

**Understanding the
Theoretical, Legal and Policy Implications of the
*Youth Criminal Justice Act***

by

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Abstract

The *Youth Criminal Justice Act*, like its predecessor, the *Young Offenders Act*, incorporates philosophies, principles and ideologies from several theoretical models of youth justice. Concerns have been raised regarding how challenging it is for the various youth justice professionals such as judges, lawyers and youth probation officers responsible for implementing this law to apply it consistently across cases with varying characteristics. This study will examine the complexity of the *YCJA* from a theoretical, legal and policy perspective by looking at a number of different aspects of the legislation. Firstly, a description of five theoretical models of youth justice will be explored in order to help explain the varying case law interpretations of certain *YCJA* provisions by provincial/territorial and appellate judges, including key decisions made by the Supreme Court of Canada to resolve the case law debate across Canada. Secondly, this study examines the perceptions and decision-making styles of 147 youth probation officers from the province of British Columbia. It involves probation officers reviewing five actual serious and/or violent young offender cases from across Canada. Their theoretical orientation to each case was derived as well as a comparative analysis of YPO sentencing recommendations and the final judicial sentencing decision. Finally, this study will report on a qualitative sample of Canadian senior youth justice officials in relation to the potential impact of the deterrence principle being added to the *YCJA* in October 2012.

Keywords: Youth Criminal Justice Act; Youth Probation Officers; Pre-Sentence Reports; Mixed Models of Juvenile Justice; Deterrence; Supreme Court of Canada

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Table of Contents

Approval.....	ii
Partial Copyright Licence	iii
Abstract.....	iv
Dedication	v
Acknowledgements	vi
Table of Contents.....	vii
List of Tables.....	ix
List of Figures.....	ix
List of Acronyms.....	x
Chapter 1. Introduction.....	1
1.1. Canada's Response to Youth Justice	1
1.2. Impact of the Nunn Commission.....	5
1.3. Policy Stakeholders	9
1.4. Impact of the YCJA Amendments.....	16
1.5. Overview of Thesis	22
Chapter 2. Youth Justice Models	24
2.1. Theoretical Framework.....	24
2.1.1. Welfare Model.....	27
2.1.2. Crime Control Model.....	28
2.1.3. Justice Model	31
2.1.4. Corporatist Model.....	32
2.1.5. Modified Justice Model.....	35
Chapter 3. Supreme Court of Canada Decisions	39
3.1. Introduction	39
3.2. Forensic DNA Data Bank and the YCJA.....	40
3.3. Violent Offence Definition	54
3.4. Deterrence Principle	64
3.5. Adult Sentencing for Youth	74
3.6. Discussion.....	81
Chapter 4. Methodology.....	83
4.1. YPO Survey in 2004.....	83
4.1.1. Sample.....	83
4.1.2. Five Case Studies and Survey Questionnaire	85
4.2. Qualitative Interviews in 2012.....	86
4.2.1. Sample.....	86
4.2.2. Measures	86
4.2.3. Limitations.....	87

Chapter 5. Youth Probation Officers' Decision Making	89
5.1. Conceptual Framework	89
5.2. YPO Ideology	90
5.3. Case Studies.....	93
5.3.1. Case 1: Kara.....	93
5.3.2. Case 2: Carlos	95
5.3.3. Case 3: Edward	96
5.3.4. Case 4: Andy	97
5.3.5. Case 5: Amir	100
5.4. Discussion.....	101
5.5. Limitations	103
 Chapter 6. Pre-Sentence Report Recommendations	 105
6.1. Introduction	105
6.2. Focal Concerns Theory	107
6.3. Empirical Studies on the Relationship Between PSR Recommendations and Sentences	110
6.4. PSR Recommendations	113
6.5. Methods	115
6.6. Results	118
6.7. Discussion.....	129
 Chapter 7. Conclusion	 132
7.1. Thesis Limitations.....	135
 Appendices	 136
Appendix A. List of YPO Sentencing Options	137
Appendix B Sentencing Factors	138
Appendix C Models of Youth Justice	140
Appendix D Deterrence Questions for YPA Qualitative Interview.....	141

List of Tables

Table 1.	Models of Youth Justice	26
Table 2.	YPO Demographics	84
Table 3.	Percentage of Probation Officers Categorizing the Appropriate Response to Each Case	93
Table 4.	Summary of Five Case Studies	116
Table 5.	Comparison of YPO and Judicial Sentencing Options.....	120
Table 6.	Factors Considered by YPO's and Sentencing Judge.....	122

List of Figures

Figure 1.	Comparing Adult and Youth Sentencing Principles	65
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List of Acronyms

CCC	Criminal Code of Canada
DCSO	Deferred Custody and Supervision Order
ISSP	Intensive Support and Supervision Program Order
IRCS	Intensive Rehabilitative Custody and Supervision Order
JDA	Juvenile Delinquents Act
MCFD	Ministry of Children and Family Development
MJM	Modified Justice Model
PSR	Pre-Sentence Report
SCC	Supreme Court of Canada
YCJA	Youth Criminal Justice Act
YOA	Young Offenders Act
YPA	Youth Policy Analyst
YPO	Youth Probation Officer

Chapter 1. Introduction

1.1. Canada's Response to Youth Justice

When the *Youth Criminal Justice Act*¹ came into force on April 1, 2003, it introduced significant changes to youth justice law in Canada. The most prominent objectives of the *YCJA* were to address three major concerns of the *Young Offenders Act*²: to reduce the use of courts, the use of custody for the majority of adolescent offenders and to improve the effectiveness of responses to the small number of repeat young offenders convicted of serious and/or violent crimes.³ By creating a new statute instead of amending the *YOA*, the federal Liberal party government established the symbolic theme that youth justice decision-making was to be fundamentally restructured in all the youth justice process stages beginning with the roles of the police as the initial gatekeepers and ending with the roles of youth probation officers (YPOs) and other service providers in corrections and the community. For the police, YPOs and Crown prosecutors, repeated use of extrajudicial measures⁴ provide options designed to substantially reduce the number of cases brought to the formal youth court processing stage. At the latter stage, the *YCJA* sentencing guidelines are markedly different and more prescriptive than the *YOA* causing Crown prosecutors, defence counsel, and youth court judges to shift their perspectives on appropriate sentences depending on new explicit criteria. For example, judges can no longer sentence a young offender to custody based on extralegal considerations such as whether a homeless youth might be

¹ Youth Criminal Justice Act, S.C. 2002, c. 1 (hereafter *YCJA*).

² Young Offenders Act, R.S.C. 1985, c.Y-1 (hereafter *YOA*).

³ For further elaboration see: *YCJA Explained*. (Ottawa, ON: Department of Justice Canada , 2002) online: <http://canadajustice.gc.ca/eng/pi/yj-jj/repos-depot/index.html>.

⁴ Section 4(d) *YCJA* states: “extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and . . . nothing in this Act precludes their use in respect of a young person who (i) has previously been dealt with by the use of extrajudicial measures, or (ii) has previously been found guilty of an offence.

at risk of harm or a youth whose drug addiction warrants intervention by being removed from the community. By reforming the sentencing provisions for youth, YOA case law was no longer applicable under the YCJA due to the Act's complexity and vastly different legal terminology (e.g. conferencing, proportionality, serious violent offence, deferred custody and supervision order, intensive rehabilitative custody and supervision). As well, key Supreme Court of Canada (SCC) decisions that interpreted critical sentencing provisions such as the violent offence definition and deterrence not being a sentencing objective under the YCJA reduced YOA case law to mere historical context:

The YCJA created such a different sentencing regime that the former provisions of the YOA and the precedents decided under it, including the decision of the Supreme Court of Canada in *M. (J.J.)*, are of limited value. . . . the focus must be rather on the relevant provisions of the new statute.⁵

With a majority in both the House and Senate in 2002, the federal Liberal government passed the YCJA without difficulty but also with limited negative reaction from opposition political parties and public interest groups. This complex law mixed principles from all the critical theories of youth crime and related models of youth justice, which is a key theme of this thesis (elaborated in detail in Chapter 2). For example, “get tough on crime” proponents (prescribed in the Crime Control model) such as the Conservative political party, approved the new presumptive adult sentencing provisions for serious and/or violent offences. While proponents of administrative based policies (prescribed in the Corporatist model) approved police diversion especially to community resources for youth in need of services. Supporters of non-punitive rehabilitative approaches to young offenders (prescribed in the Welfare model) endorsed the conferencing option and the strict sentencing guidelines to limit the use of custody for both less serious and moderate offenders. As well, all procedural safe guards remained under the YCJA (as prescribed by the Justice model). Finally, the YCJA established at least three distinctive youth justice processing streams for minor young offenders, moderately serious young offenders, and very serious young offenders respectively (as prescribed in the Modified Justice model).

⁵ *R. v. P.(B.W.)*; *R. v. N.(B.V.)*, [2006] S.C.J. No. 27, at para. 21.

Nonetheless, major objections to the *YCJA* came from provincial governments, most ardently, Québec, and scholars opposed to the perceived severe crime control aspects of the legislation such as adult sentences for offenders as young as 14 years found guilty of presumptive serious violent offences. Québec youth justice officials and federal parliamentary members from the separatist Bloc Québécois vehemently argued the new law was unnecessary and constituted another imposition of a youth criminal justice system that conflicts with Québec's distinctive formal diversion based educative and rehabilitative approach to young offenders (categorized in this thesis as an example of the Corporatist model).⁶ Even the Québec Court of Appeal, prior to the *YCJA* being implemented, emphasized its concerns that certain provisions of the Act pertaining to presumptive adult sentences and publication bans for youth sentences violated a young person's right under the *Canadian Charter of Rights and Freedoms*.⁷ As will be discussed in Chapter 3, the federal government did not appeal the constitutional challenges put forth in the *Reference* opinion, yet amendments to the *YCJA* were eventually made almost a decade after the initial concerns were raised by Québec.

Despite the ease of its passage, and like the *YOA*, once implemented, the *YCJA* became theoretically and politically quite controversial. Most importantly, certain legal constructs generated considerable debate in the provincial and appellate case law across Canada during the first three years of the Act. Several cases were successfully appealed to the Supreme Court of Canada to address provincial and territorial variations in case law. While some scholarly experts viewed the *YCJA* as more coherent and directive than the *YOA*,⁸ others viewed the *YCJA*'s competing principles and objectives as a recipe for confusion for youth justice practitioners including judges, lawyers and

⁶ J. Trepanier, "What Did Quebec Not Want? Opposition to the Adoption of the Youth Criminal Justice Act in Quebec" (2004), 46 *Canadian Journal of Criminology and Criminal Justice* 273.

