4%20Submission%20to%20JHR%20Committee.pdf>
- Keenan, K. (2009). "Mr. Big" Recruiting for the Criminal Underworld: an examination of undercover police investigations in Canada. M.A. Thesis, Simon Fraser University.
- Knudsen, E. & Jones, C. (2008). *Regarding the Youth Criminal Justice Act*. Submitted to the Department of Justice. John Howard Society of Canada.
- Krawchuk, M. (2008). *The Use of Custody Under the Youth Criminal Justice Act: A Review of Section 39, Prohibitions on the Use of Custodial Sentences*. M.A. Thesis, University of Manitoba.
- Latimer, J., & Foss, L. (2004). *A One-day Snapshot of Aboriginal Youth in Custody across Canada: Phase II*. Department of Justice Canada: Research and Statistics Division.
- Loeber, R. Farrington, D. (2001). *Child delinquents: development, intervention, and service needs*. London: Sage Publications.
- Maxfield, M. & Babbie, E. (2006). *Basics of Research Methods for Criminal Justice and Criminology*. Belmont, CA: Thomson Wadsworth.
- Meyer, D. (2005). *Boys among Men: Trying and Sentencing Juveniles as Adults*. London: Praeger.
- Olivo, L., Goldstein, D., & Cotter, R. (2001). *Youth and the Law: New Approaches to Criminal Justice and Child Protection*. Toronto: Emond Montgomery Publications Limited.
- Platt, A. (1969). *The Child Savers: The Invention of Delinquency*. Chicago: University of Chicago Press.
- Pratt, J. (1989). Corporatism: The Third Model of Youth Justice. *British Journal of Criminology*, 29 (3), 301-326.
- Roberts, J. (2004). Harmonizing the Sentencing of Adult and Young Offenders: A Comparison of the *Youth Criminal Justice Act* and Part XXII of the Criminal Code. *Canadian Journal of Criminology & Criminal Justice*, 46 (3), 251-272.
- Rosen, P. (2000). *Young Offenders Act (revised 2000)*. *Library of Parliament, Parliamentary Information and Research Services*. Available online: <http://www.parl.gc.ca/information/library/PRBpubs/8613-e.htm>

- Steinberg, L. & Cauffman, E. (2000). A Developmental Perspective on Judicial Boundary. In J. Fagan & F.E Zimring (Eds.), *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*. Chicago: University of Chicago Press.
- Steinberg, L. & Schwartz, R.G. (2000). Developmental psychology goes to court. In T.Grisso & R.G. Schwartz (Eds.), *Youth on Trial, A Developmental Perspective on Juvenile Justice*. Chicago: University of Chicago Press.
- Taylor-Butts, A. & Bressan, A. (2008). Youth Crime in Canada, 2006. *Juristat*, Vol. 28, No. 3. Ottawa: Minister of Industry.
- Thomas, J. (2010). Youth Court Statistics, 2008/2009. *Juristat*, Vol. 28, No. 4. Ottawa: Statistics Canada.
- Tufts, J. & Roberts, J. (2002). Sentencing Juvenile Offenders: Comparing Public Preferences and Judicial Practices. *Criminal Justice Policy Review*, 13 (1), 46-64.
- Turpel-Lafond, M.E. (2010). *Submission to the House of Commons Standing Committee on Justice and Human Rights respecting An Act to Amend the Youth Criminal Justice Act (Bill C-4)*. B.C. Representative for Children and Youth. Victoria, BC. Available online: [http://www.rcybc.ca/Images/PDFs/Sub\\_Bill\\_C-4.pdf](http://www.rcybc.ca/Images/PDFs/Sub_Bill_C-4.pdf)
- Von Hirsch, A. (2009). Reduced Penalties for Juveniles: the Normative Dimension. In A. von Hirsch, A. Ashworth & J. Roberts, (Eds.), *Principled Sentencing: Readings on Theory and Policy*, 3<sup>rd</sup> Edition. Oxford: Hart Publishing.
- Winterdyk, John. (2005). *Issues and Perspectives on Young Offenders in Canada*, 3<sup>rd</sup> Edition. CA: Nelson.
- Zimring, F.E. (2000). Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility. In T. Grisso & R.G. Schwartz (Eds.), *Youth on Trial: A Developmental Perspective on Juvenile Justice*. Chicago: University of Chicago Press.
- Zimring, F.E. (2009). Rationales for Distinctive Penal Policies for Youth Offenders. In A. von Hirsch, A. Ashworth & J. Roberts, (Eds.), *Principled Sentencing: Readings on Theory and Policy*, 3<sup>rd</sup> Edition. Oxford: Hart Publishing.
- Zimring, F.E., & Fagan, J. (2000). Transfer policy and law reform. In J. Fagan & F.E.Zimring (Eds.), *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*. Chicago: University of Chicago Press.



## Legislation and Treaties

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, ch. 11 (U.K.).

*Canada Bill C-25: An Act to amend the Youth Criminal Justice Act*, 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl. October 16, 2007. (This bill did not become law before the 39<sup>th</sup> Parliament ended on 7 September 2008.)

*Canada Bill C-4: An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other acts (Sébastien's Law (Protecting the Public from Violent Young Offenders) )*, 3<sup>rd</sup> Sess., 40<sup>th</sup> Parl., March 3, 2010.

*Criminal Code of Canada*, R.S.C. 1985, c. C-46.

*United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.

*Young Offenders Act*, R.S.C. 1985, c. Y-1.

*Youth Criminal Justice Act*, S.C. 2002, c. 1

## Cases Cited

*R. v. A.D.* [2008], N.S.J. No. 345 (C.A.)  
*R. v. B.W.P.*; *R. v. B.V.N.*, [2006] 1 S.C.R. 941  
*R. v. C.D.*, [2005] 3 S.C.R. 668  
*R. v. D.B.*, [2008] 2 S.C.R. 3  
*R. v. D.W.*, [2009] S.J. No. 185 (Prov.Ct.)  
*R. v. Gladue*, [1999] 1 S.C.R. 688  
*R. v. J.K.E.*, [1999] Y.J. No. 119  
*R. v. M. (J.J.)*, [1993] 2 S.C.R. 421  
*R. v. R.C.*, [2005] 3 S.C.R. 99  
*R. v. S.A.C.*, [2005] 3 S.C.R. 99

## Cases for Analysis

*LSJPA - 074*, [2007] Q.J. No. 4393 (Prov.Ct.)  
*R. v. A.C.S.*, [2008] Y.J. No. 77 (Prov.Ct.)  
*R. v. A.H.*, [2006] S.J. No. 582 (Prov.Ct.)  
*R. v. A.J.D.*, [2009] N.S.J. No. 78 (S.C.)  
*R. v. A.J.Y.*, [2007] B.C.J. No. 1987 (Prov.Ct.)  
*R. v. A.M.*, [2007] N.J. No.76 (Prov.Ct.)  
*R. v. A.O.*, [2007] O.J. No. 561 (C.A.)  
*R. v. A.R.*, [2008] O.J. No. 2011 (C.J.Prov.Div)  
*R. v. B.B.*, [2007] O.J. No. 3813 (C.J.Prov.Div)  
*R. v. B.C.F.*, [2008] S.J. No. 510 (Prov.Ct.)  
*R. v. B.K.T.S.*, [2009] M.J. No.78 (Prov.Ct.)