⁷ The Québec Court of Appeal's *Reference re Bill C-7* decision is known as *Quebec (Minister of Justice of Quebec) v. Canada (Minister of Justice of Canada)* (2003), 175 C.C.C. (3d) 321 228 D.L.R. (4th) 63, [2003] R.J. Q. 1118 (Que.C.A.); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸ N. Bala, P. J. Carrington & J.V. Roberts, "Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success," (2009), 52(2) *Canadian Journal of Criminology and Criminal Justice* 131.

youth probation officers.⁹ These critics pointed to the practical challenges required to unravel the overlap among the guiding philosophical statements of the YCJA with particular reference to the Preamble and Declaration of Principle which are taken together as overarching principles for more specific statements relating to section 4 on extrajudicial measures, section 38 on sentencing and section 83 on youth in custody. Because of the repetitive themes and restatement of ideas within each of the guiding principles, it has been challenging for lawyers and judges to determine what actually takes priority in the Act.

Another contentious area for scholars and government officials has been the use of custody. It was expected that custody rates would decline, particularly remand rates, but remand rates continued to exceed sentenced custody rates raising several key issues about the pre-adjudication detention process.¹⁰ Specifically, the major challenges involved the procedures in deciding to release or detain a young person because the YCJA required the youth justice court to apply the *Criminal Code of Canada*¹¹ sections governing judicial interim release while simultaneously cross referencing related sections in the YCJA. Utilizing provisions from two separate pieces of legislation created a level of complexity that became confusing for youth justice professionals to interpret and correctly apply. Deciphering and subsequently implementing the complicated pre-trial detention provisions of the YCJA is central to understanding “how public policy has actually fared in action . . . in terms of its perceived intentions and results. . . Sometimes an entire policy regime can fail, while more often specific [provisions] within a policy field may be designated as successful or unsuccessful.”¹² Ever since the YOA was

⁹ R. Corrado, K. Gronsdahl and D. MacAlister, "The Youth Criminal Justice Act: Can the Supreme Court of Canada Balance the Competing and Conflicting Models of Youth Justice?" (2007) 53(1) Criminal Law Quarterly 14

¹⁰ The custody portion accounted for by remanded youth in custodial facilities across Canada, excluding Ontario, increased from 25% in 2002/2003 to 47% in 2007/2008. Statistics Canada, Canadian Centre for Justice Statistics, Corrections Key Indicators Report. Rates have not improved since 2007-2008 as there were approximately 1,500 youth in custody on any given day in 2010/2011, of which 54% were in remand and 44% were in sentenced custody. Remand youth continued to outnumber those in sentenced custody for the fourth year in a row. See C. Munch, "Youth Correctional Statistics in Canada, 2010/2011, Juristat (Ottawa: Minister of Industry, 2012).

¹¹ *Criminal Code of Canada*, R.S.C. 1985, c. C-46.[hereafter the *Criminal Code*]

¹² M. Howlett & M. Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems* (ON: Oxford University Press, 2003), at pp 207-208.

introduced three decades ago, there have been gradual legislative and operational policy changes regarding pre-trial detention that shifted the emphasis away from public safety in order to elevate the importance of protecting the young person's rights and needs. The legal constructs of pre-trial detention in the *YCJA* were not successful in remedying the bail/remand criticisms apparent under the *YOA*. This tension between public safety and due process was a central theme in the provincially appointed Nunn Commission. This inquiry's findings and recommendations appear to have been a critical step in the reform of the *YCJA*. The next section provides an overview of the Nunn Commission and its impact on eventual amendments to the *YCJA* through Bill C-10.

1.2. Impact of the Nunn Commission

On June 29, 2005, the Nova Scotia provincial government appointed retired Justice Merlin Nunn to head a public inquiry into the circumstances surrounding the release of a youth from custody who was well known to police as an active criminal in auto thefts, who had no convictions or criminal record. Two days after his release on bail, the young person stole a vehicle, and during a police pursuit crashed into Theresa McEvoy's car and killed her. The Nunn Commission heard from forty-seven witnesses over thirty-one days to assess what happened in the youth justice process i.e., the procedures and policies followed; the actions of law enforcement and justice officials and the rationale for release from remand. Equally important, another theme explored was the effectiveness of the *YCJA*. Justice Nunn made thirty-four recommendations involving legislative provisions; provincial programs and policies; and the need for operational consistencies relating to arrest warrants, in-custody transfers, and communication protocols among police and justice officials.¹³

The Nunn Commission is an important milestone in understanding the *YCJA* and one of the central themes of this thesis: this law is enormously complex not only

¹³ For a thorough review of the inquiry, see: D.M. Nunn, "Spiralling Out of Control: Lessons Learned from a Boy in Trouble," *Report of the Nunn Commission of Inquiry*, (Province of Nova Scotia, December, 2006). Online: <http://www.nunncommission.ca>.

because of its length and elaborate sections and subsections, but also because it involves a contentious, often acrimonious, political history and academic debate about the appropriate models of youth justice in a diverse federal system such as Canada's. Also, this commission heard testimony from several leading scholars and policy analysts in Canada including Professor Nicholas Bala from Queen's University Law School and a former Assistant Deputy Minister of British Columbia's Ministry of Children and Family Development, Alan Markwart. The input of such experts to commissions is potentially useful in helping resolve enormously difficult and politically challenging issues arising under the legislation. However, there are conflicting perspectives among scholars about this role for commissions. Traditionally, commissions of inquiry have been appointed to analyze complex public policy issues, often arising from unresolved and, not atypically tragic incidents, in a publically perceived apolitical or ideologically neutral manner. Commissions also constitute an important organizational instrument for governments because the former institution represents the most effective option for detailed policy recommendations in an independent, objective, yet official manner.¹⁴ According to Aucoin, such commissions ideally evaluate policy options, "free from the constraints of partisan controls or institutional limitations extant in other governmental organizations which conduct policy analysis."¹⁵ However, there are critics of the role of commissions. The main concern is that commissions purport to engage in the examination and/or development of public policy recommendations in conjunction with fact finding relating to a specific event and create, "an unwarranted aura of judiciousness and objectivity."¹⁶ Schwartz contends the public receives a mixed message by being:

. . . misled into thinking that the policy proposals are entitled to the same level of respect as the investigative findings of the inquiry. . . Adjudication is one thing, and policy-making quite another. Adjudication looks at a heavily documented past; policy-making involves making projections about an uncertain future. . . Policy-making should embody a realistic

¹⁴ W. Estey, "The Use and Abuse of Inquiries: Do They Serve a Policy Purpose?" in *Commissions of Inquiry*, A.P. Cross, I. Christie & J.A. Yogis, Eds. (Toronto, ON: Carswell Publishing, 1990), at pp.209-216.

¹⁵ P. Aucoin, "Contributions of Commissions of Inquiry to Policy Analysis: An Evaluation," *Commissions of Inquiry*, A.P. Cross, I. Christie & J.A. Yogis, Eds. (Toronto, ON: Carswell Publishing, 1990), at p. 190.

¹⁶ B. Schwartz, "Public Inquiries" in *Commissions of Inquiry: Praise or Reappraise?* A. Manson & D. Mullan Eds. (Toronto, ON: Irwin Law, 2003) at p. 451.

understanding of how the relevant part of society actually operates; judges are constrained in the extent to which they can participate in many political and social activities, and tend to see the world through the filter of evidentiary rules and courtroom decorum.¹⁷

Despite the mixed perspectives concerning the objectiveness and thoroughness of commissions generally, arguably, the Nunn Inquiry attempted to balance the challenging task of examining a specific incident in order to provide a broader scope of making federal public policy recommendations. For instance, Justice Nunn included seven specific recommendations pertaining to the *YCJA* for the federal government's consideration. Several recommendations have been incorporated into the recent *YCJA* amendments.

Specifically, the Nunn inquiry recommended making public protection one of the primary goals of the *YCJA* and amending the definition of violent offence to include 'offences that could endanger public safety.' However, the second recommendation can be interpreted as arising from the specific circumstances of the young person in question during the inquiry rather than a redefinition of violence based on traditional theoretical and legal conceptualizations of these phenomena. In effect, it can be seen as a politically expedient and inappropriate basis for a critical and controversial national policy-making recommendation. For example, Justice Nunn's proposed violent offence definition contradicts an earlier Supreme Court of Canada decision of a harm-based, restricted definition of violent offence: "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm."¹⁸ In this decision, Justice Bastarache believed a narrow definition which excluded property offences complements and respects the objectives, purpose and overall scheme of the legislation, because Parliament's intent when drafting the *YCJA* was to reduce the over reliance on detention.¹⁹ Nonetheless, the federal Conservative party government amalgamated the Supreme Court of Canada definition with Justice Nunn's proposal of endangering public safety in the new *YCJA* amendments. While the new amendments have created a completely separate section for pre-trial detention that no longer includes the *Criminal*

¹⁷ *Ibid*, at pp. 451-452.

¹⁸ *R. v. C.D.; R. v. C.D.K.*, [2005] 3 S.C.R. 668.

¹⁹ *Ibid*, at para, 43.

Code or involves section 39 YCJA criteria for custody, the possibility of pre-trial detention for a larger number of young people now exists. This outcome will inevitably exacerbate what critics have already identified as overly high remand rates.

The Nunn Commission further illustrates a central theme of renowned policy theorists, Thomas Dye and Leslie Pal, that central to any evaluation is whether a policy has had an overall measurable impact.²⁰ In other words, assuming the goals are clear, can expected outcomes be attributed to a particular project, program or policy? Given the controversies involving pre-trial detention in Canada, the dual goals of reducing the use of remand and protecting the public, an outcome assessment is extremely challenging. More generally, there is also the inherent challenge in the policy context of trying to link cause and effect i.e., “a single effect may conceivably have several causes, and the policy intervention is only one of them.”²¹ Arguably, the Nunn Commission appeared to view the YCJA as a distal causal variable in a sequence of events that led to the fatal car accident. Yet, the YCJA was not an isolated variable, but rather a complex legislation that contributed to a causal sequence of poor communication and decision-making by police and justice officials. In other words, it was not the YCJA, even as a distal causal factor, but, rather more simply and immediately, miscommunication and poor case level decision-making that resulted in the fatal incident. In support of this explanation, the Nunn inquiry had overwhelming evidence that Nova Scotia did not have operational policies and programs (e.g. family care residential placement, intensive bail supervision program) in place to support and monitor a young person in the community while on bail other than general supervision from a probation officer. Secondly, there were no alternative support placements for

²⁰ Impact evaluation helps answer key questions for evidence-based policy making in terms of what works, what doesn't and the costs associated with such policy or programs. In contrast to outcome monitoring which most governments produce in abundance through statistics measuring outputs and target achievement, impact evaluation is structured to answer the question: are changes in society associated with measures of government activity? T. Dye, “Policy Evaluation: Finding Out What Happens After a Law is Passed,” in *Understanding Public Policy*, (Upper Saddle River, NJ: Prentice Hall, 2005), at pp. 332-350; L.A. Pal, “Evaluation,” in *Beyond Policy Analysis: Public Issue Management in Turbulent Times*, (ON: Nelson Education Ltd, 2006).

²¹ L.A. Pal, *ibid*, at p. 292.

youth when parents relinquish their responsibility to supervise their child on bail.²² Essentially, once the youth had been released from remand, or even custody had there been a conviction resulting in a custody sentence, there were insufficient programs and inter-ministerial/agency communication to prevent this youth from reoffending.

Again, it could be argued that another theme of this thesis was ignored or, at least down played by the Nunn Commission; the *YCJA* is a complex compromise of principles from multiple models of youth justice and that political party platforms and related ideologies are most important in how *YCJA* sections such as pre-trial detention and custody sentences, more generally, are interpreted and effected in practice. In other words, the Bill C-10 pre-trial detention changes to the *YCJA* reflect more a partial solution by the federal Conservative party government ideology that the *YCJA* is insufficiently governed by Crime Control model principles such as protection of the public and the Justice model principles of sentencing proportionality and responsibility. Yet opposition members of parliament, for example, criticized the Harper Conservative party government for ignoring other blatantly key Nunn Inquiry recommendations as Liberal MP Geoff Regan asserted, "I see other elements that were not at all recommended by Justice Nunn . . . it seems to me that the government has chosen to cherry-pick from the Nunn report the kinds of things that suited its own ideology and rejected those that did not. It is a bit like its attitude toward evidence generally."²³

1.3. Policy Stakeholders

It can be argued instead of allaying public misperception of youth crime trends, i.e. serious and violent youth crime has been consistently increasing and becoming more

²² D.M. Nunn, *supra*, footnote 12, at pp. 213-216. Justice Nunn questioned Alan Markwart, then the Assistant Deputy Minister for the Ministry of Children and Family Development on what type of services British Columbia offers as alternatives to remanded custody. Justice Nunn recommended Nova Scotia establish similar services and programs as intermediate options between basic probation supervision and pre-trial custody.

²³ Comments from Liberal Member of Parliament Geoff Regan's speech during the First Reading of Bill C-4 on 16 March 2010, House of Commons, 40th Parliament – 3rd Session. Online:
<http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=6954&Session=23&List=stat>

random and vicious, the current Conservative party led government reinforces the public's misunderstanding. This describes how the public's perception of an issue intersects three variables – *problem, policies and politics* – producing a shift in national mood and pressuring the government to respond.²⁴ Often, these variables will intersect and come to the attention of policy-makers as a result of sensational events. As aforementioned, a fatal car accident involving a youth on bail in Nova Scotia created a “policy window”²⁵ whereby the YCJA provisions governing youth bail and remand custody became first an immediate provincial issue and second, a federal issue. Specifically, local and national media along with victims and victims' interest groups raised the saliency profile of this provincial youth criminal justice issue into a national youth criminal justice issue. The latter stage was evident when provincial criminal justice officials formally lobbied the federal Justice Minister to reform the YCJA regarding pre-trial detention for young offenders. However, contrary to media induced perceptions of the under use of remand for young offenders the opposite reality existed i.e., the overuse of pre-trial detention for young people.²⁶ It is difficult to avoid the political/ideological perspective when explaining this contradiction in public perceptions of remand since this factual discrepancy is well known to government officials not only because of internal policy research sources, but also published academic research. Keynes, in his study of government agenda setting, asserted, “. . . there is nothing a government hates more than to be well-informed; for it makes the process of arriving at decisions much more complicated and difficult. We must not forget that there is more to

²⁴ Kingdon's study of agenda setting has revealed three variables or streams of *problems, policies* and *politics* which interact at some point in time and are seized upon by policy-makers, largely in response to one of the streams. The *problem stream* is the public's perception of the issue requiring a solution by government. The *problem stream* comes to the attention of policy-makers because of a sudden event or feedback loop. The *policy stream* consists of experts examining problems and proposing solutions. The *political stream* is composed of factors which push for a change such as pressure from interest groups, public discontent or legislative turnover. Kingdon says the three variables operate independent of one another until their paths intersect during a “policy window.” See J. W. Kingdon as cited in M. Howlett & M. Ramesh, *supra*, footnote 7, at pp.135-138.

²⁵ *Ibid*, Kingdon developed a sophisticated approach to agenda setting opportunities called – policy windows - which allow issues to be, “opened either by the appearance of compelling problems or by happenings in the political stream.” at pp. 136.

²⁶ See, *supra*, footnote 10.

policy and practices than the disinterested pursuit of truth and wisdom . . .²⁷ This thesis will contend the Harper government did not inform the public regarding high remand custody rates and ignored this research because it would have undermined its electoral/ideological Crime Control model of criminal justice and agenda setting platform of reforming the YCJA to be tougher on “run away” youth crime. Essentially, the Harper government preferred the public, especially its core electoral supporters, continue to believe the YCJA is not tough enough on young offenders thus facilitating the YCJA shift to crime control ideology of punishment, deterrence, denunciation and an increase use of custody in order to protect society. In effect, a policy setting agenda theoretical perspective will be utilized to explain several sections of the YCJA in this thesis. The history of youth justice legislation in all national jurisdictions, including Canada, reflect, in varying degrees, governments’ inherent ability to be very persuasive in their power and authority to shape policy objectives and agendas at the expense of evidence-based knowledge and expertise.²⁸

Typically the media is the most common avenue for the public to become informed about youth justice issues, yet most issues only momentarily capture public attention thus lessening the likelihood of prompting government policy reaction. Renowned policy theorist, Anthony Downs argued that many controversial social problems quickly fade from media and public view as their complexity or intractability become apparent:

Public attention rarely remains sharply focused upon any one domestic issue for very long - even if it involves a continuing problem of crucial importance to society. Instead, a systematic issue-attention cycle seems strongly to influence public attitudes and behaviour concerning most key domestic problems. Each of these problems suddenly leaps into

²⁷ John Maynard Keynes as cited in William Solesbury, “Evidence Based Policy: Whence It Came and Where It’s Going,” ESRC UK Centre for Evidence Based Policy and Practice, Working Paper, University of London, (October 2001), at p. 7.

²⁸ I. Sanderson, “Evaluation, Policy Learning and Evidence-Based Policy Making,” (2002), Vol. 80(1) *Public Administration*, at pp. 1-22.

prominence, remains there for a short time and then – though still largely unresolved – gradually fades from the centre of public attention.²⁹

However, it will be emphasized that the Canadian public's ability, generally, to understand complex crime trends and laws is evident historically in Canada because of its extensive range of media sources and relatively educated - i.e. minimum high school - public.³⁰ While there admittedly is considerable variability in public attention spans on current political issues, crime issues traditionally focus and sustain the public and specific groups' interest. For example, in British Columbia, Chuck Cadman responded to the death of his teenage son in 1992 by creating the group Crime Responsibility and Youth (CRY). Cadman's political activism against youth violence and victim's rights resulted in his election as a federal Reform Party MP in 1997. Thereafter, he successfully introduced a private members bill that increased the maximum jail term for parents whose adolescent children committed crimes while under their supervision. This provision was later incorporated into the YCJA, which increased the penalty from a maximum of six months imprisonment to two years for adults who wilfully fail to comply with the responsibility of monitoring a young person on bail in the community.³¹ Similarly, Sandra Martins-Toner responded to the brutal and unprovoked murder of her son outside a sky train station in Surrey in 2005 by authoring a book about her experiences with the criminal justice system and then with her husband founded the victims' advocacy group Families Against Crime and Trauma (FACT). This organization lobbied the federal government for changes to the law in support of victims.³² As well, Joe and Lozanne Wamback founded the Canadian Crime Victim Foundation in 2002 after their son was victim of a near fatal swarming attack by teenagers. This foundation

²⁹ A. Downs, "Up and Down with Ecology – the 'Issue-Attention Cycle'" (1972), Vol. 28 *The Public Interest*, at p.38. As cited in Howlett and Ramesh, *supra*, footnote 7, at p. 77.

³⁰ See for example, V.J. Roth, L. Bozinoff & P. MacIntosh, "Public Opinion and the Measurement of Consumer Satisfaction with Government Services, (1991), Vol. 33 (4), *Canadian Public Administration*, at pp 571-583; K.G. Banting, "The Social Policy Review: Policy Making in a Semi-Sovereign Society,"(1995),Vol. 38(2) *Canadian Public Administration*, at pp. 283-290.