*R. v. Bird*, [2008] A.J. No. 609 (Prov.Ct.)  
*R. v. C.G.R.*, [2006] B.C.J. No. 2037 (Prov.Ct.)  
*R. v. C.H.C.*, [2009] A.J. No. 225 (Prov.Ct.)  
*R.v. C.K.*, [2006] O.J. No. 2982 (C.J.Prov.Div)  
*R. v. C.S.*, [2008] N.S.J. No.218 (Prov.Ct.)  
*R. v. C.S.U.*, [2006] S.J. No.674 (C.A.)  
*R. v. C.W.W.*, [2006] A.J. No.914 (Prov.Ct.)  
*R. v. D.B.*, [2007] N.J. No.423 (Prov.Ct.)  
*R. v. D.B.*, [2008] 2 S.C.R. 3  
*R. v. D.D.L.B.*, [2008] M.J. No.67 (Prov.Ct.)  
*R. v.D.D.Q.*, [2008] A.J. No.718 (Prov.Ct.)  
*R. v. D.E.*, [2008] A.J. No.936 (Prov.Ct.)  
*R. v.D.E.C.*, [2008] M.J. No.290 (Prov.Ct.)  
*R. v. D.G.J.*, [2008] O.J. No.3886 (C.J.Prov.Div)  
*R. v. D.J.B.*, [2007] N.J. No.87 (Prov.Ct.)  
*R. v. D.V.*, [2007] O.J. No.3097 (C.J.Prov.Div)  
*R. v. E.F.*, [2007] O.J. No.1000 (C.J.Prov.Div)  
*R. v. F.M.*, [2008] B.C.J. No.467 (C.A.)  
*R. v. Ferriman*, [2006]O.J. No.3950 (C.J.Gen.Div.)  
*R. v. Foreman*, [2007]O.J. No.3588 (C.J.Gen.Div.)  
*R. v. G.D.S.*, [2007]N.S.J. No.232 (Prov.Ct.)  
*R. v. Green*, [2007] B.C.J. No.2634 (Prov.Ct.)  
*R. v. I.C.*, [2007] N.J. No.280 (Prov.Ct.)  
*R. v. J.A.B.*, [2008] O.J. No.3995 (C.J.Prov.Div)  
*R. v. J.A.P.*, [2008] B.C.J. No.1771 (Prov.Ct.)  
*R. v. J.D.*, [2008] B.C.J. No.395 (Prov.Ct.)  
*R. v. J.D.*, [2008] O.J. No.2679 (C.J.Prov.Div)  
*R. v. J.H.*, [2006] B.C.J. No.3425 (Prov.Ct.)  
*R. v. J.O.*, [2009] O.J. No.2041 (C.J.Prov.Div)  
*R. v. J.S.*, [2006] O.J. No.2654 (C.A.)  
*R. v. K.C.R.*, [2006] B.C.J. No.1790 (Prov.Ct.)  
*R. v. K.G.S.*, [2009] Nu.J. No.10 (Prov.Ct.)  
*R. v. K.V.*, [2009] B.C.J. No.67 (Prov.Ct.)  
*R. v. Kenworthy*, [2008] B.C.J. No.1442 (S.C.)  
*R. v. L.A.B.*, [2007] O.J. No.4473 (C.J.Prov.Div)  
*R. v. Lights*, [2007] O.J. No.1516 (C.J.Prov.Div)  
*R. v. M.(S.A.)*, [2007] S.J. No.728 (Prov.Ct.)  
*R. v. M.A.H.*, [2006] S.J. No.538 (C.A.)  
*R. v. M.B.*, [2007] A.J. No.8 (Prov.Ct.)  
*R. v. M.B.*, [2007] N.J. No.61 (Prov.Ct.)  
*R. v. M.B.W.* [2007] A.J. No. 1170 (Prov.Ct.)  
*R. v. M.D.*, [2008] O.J.No.2658 (C.J.Prov.Div)  
*R. v. M.J.*, [2007] O.J. No.2696 (C.J.Prov.Div)

*R. v. M.L.M.*, [2008] A.J. No.597 (C.A.)  
*R. v. Nguyen*, [2008] B.C.J. No.1128 (C.A.)  
*R. v. N.L.H.*, [2009] A.J. No.46 (C.A.)  
*R. v. O.B.*, [2008] O.J. No.5649 (C.J.Prov.Div)  
*R. v. P.N.*, [2008] B.C.J. No.305 (Prov.Ct.)  
*R. v. Pratt*, [2007] B.C.J. No.670 (C.A.)  
*R. v. Quintana*, [2008] B.C.J. No.212 (Prov.Ct.)  
*R. v. R.I.R.M.-M.*, [2008] B.C.J. No. 1235 (C.A.)  
*R. v. Ritchie*, [2006] B.C.J. No.2827 (S.C.)  
*R. v. S.A.C.*, [2008] 2 S.C.R. 675  
*R. v. S.G.F.*, [2007] B.C.J. No.1135 (Prov.Ct.)  
*R. v. S.G.Z.*, [2009] B.C.J. No.601 (Prov.Ct.)  
*R. v. S.K.*, [2007] N.J. No.50 (Prov.Ct.)  
*R. v. S.N.G.*, [2007] N.S.J. No.297 (C.A.)  
*R. v. S.Q.F.*, [2008] M.J. No.195 (Prov.Ct.)  
*R. v. S.R.G.*, [2008] B.C.J. No.1572 (Prov.Ct.)  
*R. v. Smith*, [2009] N.S.J. No.30 (S.C.)  
*R. v. T.B.*, [2008] B.C.J. No. 1568 (Prov.Ct.)  
*R. v. T.F.*, [2008] N.W.T.J. No.66 (Prov.Ct.)  
*R. v. T.J.S.*, [2007] B.C.J. No.1064 (S.C.)  
*R. v. T.R.*, [2007] O.J. No.4074 (C.J.Prov.Div)  
*R. v. T.W.T.*, [2008] A.J.No. 1019 (C.A.)  
*R. v. Van Buskirk*, [2007] B.C.J. No.2855 (S.C.)  
*R. v. Waldo*, [2006] O.J. No.4806 (C.A.)  
*R. v. Z.Q.P.*, [2006] B.C.J.No. 3021 (Prov.Ct.)