³¹ See "Cadman: From musician to political kingmaker" CTV News (12 May 2005). Online: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050515/cadman_profile_050514?s_name=&no_ads

³² See: "Murder Victims Mother Authors Book" National Justice Network Update Vol. 16(7) (July 2009). Online: <http://crcvc.ca/enewsletter/july-09/story06.html>

also lobbied many federal and provincial officials to develop more comprehensive laws, policies and programs to assist victims of crime.³³ Honouring victims of vicious youth violence also was evident more recently when the minority federal Conservative government attracted considerable media and public's attention by giving previously failed youth justice Bill C-4 an alternative title, Sébastien's Law.³⁴ This law was to commemorate Sébastien Lacasse's senseless murder and the need to protect the public from violent young offenders. In response to this blatant emotional Crime Control approach to criminal justice reforms, typically evident in the United States, the Canadian Bar Association stated that naming this bill after Sébastien Lacasse was clearly inappropriate: ". . . the title of any proposed legislation should reflect the proposal in a neutral, objective way, given that the Bill must receive parliamentary scrutiny before actually becoming law. The name given to this Bill appeals to emotion and could be seen as promoting a political response to a family's tragedy."³⁵

In Kingdon's policy based theoretical perspective, legislative timing is another key construct. Prior to the 2008 federal election, Prime Minister Harper denounced Canada's approach to handling young offenders as an "unmitigated failure" because it did not hold youth sufficiently accountable for their criminal behaviour.³⁶ Kingdon maintains that many opportunity windows for major and controversial legislative reforms reflecting ideological shifts open in a predictable and cyclical fashion, particularly during elections and by the appearance of compelling problems.³⁷ As a minority government, Harper was unable to pass two previous youth justice bills that would have embraced their get tough on young offenders approach by negating the value of the rehabilitation

³³ The Canadian Crime Victim Foundation has a well established website with numerous articles promoting victim advocacy through research, education and awareness. Online: <http://www.ccvf.net/index.cfm>

³⁴ Bill C-4 (Sébastien's Law) Protecting the Public from Violent Young Offenders. An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts. This bill was last introduced in the 40th Parliament, 3rd Session, which ended in March 2011 and did not become law. Online: <http://openparliament.ca/bills/40-3/C-4/>

³⁵ See: *Bill C-4 – Youth Criminal Justice Act Amendments*, National Criminal Justice Section, Canadian Bar Association (June 2010), at p. 3. Online: <http://www.cba.org/cba/submissions/pdf/10-41-eng.pdf>

³⁶ Speech by Prime Minister Harper to the Canadian Crime Victims Foundation in Vaughn, Ontario, June 2008, online: <http://pm.gc.ca/eng/media.asp?category=2&id=2145>

³⁷ J.W. Kingdon, *supra*, footnote 23, at p. 136.

principle. The majority opposition parties disparaged these bills. Liberal justice critic, Dominic LeBlanc, for example, asserted during Bill C-4 debates that, “If there is one group of people in the justice system where rehabilitation and reintegration should be the priority, surely its young people, and I’m surprised this government hasn’t been able to accept that. If the [Conservative party] government’s assuming they’re going to have quick and easy passage of this bill, certainly from the Liberal perspective, they’ve misunderstood.”³⁸

Along with the opposition political parties, certain interest and service groups also challenged both the view that serious violent youth crime had increased and was out of control, and the Harper government belief that the original *YCJA* was not a success despite having achieved its principle objectives of reducing sentenced custody rates and promoting the use of community-based responses for young offenders.³⁹ For example, the John Howard Society of Canada elucidated a fundamental media and public misunderstanding concerning the inconsistencies between the “political and media” youth justice system, which is a federal constitutional jurisdiction, and the “operational” youth justice system, which is a provincial constitutional jurisdiction:

. . . it is the inability, or unwillingness, of decision-makers to make hard choices about what the goals of the youth justice system ought to be *in the operational realm* that have contributed to the current public ambivalence *in the political/media realm* toward how the youth justice system should operate. On the one hand, the *YCJA* has been successful at reducing numbers of incarcerated youth and facilitating successful reintegration – as was its intended purpose. Ironically, this has given rise to a public perception that the youth criminal justice system is lenient . . . But public opinion on criminal justice issues are susceptible to education – and when this happens we often observe black and white attitudes dissolve into shades of gray as deeper information displaces ignorance and moral panic.⁴⁰

³⁸ See B. Weese, ‘Proposed bill gets tough on repeat young offenders’ Toronto Sun (16 March 2010), online: <http://www.torontosun.com/news/canada/2010/03/16/13252896-qmi.html>

³⁹ N. Bala, P.J.Carrington & J. V. Roberts, *supra*, footnote 8, at p.152.

⁴⁰ E.M. Knudsen & C. Jones, “Submission to the Government of Canada Regarding the Youth Criminal Justice Act” (Ottawa: The John Howard Society of Canada, May 2008), at pp. 8-10.

The John Howard Society perspective reflects the complexity of Canadian youth justice where federal legislation is implemented through provincial legislation and youth justice institutions and policies/programs. For this interest group that operates at the provincial youth justice level, the YCJA has been successfully implemented despite the Harper government's assertions to the contrary. John Howard Society also emphasized the federal Conservative government's youth justice reform legislation was ideological rather than pragmatic. Not surprisingly, this service/interest group, along with a vast number of legal experts and academics across Canada, have argued that rather than making public protection the primary goal of young offender legislation, focus on long term social investments underlying the causes of youth crime such as poverty, education, and mental health needs.⁴¹ There are not only differences in the philosophical outcomes reflected in youth justice legislation between political parties, interest and service groups in Canada, but also fundamental differences in how to implement policies/programs at the operational/provincial level when common goals exist at the federal level, most importantly, the protection of the public.

From a theoretical and policy perspective, Innes and Booher expressed the concern that a central issue often underlying federal government policy making is the partisan politics which interfere with or ignore potential collaborative dialogue among the respective political parties and service groups. These theorists emphasize that collaborative dialogue among stakeholders is a progressive and creative way of conducting policy making, particularly in an age of information technology despite differences in knowledge and power:

. . . a key to achieving better performance from our public policy institutions lies in the understanding that the behaviour of an individual is directly affected by the behaviour of other individuals in a co-evolutionary context . . . stakeholders in public policy have been accustomed to concealing their interests and engaging in positional bargaining rather than to discursive inquiry and speculative discussion or interest-based

⁴¹ *The Toronto Star* reporting on the Harper government's stance of toughening the YCJA and putting a political slant on current youth crime to justify a change in the tone of our youth justice system from rehabilitation to punishment despite widespread evidence that crime rates are dropping. See, Carol Goar, "Young offenders get Ottawa's spin" *The Toronto Star* (20 March 2010).

bargaining. They tune out a priori those with whom they assume they disagree rather than explore for common ground.⁴²

A major theme in this thesis, though, is the current Conservative federal government is focused on advancing their ideology of increasing crime control initiatives rather than taking a more systemic approach inclusive of a blended philosophy of principles from the various models of youth justice so characteristic of Canada's youth justice system since the late 1970s. It is further argued that youth justice policy-making in most jurisdictions increasingly have been constructed on evidence-based research to determine what works to reduce crime, rather than reflexive responses and narrow ideology.⁴³ It is also hypothesized the current Conservative government will not adopt the former perspective to policy problems which is effective practical guidance for policy-makers and youth justice officials at the provincial levels in Canada. Rather, the Harper government reflects Stewart and Ayres viewpoint that policy-makers using traditional techniques absent of any interconnected systems are likely to fail in obtaining broad policy objectives. They explained that, "Case histories of policy failures often bring to mind the saying that if the only tool you have is a hammer, then you tend to go looking for things to hit. As a consequence, communicative linkages . . . are overlooked. Causes and consequences are not considered sufficiently deeply."⁴⁴ This perspective underlies the analysis of the *YCJA* amendments introduced by the Harper government.

1.4. Impact of the *YCJA* Amendments

The *YCJA*, as will be discussed in this thesis is a lengthy and complex law that has been interpreted theoretically in terms of the full range of youth justice models also previously used in other youth justice laws in Canada and elsewhere. Not surprising,

⁴² J. E. Innes & D. E. Booher, "Collaborative Dialogue as a Public Making Strategy," in *Deliberative Policy Analysis: Understanding Governance in the Network Society*, M.A. Hajer & H. Wagenaar, eds (UK: Cambridge University Press, 2003), at pp 34-35.

⁴³ D.P. Farrington, "Evidence-Based Policy on Crime and Justice" Paper presented at the Third International Inter-Disciplinary Evidence-Based Policies and Indicator Systems Conference, CEM Centre, University of Durham , (July 2001).

⁴⁴ J. Stewart & R. Ayres, "Systems Theory and Policy Practice: An Exploration," (2001), Vol. 34 *Policy Sciences*, at p. 79.

since the *YCJA*'s inception in 2003, the lower trial court and appellate levels have engaged in several controversial attempts to apply and decipher this law. However, in 2006 the federal Conservative party minority government immediately attempted to shift the *YCJA* towards a law and order or "get tough" youth violent crime philosophy. Six years and three bills later, the Harper led Conservative majority government speed tracked amendments to the *YCJA* through its now controversial omnibus crime Bill C-10, the *Safe Streets and Communities Act*.⁴⁵ Even David Daubney, a former Progressive Conservative MP and chairman of the House of Commons justice committee acknowledged, "Fear is at the basis of much of the government's work here. What C-10 is going to do is make Canadians more fearful and less safe."⁴⁶ Yet, more typical of the Conservative Party, Senator Claude Carignan was merely fulfilling its re-election platform promise; the immediate passage of the omnibus crime bill within 100 days of a majority Conservative government taking office: "Canadians are expecting us to pass this. The best way to ensure the population is not jaded when it comes to politics is to keep our promises."⁴⁷ The Conservative party used their majority in the Senate to limit debate of this enormous legislation to just six hours involving nine separate bills ranging from youth justice, victims of terrorism, drug offences, sexual exploitation and pardons to name a few of the bills. The Liberals argued there was enough opposition to the package of nine bills that every senator deserved the right to speak to each bill separately and the rush to make C-10 law was an affront to democracy and a hindrance to the Senate's ability to act as, "The chamber of sober second thought. There is no excuse for what this chamber is about to do. We should be ashamed of ourselves," said Liberal Senator Joan Fraser.⁴⁸ As well, Liberal Senate leader James Cowan viewed the broad omnibus crime bill with a sarcastic metaphor: "It is not a one-size-fits-all justice system. Criminal justice is not a vending machine, where you press a button — A1, B5

⁴⁵ Bill C-10 was the third and only successful attempt by the Conservative government to amend the *YCJA* after two previous bills (Bill C-25 and C-4) failed due to the Conservative's having minority governments at the time.

⁴⁶ See, "Tory Crime Bill Will Overburden Court System: Retired Judges" *National Post* (23 February 2012), Online: <http://news.nationalpost.com/2012/02/23/tory-crime-bill-will-overburden-court-system-retired-judges>.

⁴⁷ See, "Omnibus crime bill rushed through Senate, Liberal senators say," *National Post* (2 March 2012), Online: National Post < <http://news.nationalpost.com/2012/03/02/omnibus-crime-bill-rushed-through-senate-liberal-senators-say>>.

⁴⁸ *Ibid.*

or B6 — and out pops a sentence. Vending machines usually dispense junk food. We should aim for something higher when we dispense justice to Canadians.”⁴⁹

In addition to opposition legislators, renowned scholars and lawyers were also very critical. McMurtry, Greenspan and Doob, for example, maintained the results of this bill would be ill intended:

The debate has focused largely on important but narrow issues such as whether people should be sentenced to a minimum of six or nine months in prison for growing six marijuana plants or whether we should stigmatize young people found guilty of minor assaults by publishing their names, and whether our laws should prohibit certain non-prison punishments for crimes such as break-and-enter. The sum of the Harper crime policy is simultaneously less and more than the sum of its parts. The more fundamental issue that a crime policy should address is basic: How do we, as Canadians, want to respond to those who have committed crimes?

. . . the Harper crime policy is more than the sum of its parts because it tells us that the government is committed to ignoring evidence about crime, and does not care about whether our criminal-justice system is just and humane. The government has closed its eyes to the possibility that people convicted of a crime can turn their lives around or be fundamentally good people who made one mistake. The Tories are right that their incoherent crime plan is a major shift in Canadian justice policy. But this shift will not serve us well.⁵⁰

With regard to youth justice, Bill C-10 essentially changes the emphasis of the *YCJA* from rehabilitation to protection of society, which critics of the crime control perspective assert that the focus on punishing young offenders simply does not protect the public while rehabilitation does. These critics contend the Harper Conservative government appeared to have ignored both statistics and studies that did not support their crime control ideology and the advice of experts in the field, particularly eminent legal scholar, Professor Bala. This author of classic legal analyses of all Canadian youth justice laws and related case law explained his concerns before the Standing Committee on Justice and Human Rights:

⁴⁹ *Ibid.*

⁵⁰ See: “McMurtry, Greenspan & Doob: Harper’s Incoherent Crime Policy” *National Post* (14 February 2012), Online: <http://fullcomment.nationalpost.com/2012/02/14/mcmurtry-greenspan-doob-harpers-incoherent-crime-policy/>

When I was preparing to come here today my 15-year-old daughter Elizabeth asked me what I hope to accomplish. I told her frankly that I was not optimistic about the committee making any changes. I think the process of the committee is somewhat rushed. I'm particularly concerned about the fact that youth and adult matters have been combined into one piece of legislation. I think there are good reasons for having young people, including in a legislative review context, dealt with separately from adults.

In my view, there are some very good parts to part 4 of Bill C-10 but there are other parts that are affected really by what could be referred to as a politicization response to youth crime or an ideological response, rather than one that is driven by either research or on-the-ground experienced professionals.

. . . I think Justice Nunn did a very good job of identifying, after a lengthy inquiry in Nova Scotia, some important areas that need to be changed. I would submit to you that the present bill goes significantly beyond his recommendations, and I have therefore some concerns about it.

I think some of the changes are going to help slow down the youth justice process but will not have any effect on outcomes. There are other changes that I think will be potentially negative and may result in increased use of custody for non-violent young offenders without seeing a reduction in youth crime.⁵¹

As well, Justice Nunn also responded publicly to the proposed amendments of then Bill C-4 which became the basis for Bill C-10 when commenting, "They have gone beyond what I did, and beyond the philosophy I accepted . . . I don't think it's wise."⁵² He later voiced his concerns during a Senate committee on Bill C-10:

I think, for [the Senate], that we cannot afford some political idea to float if it does not meet the best-evidence test. You probably spend more time looking at best evidence in purchasing military aircraft than you do in looking at what you will do with our youth. The Senate is the body that my mom promised me when I lived in Brockville when she came up here and said, "That is the Senate. They are appointed. They look at things without political ideology. They look at the merits." You need to look at

⁵¹ See, N. Bala, *House of Commons, Standing Committee on Justice and Human Rights*, No.7 (25 October 2011).

⁵² See, P.B. Arenburg, "Former Judge Slams Tories' Youth Crime Plan," *The Chronicle Herald* (9 September 2008), Online: http://thereissomethingyounneedtoknow.ca/stories/crime_safety/cs03.php.

this carefully on the evidence. If the evidence supports it, fine. If the evidence does not, I hope you have the courage to say no.

Having told you that, all you can do when you are looking at an amendment is ask yourselves if it is in the best interests of the child because that is the standard that the government should be following. That is the standard they said they were going to follow. I am not picking on this government. It does not matter which side is in; I think this is bad. They must look at it from the point of view of the best interests of the child.⁵³

In other words, the provisions in Bill C-10 go considerably further than Justice Nunn's original recommendations. Most importantly, his report suggested protection of the public be one of the primary goals of the Act, however, the new amendments made it the only primary goal. By removing "long term protection of the public" from section 3(1)(a) Declaration of Principle now limits the YCJA's original intent of preventing youth crime by using the law in a broader context to address adolescent problems that are causally related to their offending behavior (e.g. social problems such as housing and welfare; learning disabilities being diagnosed sooner in the educational system). This perspective was explained by Anne McLellan, then Minister of Justice when the first version of the YCJA was introduced in 1998; "an effective approach for dealing with youth crime must reach beyond the justice system and include crime prevention and a host of other programs and services that help to support children and youth."⁵⁴

Even the former federal ombudsman for victims' rights, Steve Sullivan, criticized the Harper government for having ignored massive amounts of research. He maintained that both the Conservative government's federal Justice and Public Safety Ministers, "have a very narrow view of what it is that victims actually need. I think they equate victims' rights and victims' needs with how you deal with the offender. So if you punish

⁵³ See, Justice M. Nunn, "Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs," (Issue 13, February 22, 2012). Online: <http://www.parl.gc.ca/content/sen/committee/411/LCJC/13EV-49345-E.HTM>

⁵⁴ Minister of Justice and Attorney General for Canada, "Notes for Remarks by the Honourable Anne McLellan," *Justice Information* (12 May 1998) at p. 1.

the offender enough, then victims will be happy.”⁵⁵ A related criticism is the *YCJA* now focuses on making youth criminal court decision-making consistent with adult criminal justice with limited impact or awareness on young offenders’ future behaviour. For example, extending the SCC definition for violent offences⁵⁶ to include endangerment of others without any element of knowledge by the individual (e.g. a young person in a high speed car race who does not hit or injure anyone) removes the requirement that a youth must understand or even have reasonable grounds to believe his/her conduct is endangering the public. As well, the expanded violent offence definition has far reaching and possibly unintended consequences i.e., it is now linked to the new amendments in section 75⁵⁷ whereby the courts are obligated to decide whether to lift a publication ban when youth are convicted of a violent offence which would apply to an extensive range of offences (e.g. common assault) that are not necessarily violent or result in bodily harm but are at risk of causing bodily harm. Lifting the publication ban at any stage could seriously harm the privacy of a young person, which is why it is part of a principle of fundamental justice in Canada and based on the UN Convention of the Rights of a Child. Canada is a signatory to this convention.

Obviously there are several perspectives on the current Conservative government’s major reform of the *YCJA*. Yet it will not be possible to assess the validity of these perspectives until the revised *YCJA* has been in effect for a sufficient time period to compare the impact on young offenders before and after. To reiterate, Bill C-10 reforms are designed to protect the public from violent young offenders at every decision-making stage of the provincial/territorial youth justice systems, yet critics predict

⁵⁵ See, M. Stephenson, “Nunn Set the Record Straight on Crime Bill,” *The Chronicle Herald* (25 February 2012), Online: <http://thechronicleherald.ca/opinion/67070-nunn-sets-record-straight-crime-bill>

⁵⁶ Section 2 *YCJA* definition of violent offence means: (a) an offence committed by a young person that includes as an element the causing of bodily harm; (b) an attempt or a threat to commit an offence referred to in paragraph (a); or (c) an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

⁵⁷ Section 75(1) *YCJA* states: When the youth justice court imposes a youth sentence on a young person who has been found guilty of a violent offence, the court shall decide whether it is appropriate to make an order lifting the ban on publication of information that would identify the young person as having been dealt with under this Act as referred to in subsection 110(1).

this will not occur. Another perspective examined in this thesis is the history of the *YCJA* which has revealed that provincial/territorial youth justice systems adapted differently to these federal laws; therefore, long term trends in controversial areas such as the use of remand and custodial sentences may not be substantially affected. In other words, the provincial/territorial systems have already incorporated the *YCJA* principles and processes so fundamentally that the impact of Bill C-10 will be largely symbolic. This thesis will examine this perspective primarily to explain how key youth justice agents, i.e., youth probation officers, have reacted to the original *YCJA* in British Columbia and more recently, how senior youth justice officials across Canada have perceived the key *YCJA* policy challenges.

1.5. Overview of Thesis

The evolution and implementation of the *YCJA* involved compromise and consensus seeking within the federal parliament as well as among senior provincial/territorial youth justice officials. Since 2003, the process of adjustment has varied by province/territory with several having experienced more controversies and difficulties than others. The remaining chapters of this thesis incorporate three critical theoretical, policy and political themes involving the *YCJA*. First, the *YCJA* illustrates the Modified Justice model, which arguably, reflects the dominant cultural perspective adhered to by the majority of Canadians, i.e., a mixture and balance of process and sentencing principles from the various youth justice models and related theories of youth crime.

Second, the *YCJA* also reflects extensive empirical and multidisciplinary research, involving youth justice systems globally and the study of child/adolescent anti-social and criminal behaviour. It is not surprising, therefore, that the *YCJA* is extremely complex and subject to multiple positive and negative policy perspectives. It will be argued that the variation in how the *YCJA* has been implemented in Canada is best explained by the inherent problems of having mixed model legislation that is attempting to balance often competing objectives of protecting society while trying to rehabilitate and minimize the amount of interference in the lives of young people and at the same time ensure due process is observed. Chapter 2 describes in detail the theoretical

models of juvenile justice to explain the complexity of the YCJA. Chapter 3 focuses on important Supreme Court of Canada decisions regarding specific legal provisions in the Act which have been associated with disparity in judicial decision-making in both the lower and appellate court levels. The significance of legal decision-making among youth justice professionals will be extensively examined in Chapters 4 and 5 using a sample of 147 youth probation officers (YPO) in British Columbia regarding their theoretical orientation pertaining to five serious and/or violent young offender cases. Chapter 6 utilizes the same YPO sample to compare hypothetical sentencing recommendations with the final judicial sentencing decisions in each of the five cases.

Third, this thesis will argue that since coming into power, the federal Conservative Harper led government has shifted towards a more punitive, Crime Control model. Chapter 7 reviews the historical and legal context of the deterrence principle and its potential impact now that it has been added in the 2012 amendments to the YCJA. A sample of senior Canadian youth justice executives were also interviewed in this chapter to find out their opinions about deterrence as an effective principle when sentencing young offenders. This thesis will contend that judges, YPOs and senior executives who operate within their own systems provincially and territorially will mitigate the crime control philosophy that the Harper Conservative government has unilaterally imparted on the Canadian youth justice system. ***NOTE: Strict confidentiality and anonymity of participants in the qualitative study on deterrence requires Chapter 7 to be taken out of any published document including the publication of this thesis.***

Chapter 2. Youth Justice Models

2.1. Theoretical Framework

Since the mid-sixties of the 20th century, social scientists and legal scholars have examined juvenile justice laws in Western societies focusing on the political processes, in particular, historical contexts such as the advent of industrial/urban societies at the turn of the 19th century and the type of laws enacted to criminalize or decriminalize child and adolescent deviant behaviour generally and adult based criminal code offences specifically. In Canada, whether it was the original and initially uncomplicated 1908 *Juvenile Delinquents Act (JDA)*¹ or the more complex 1982 YOA, once such laws are enacted, their subsequent application in practice has been historically quite complex and difficult to understand without considerable empirical analyses. Canada's YCJA is exceptionally complex with its 165 sections (compared to 70 sections under the YOA), containing various definitions, principles, and procedural provisions. One response to this inherent complexity has been the construction of theoretically derived youth justice models that consist of sets of legal concepts and youth justice processing principles that both simplify key legal sections of the law and practices and also allow for comparisons among laws and justice systems within and between jurisdictions whether provinces, states or countries. In effect, such models reduce laws to an essential set of legal, philosophical and procedural themes. In addition, models can provide a summary depiction of the actual functioning of a youth justice system compared to its proposed operation as stipulated by law.²

¹ *Juvenile Delinquents Act*, S.C. 1908, c.40. [hereinafter *JDA*].

² K. Roach, "Four Models of the Criminal Process" (1999), 89 *Journal of Criminal Law and Criminology* 671.

Before examining in Chapter 3 the complexities of certain aspects of the YCJA, an understanding of five different theoretical models of youth justice is required.³ The models can best be conceptualized on a continuum, focusing on the needs of the young person at one end, and protection of society at the other end (see Table 1). There are three long-established models of juvenile justice; welfare, justice and crime control. Each model has distinct philosophical principles, and for the most part different procedures. The Welfare model focuses first on identifying a youth's problems and needs and then second on adjudicating dispositions or sentences that address them through juvenile or youth court proceedings. The Justice model emphasizes youth procedural rights and proportional sentencing, while the Crime Control model places a premium on the protection of the public through incapacitation of young offenders and custodial sentences to enhance both the specific deterrence of the young offender and the general deterrence of other potential young offenders. Elements of all three models - Welfare, Justice, and Crime Control - are reflected in the YCJA. For example, the Welfare model emphasizes this law's rehabilitation and reintegration of young offenders in its sentencing philosophy along with the Justice model's emphasis on due process/fair procedure, and the Crime Control principle of lengthy adult sentences for the most serious and violent young offenders. Two additional models, the Corporatist and Modified Justice models, have been developed over the past three decades as alternatives to the three traditional models.

³ The use of models to help explain the complex sets of values underlying a system of justice was first popularized by Herbert Packer in "Two Models of the Criminal Process" (1964) 113 University of Pennsylvania Law Review 1, which first laid down the elements of the crime control and due process models of justice. An equally valuable contribution to understanding the adult justice system was provided by Kent Roach in "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671. Professor Roach's analysis adds punitive and non-punitive victim's rights models to Packer's two initial models.

Table 1. Models of Youth Justice

	Welfare	Corporatism	Modified Justice	Justice	Crime Control
General Features	Best interest & Informality Individualized Sentences Indeterminate Sentencing	Administrative decision making Diversion from youth court system & custody Alternatives to custody programs	Legal rights & Informality Sentence based on severity of offence, prior record & needs Determinate Sentences	Legal rights Least Restrictive Alternative Determinate Sentences	Legal rights/ discretion Punishment Determinate Sentences
Key Personnel	Social Worker, Rehabilitation Experts	Police & Probation Officers	Lawyers Probation Officer Social Worker Mental Health	Judge, Crown & Defense Lawyers	Police, Judge, Crown & Corrections
Key Agency	Social Work	Multidisciplinary Agency	Law & Multidisciplinary Agency	Law	Law
Justice System Goals	Diagnosis	Integrated Case Management Intervention	Diversion, Conferencing, Integrated Case Management, All sentence types & options	Proportionate sanctions & Punishment	Incarceration Punishment Incapacitation
Under-standing of Client Behaviour	Pathology is environmental & socially determined	Poor socialization Negative peers Poor family Impulsive/Risky	Diminished or full individual responsibility	Individual Responsibility	Responsibility Accountability
Purpose of Interventions	Provide Treatment	Retrain youth Employment Education	Sanction behaviour & provide treatment	Sanction behaviour	Public protection & deterrence
Objective	Rehabilitation	Implementation of policy & guidelines	Respect youth rights, respond to individual & "special" needs	Respect youth rights & hold accountable	Maintain public order & safety

Note. The left side of the table focuses on the young offender while the right side of the table concentrates on public protection.

2.1.1. *Welfare Model*

The *Juvenile Delinquents Act*⁴ exemplified the Welfare model. Canada's first juvenile justice legislation established separate court and correctional systems distinctly separate from adults. With a core emphasis on rehabilitation and treatment, the guiding child welfare philosophy of the *JDA* was expressed in s. 38:

. . . 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.⁵

This model asserts that children and adolescents engage in deviant and criminal behaviour as a result of problems involving their families, peers, culture, poverty, socialization; essentially those external socio-demographic issues that are beyond their control.⁶ In effect, the Welfare model presupposes the young offender is a troubled individual who requires help and assistance and, importantly, assumes rehabilitative measures will be effective in addressing those critical needs of young persons that initially caused the delinquent behaviour.⁷

⁴ A principle drafter of the *JDA*, W.L. Scott explained the overarching philosophy of the Act: "There should be no hard and fast distinction between neglected and delinquent children. All should be recognized as in the same class and should be dealt with a view to serving the best interests of the child . . . The spirit of the court is always that of a wise and kind though firm and stern, father. The question is not "What has this child done?" but "How can this child be saved?" O. Archambault, "Young Offenders Act: Philosophy and Principles" (1983), 7 *Provincial Judges Journal* at pp.2-3.

⁵ *Ibid.*, s.38.

⁶ R.R. Corrado "Introduction" in R.R. Corrado, N. Bala, M. LeBlanc & R. Linden, eds., *Juvenile Justice in Canada*. (Toronto: Butterworths, 1992).

⁷ Susan Reid-MacNevin proposes another model, the Community Change Model, which positions itself to the extreme left of the Welfare Model. This model presupposes that society is ultimately responsible for the welfare of its citizens. The underlying factors for youth crime stem from disadvantages in the economic, political and social order which are beyond the control of the individual. Therefore this model believes the community is primarily in charge of changing the social processes that lead young people to engage in crime. S.A. Reid-MacNevin, "Conceptual Frameworks for Understanding Youth Justice in Canada: From the *Juvenile Delinquents Act* to the *Youth Criminal Justice Act*" in *Understanding Youth Justice in Canada*. (Toronto: Pearson Prentice Hall, 2005).

As well, the Welfare model is primarily concerned with informal proceedings and justice officials' broad discretion and, accordingly, highly individualized rehabilitative dispositions/sentences are mandated except for the most extreme violent acts (e.g. murder) committed by older adolescents. Although, certain jurisdictions allow for lengthy custodial sentences for children as young as ten years old (e.g. England).⁸ For such extreme violent cases, adolescents can also be transferred to adult courts for criminal prosecution and in certain jurisdictions, life sentences (e.g. Florida). The general dispositional principle is the "best interests" of the child,⁹ which provides wide ranging discretion to juvenile justice officials including police, judges, probation officers and correctional administrators. This discretion to determine the best interests of the child/youth results in enormous disparity in how similar juvenile delinquencies are responded to at every stage of processing including dispositions. Critics of this model typically point out that the vague philosophy of promoting the welfare of children ignores fundamental legal rights especially due process.¹⁰ While Crime Control model proponents maintain this model is "too soft" on serious youth crime to the detriment of public safety.¹¹

2.1.2. Crime Control Model

On the far right of the youth justice models continuum, the Crime Control model, focuses on the offence rather than the offender and posits that the paramount objective of the youth justice system is protection of the public. The safety of the community is asserted to be best achieved by general and specific deterrence of offenders that

⁸ In England, James Bulger (age 2) was abducted and murdered by two ten year old boys in 1993 making them the youngest convicted murderers in modern English history. The boys were sentenced to custody until they reached adulthood (i.e. age 18) and were subsequently released on lifelong parole in June 2001.

⁹ The welfare model is premised upon the *parens patriae* doctrine, whereby the state stands *in loco parentis*, taking the place of the parent in determining appropriate dispositions for young people.

¹⁰ N. Bala, "The Young Offenders Act: the Legal Structure" in R.R. Corrado, N. Bala, M. LeBlanc & R. Linden, eds., *Juvenile Justice in Canada*. (Toronto: Butterworths, 1992).

¹¹ Under the *Juvenile Delinquents Act*, based on the welfare model, during the early 1970s, the NDP government of British Columbia went so far as to abandon secure confinement as a disposition for juvenile offenders. This met with considerable opposition at the time. See discussion in R.R. Corrado, "Introduction" in R.R. Corrado, M. LeBlanc & J. Trepanier, eds., *Current Issues in Juvenile Justice*. (Toronto: Butterworths, 1983) at 26.

requires a sentencing philosophy emphasizing punishment, accountability and incapacitation through incarceration, particularly with respect to chronic and violent offenders.¹² The political proponents of this model are exemplified in elections when politicians propose criminal justice platforms demanding youth laws and practices be “tough on crime.” They argue further that laws based on other models result in increases in serious violent young offending.¹³

One perspective of the *YCJA* is that it resulted from a politically motivated Liberal Party federal government initiative to reform the juvenile justice system to produce harsher penalties for the most serious offences in response to increased electoral support for the Crime Control model.¹⁴ For instance, the Act lowered the age for serious violent offences (e.g. murder, manslaughter, aggravated sexual assault) to 14 years even though the provinces and territories continue to maintain the age at 15 or 16 years, as allowed under s. 2 of the Act. Even more dramatic, the original *YCJA* added a new category of serious violent offences (SVO) for young offenders who could be subject to adult type lengthy sentences upon third conviction for a similar offence.¹⁵ Even more explicitly, the *YCJA* Declaration of Principle, which is listed in order of importance, has

¹² R.R.Corrado, *supra*, footnote 6.

¹³ J.V. Roberts, “Sentencing Juvenile Offenders in Canada” (2003), 19 *Journal of Contemporary Criminal Justice* 413. Despite public perceptions of increasing rates of youth crime, in actuality youth crime in Canada has shown a declining trend over the last fifteen years. See: J.V. Roberts “Public Opinion and the Evolution of Juvenile Justice Policy in Western Nations” in M. Tonry & A. Doob, eds., *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives, Vol. 31 Crime and Justice* (Chicago: University of Chicago Press, 2004); Julie Sauvé “Crime Statistics in Canada, 2004” *Juristat, Vol. 25, No. 5* (Ottawa: Minister of Industry, 2005); Jennifer Thomas “Youth Court Statistics, 2006/07” *Juristat, Vol. 28, No. 4* (Ottawa: Minister of Industry, 2008); N. Bala, P.J. Carrington and J. V. Roberts, “Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success” (2009), 1 *Canadian Journal of Criminology and Criminal Justice* 51(2) 131; Shannon Brennon “Youth Court Statistics, 2010/11” *Juristat, Vol. 30, No. 3* (Ottawa: Minister of Industry, 2012).

¹⁴ *Ibid.*, Roberts at p. 416.

¹⁵ Bill C-10 amendments eliminated the presumptive offence terminology and the 3rd SVO designation for offences that could receive an adult sentence. Now only a 3rd serious offence can result in a youth receiving an IRCS sentence with the following modified provision: The young person has been found guilty of a serious violent offence or the young person has been found guilty of an offence, in the commission of which the young person caused or attempted to cause serious bodily harm and for which an adult is liable to imprisonment for a term of more than two years, and the young person had previously been found guilty at least twice of such an offence (s. 42(7) (a)(i)&(ii)).

as its first principle a strong Crime Control tenet that says, "the youth criminal justice system is intended to protect the public."¹⁶

Examples of the Crime Control model are evident in many state jurisdictions in the United States where juvenile justice laws constitutionally are the prerogative of the states and not the federal government as it is in Canada. Several US states such as New York State lower youth court age jurisdictions (often sixteen years or less) and automatic transfers to adult court processes for chronic or serious violent young offenders.¹⁷ Other U.S. illustrations of Crime Control principles are evident with the U.S. Supreme Court decisions regarding key juvenile justice issues such as the rejection of proportionality because of diminished responsibility due to age/immaturity in sentencing, its endorsement of mandatory life sentences for drug offences and its apathy towards state legislatures prescribing strict sentences for offences without careful evaluation or scrutiny of the process.¹⁸ An even more pronounced example of this Model in the United States could be found in the use of capital punishment for older adolescents. Twenty-five states had approved the execution of young offenders for serious violent offences committed between the ages of sixteen and seventeen.¹⁹ The United States was the only liberal democratic country that allowed for the execution of young offenders until March, 2005, when the U.S. Supreme Court in *Roper v. Simmons* officially rejected the juvenile death penalty as an inappropriate punishment for offenders under the age of

¹⁶ The original 2003 YCJA Declaration of Principle had public protection as a long term goal; however, the Conservative government in its stance to appease societal pressure for those small number of serious and violent juvenile offenders has made safety of the public its primary goal in the recent amendments to the Act.

¹⁷ See e.g. A. Markwart, "A Review of the Young Offenders Act and The Youth Justice System in Canada" *Report of the Federal-Provincial-Territorial Task Force on Youth Justice*, August 1996 [unpublished]; S.R. Hechinger, "Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet" (2011), 35(2) *New York University Review of Law and Social Change* 408.

¹⁸ B.C. Feld, "Juvenile and Criminal Justice Systems' Responses to Youth Violence" in Michael Tonry and Mark H. Moore, eds., *Youth Violence* (Chicago: The University of Chicago Press, 1998); B.C. Feld, "Slower Form of Death: Implications of *Roper v. Simmons* for Juveniles Sentenced to Life Without Parole" (2008), 22 *Notre Dame Journal of Law, Ethics & Public Policy* 9; M. Berkheiser, "Death is Not So Different After All: *Graham v. Florida* and the Court's Kids are Different Eighth Amendment Jurisprudence" (2011), 36(1) *Vermont Law Review* 1.

¹⁹ B.C. Feld, *ibid.*, at p. 216.

eighteen.²⁰ However, young persons under the age of eighteen convicted of serious crimes still are subject to life without parole in many states. The Supreme Courts exclusion of a juvenile's diminished responsibility from the proportionality analyses allowed state legislatures to enact, trial courts to impose and appellate courts to affirm life without parole and "other draconian sentences inflicted on very young and manifestly immature offenders . . . laws that are irrational, inhumane, unjust and counterproductive."²¹ Forty-two states permit judges to impose life without parole sentences on all offenders - adult or youth - convicted of serious crimes such as murder or rape. In twenty-seven of those states, life without parole is mandatory for all offenders convicted of these crimes and judges are not obligated to conduct any proportionality evaluation or consider individual circumstances such as youthfulness and age prior to its imposition.²² The common Crime Control model theme in such states is that serious young offenders are perceived to be a threat to society and a youth's "needs" are considered risks for further harm to the public requiring incapacitation rather than rehabilitation.²³ For example, this theme is exemplified in Washington State when its Supreme Court, in *State v. Lawley*, endorsed the legislature's assumption in its juvenile justice law that, "accountability for criminal behaviour, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile."²⁴

2.1.3. Justice Model

The Justice model is demonstrated in adult Common Law criminal justice systems. Its essence is due process/fair procedure rights (or procedural safe guards in Roman or European Continental law based legal systems) for the accused and the convicted. This model can be traced back to the 1215 Magna Carta in England which

²⁰ *Roper v. Simmons*, 543 U.S. 551 (2005). Twenty-two youth had been executed since the reinstatement of the death penalty in 1976.

²¹ B.C. Feld, *supra*, footnote 18, at p. 10 and 63.

²² *Ibid*, at p. 43.

²³ L. McAra, "Models of Youth Justice" in David J. Smith, ed., *A New Response to Youth Crime* (Willan Publishing, 2010).

²⁴ B.C. Feld, *supra*, footnote 18, at pp. 222-223.

established several contemporary rights designed to protect the accused against the vastly greater coercive powers of governments.

The Justice model is not focused on either the offender or on the protection of the community, but rather on the justice process itself, emphasizing legal rights and procedural fairness. This model asserts that an adolescent's criminal behaviour is wilful and therefore, they should be held responsible for their actions.²⁵ The focus of this model is on due process and accountability of the offender within the framework of sanctions that are proportionate to the seriousness of the offence. In effect, the Justice model attempts to protect society from criminal behaviour while maintaining legal rights and fair representation for young offenders.

According to proponents of this model, the Welfare model bases laws which allow for intrusiveness and coercive treatment that fundamentally contravene a young person's due process/fair procedure rights. Advocates claim the Justice model provides greater protection to society as well as more safeguards for youth against subjective and often ineffective government intervention. Critics of the Justice model assert that young offenders receive greater punishments that do not deter future offending and minimize the focus on environmental factors – that is, family background, race, mental health, economic status - typically associated with youth crime.²⁶

2.1.4. Corporatist Model

John Pratt's Corporatist model²⁷ was formulated as an option to the Welfare and Justice models to describe the various laws that emerged as result of the contentious debates beginning in the 1970's and continuing into the late 1980's involving attempts to reform the juvenile justice system in England and Wales. Pratt argued that the traditional models did not accurately depict the fundamental changes that juvenile justice had undergone in England and Wales in the second half of the 20th century as a result of innovative theoretically based changes in practices such as the administrative or non-

²⁵ R.R. Corrado, *supra*, footnote 6.

²⁶ *Ibid.*

²⁷ J. Pratt "Corporatism: The Third Model of Juvenile Justice" (1989), 29 British Journal of Criminology 236.

judicial diversion for minor offenders from formal juvenile justice processing and decision-making. Instead, Pratt maintained that England and Wales and other jurisdictions, most definitively New Zealand, had begun to rely on administrative based decision-making in part or whole for most young offenders. His Corporatist model, therefore, emphasizes an increase in the use of administrative decision-making and broader discretion for professionals such as social workers and youth probation officers. It also embodies a decreased reliance on the formal criminal procedures central to the Justice model. The Corporatist process envisions the merging of various multi-disciplinary juvenile justice agencies and personnel to manage, negotiate and resolve conflicts with most young offenders, resulting in a planned outcome that often includes diversion to specific community programs. A central element to the workings of a Corporatist approach is an increase in discretion and an emphasis on policy.²⁸ Equally important, this model trifurcates the youth justice process by separating procedural and sentencing approaches for minor offenders (e.g. usually first time and non-serious property offenders), moderate offenders (e.g. multiple property offenders and less serious violent crimes), and serious or violent offenders (e.g. offences including murder, attempted murder, manslaughter, aggravated sexual assault).²⁹ Corporatism, therefore, adheres to an interagency structure with a focus on the offender and a move away from crime and punishment, which essentially positions this model near the Welfare model end of the continuum.

Corporatist model principles were included in the YOA in general themes such as the Declaration of Principle, and in the Alternative Measures sections, for the most part involving discretion by police and Crown Counsel, however, these principles are more expressly identified in the YCJA at several stages of the youth justice process. For example, Corporatist options are evident in the YCJA with the increased use of extra-judicial measures and conferencing. Extra-judicial measures, such as police diversion, which are presumed to be adequate under the Act for non-violent offenders who have not previously been found guilty of an offence, avoid formal judicial hearings and more punitive sentencing outcomes. Beyond police diversion, most provincial and territorial

²⁸ *Ibid*, at p. 247.

²⁹ *Ibid*, at p. 244.

governments have explicit policy and administrative guidelines for youth probation officers (or sometimes contracted agencies) to conduct screening assessments for extra-judicial sanctions, a more formalized kind of diversion from court. Typically, most cases involving repeat minor offenders are referred by Crown Counsel to a probation officer to assist in deciding the appropriate non-judicial sanction(s).

The clearest expression of the Corporatist model in the *YCJA* is found in the provisions promoting conferencing. The main goal of conferencing is a mutually agreed upon resolution by the young offender, the victim, community members and youth justice representatives to the harm done by the crime. The *YCJA*'s definition of a conference is purposefully vague, allowing for broad discretion and differing approaches among the provinces and territories in setting up and convening conferences. The *YCJA*'s broad definition of conference leaves the structure and implementation of setting up and convening a non-judicial conference to the provinces.³⁰ Provinces have utilized integrated case management meetings, youth justice committees, community accountability programs and formal judicially ordered conferences. For example, British Columbia and Alberta have designated youth justice specialists to organize judicially ordered conferences.³¹ As well, a judicially ordered conference may or may not involve a judge and other court personnel in attendance. A non-judicially ordered conference depends on administrative policy and guidelines for specifying procedures and outcomes. There is little doubt the success of restorative justice movements in common-law countries such as Australia and New Zealand in setting up youth justice systems based largely on Corporatist model principles has influenced the framers of the

³⁰ See K. Roach, "The Role of Crime Victims Under the Youth Criminal Justice Act," (2003) 40 *Alberta Law Review*, 965. Roach analyzes the contribution of victims under the *YCJA*. In particular he discusses the Act's conferencing provisions by encouraging the utilization of "family conferences" which are not specifically mentioned in the *YCJA*, but have proven to be very successful in New Zealand. Roach also underscores the importance of the federal government's cost-sharing agreements with the provinces to develop youth justice policy that encourages conferencing as an alternative to judicial proceedings.

³¹ Prince Edward Island has trained a number of youth justice services staff, including some probation officers, in facilitating Community Justice Forums. Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick and Nova Scotia do not have youth probation officers trained in restorative justice conferencing. For an in-depth examination of conferencing in British Columbia, see D. Hillian, M. Reitsma-Street & J. Hackler, "Conferencing in the Youth Criminal Justice Act: Policy Developments in British Columbia" (2003), 46 *Canadian Journal of Criminology and Criminal Justice* 343.

YCJA. Although conferencing is only one option in this Act, it does constitute an important alternative to mainstream Justice model proceedings typically characterized under most juvenile justice laws.³²

2.1.5. Modified Justice Model

The Modified Justice model³³ reflects the more recent trend, evident first in the United Kingdom as early as 1908, of combining different elements of the other youth justice models. This approach originally synthesized Justice, Welfare, and Crime Control models, and much later, beginning in the 1970s, brought in elements of the Corporatist model. This model was developed primarily due to the difficulties in categorizing much of the juvenile justice reform legislation and practices in Canada, the U.S. and Britain over the last several decades. Under this model, Crown prosecutors, defense counsel and judges are guided by the goals of ensuring procedural fairness, protecting society, holding young people accountable for their offending in accordance with their maturity level, proportionality between the harm caused by the offence and the severity of the sentence, and providing rehabilitative resources to meet the needs of the youth. Again, procedural fairness is the dominant process principle in the Modified Justice model whereby a youth is protected from making uninformed and/or coerced choices regarding admissions of guilt, selection of procedures, and where outcome options exist, selecting the least intrusive alternative.

Both the YOA and the YCJA have been characterized as examples of the Modified Justice model, albeit with differences in the emphasis of the other four models' principles.³⁴ For example, the option of adult custodial sentences for offences, such as murder, currently available in the youth justice court can be considered to reflect a shift to the Crime Control principle of incapacitating serious and violent offenders in order to

³² Theoretically, conferencing is an excellent example of a Corporatist approach; but from a procedural, operational and administrative standpoint, conferencing has not been fully utilized across Canada.

³³ R.R. Corrado, *supra*, footnote 6.

³⁴ R. Corrado, K. Gronsdahl and D. MacAlister, "The Youth Criminal Justice Act: Can the Supreme Court of Canada Balance the Competing and Conflicting Models of Youth Justice?" (2007) 53(1) Criminal Law Quarterly 14.

protect the public. It also embodies the Justice model's principle of proportionality connecting the seriousness of the offence to the length and type of sentence (i.e., the severity of the punishment).

This model also incorporates other complexities of the *YCJA*, particularly the confusing mixture of philosophical principles and objectives that guide decision makers in the youth justice process. Since the *YOA* there has been disagreement and controversy in deciding what principles should govern Canada's youth justice system. Given the criticisms of the *YOA*'s overarching and conflicting principles,³⁵ the federal government's intention was to draft a new Act that provided greater clarity and guidance. While the scope of this chapter does not allow for a comparison of each section of the *YCJA*, it is important to illustrate why this law more generally reflects the Modified Justice model approach to youth justice, and, to highlight how this law, even more than the *YOA*, mixes competing and conflicting principles from all five models of youth justice.

While the *YOA* did not contain a Preamble, the *YCJA* does. Traditionally, preambles were not given much weight by the courts, but recently it has been acceptable practice to refer to the preamble when interpreting the rationale of the legislation.³⁶ The Preamble, can be considered to depict a mixed model approach because it emphasizes the rights of young persons, society sharing responsibility by providing guidance and responding to the needs of young people, rehabilitation and reintegration, accountability through meaningful consequences, and reducing the over-reliance on incarceration for non-violent young offenders. The Preamble also adds two distinct policies regarding victim interests and public access to youth justice information. The Preamble is essentially a digest of moral, legal and policy standards in an attempt to meet the demands of the public and the perceived needs of young offenders. Therefore, like the *YOA*, the *YCJA* is another portrayal of a Modified Justice model approach in dealing with young offenders. This elaborate and complex Preamble, as discussed

³⁵ *Per* Cory J. for the court in *R. v. M.(J.J.)*, [1993] 2 S.C.R. 421 at 426.

³⁶ N. Bala, *Youth Criminal Justice Law* (Toronto, ON: Irwin Law, 2003), at p. 76. On the purposes and uses of preambles in legislation, see: K. Roach "The Uses and Audiences of Preambles in Legislation" (2001), 47 McGill L.J. 129.

above, can be partly explained, at least, as a reaction to persistent negative public perception about youth crime generally and serious violent youth crime in particular.³⁷

The complexity of the *YCJA* is further exemplified by four distinct yet overlapping sets of principles in sections 3, 4, 38 and 83.³⁸ An illustration of a mixed model approach is found in section 3 of the *YCJA* which contains a general declaration of principle that applies to the entire Act. The *YCJA*'s Declaration of Principle states its primary goal is to protect the public which is promoted through proportionate accountability, prevention, meaningful consequences, rehabilitation and reintegration.³⁹ This goal set out in the Declaration of Principle is not a novel consideration; rather, the Act is essentially promoting a safer society by melding various elements of the different models of youth justice.⁴⁰ The *YCJA* is another version of a Modified Justice model whereby the overall portrayal of the youth's needs and his or her offending are assessed together. In other words, the offence and subsequent sanction is not evaluated in isolation of the youth's emotional, social and psychological background.

The *YCJA* is a very lengthy and complex piece of legislation that represents a mixture of characteristics best explained by the Modified Justice model ideology. As will

³⁷ P. Carrington & J. Schulenberg "Introduction: The *Youth Criminal Justice Act* – A New Era in Canadian Juvenile Justice?" (2004), 46 *Canadian Journal of Criminology and Criminal Justice* 219; J. Barber & A.N. Doob "An Analysis of Public Support for Severity and Proportionality in the Sentencing of Youthful Offenders" (2004), 46 *Canadian Journal of Criminology and Criminal Justice* 327.

³⁸ *YCJA*, ss. 3, 4, 38 and 83. The *YOA* offered limited guidance to the courts with respect to alternative measures, sentencing and the purpose of custody. The *YCJA* has attempted to rectify this by providing far reaching purposes, principles and objectives with the aim of achieving more consistency and guidance in the youth criminal justice system. However, these extensive and overarching terms often conflict and have been open to interpretation, especially during sentencing.

³⁹ *Ibid.*, at s.3(1)(a).

⁴⁰ Furthermore, in relation to the purposes of sentencing, Professors Roberts and Bala commented that it would be difficult for a youth criminal justice court to achieve all of the stated purposes in section 38(1) which are: to contribute to the long term protection of society, hold a young person accountable, impose just sanctions, provide meaningful consequences and promote rehabilitation and reintegration into society. They surmise, "No sanction can accomplish all of these goals. What if some goals are fulfilled while others are not? What happens when the goals conflict? When a judge tries to determine whether a given sanction achieves the above aims, must she or he consider all of them *seriatim*?" From a practical sense they believe it would be difficult for section 38(1) to assist judges during sentencing. J. Roberts and N. Bala, "Understanding Sentencing Under the *YCJA*" (2003), 41:2 *Alberta Law Review* 395 at p. 403.

be discussed in the next chapter, certain provinces and territories, in their legal decisions, have apparently endorsed crime prevention through a more punitive and deterrent approach while other jurisdictions have not. It was inevitable the *YCJA* would be subject to provincial, administrative and judicial interpretations based on the vague and complex nature of its guiding principles and provisions that are embedded in the law.

Chapter 3. Supreme Court of Canada Decisions

3.1. Introduction

Although the YOA was amended three times (1986, 1992 and 1995) in an attempt to toughen the Act especially for those youth charged with serious crimes,¹ the number of appeals to Canada's highest court during this Act's tenure remained surprisingly scarce. In the nearly two decades the YOA was in effect, the Supreme Court of Canada essentially resolved one rather controversial issue regarding general deterrence in *R. v. M. (J.J.)*.² This has not been the case with the YCJA as during the years since this Act came into force in 2003, the Supreme Court of Canada has been very busy interpreting a number of key aspects of the legislation. Early on it became evident that provincial and territorial judges, both at the lower trial court level and at the appellate level, had opposing philosophical and legal views regarding certain areas of the YCJA. Not unlike its predecessor, the YCJA is criticized for the inherent ambiguities and inconsistencies in the legislation because it is based on a Modified Justice model that incorporates competing and inconsistent principles and objectives. This mixed model resulted in considerable confusion among youth justice decision makers requiring the Supreme Court of Canada to resolve the case law debate reflected in inconsistent appellate court decisions across Canada. Using the Supreme Court of Canada

¹ In 1986 minor amendments were made to the YOA to respond to some concerns by police and provincial governments about difficulties implementing the YOA and to toughen some parts of the Act. Therefore provisions were added to facilitate charges for breach of probation orders and to allow publication of information about the identity of dangerous young person's at large in a community. The 1992 YOA amendments increased maximum youth prison terms to five years less a day for murder and amended the transfer provisions so that "protection of the public" was the paramount consideration. In 1995 the YOA was again amended to increase the maximum penalty to ten years for first degree murder and seven years for second degree murder as well as creating a presumption that sixteen and seventeen year olds charged with the most serious offences would be transferred to adult court where longer sentences could be imposed.

² *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421

decisions, this chapter will elaborate on the five theoretical models of youth justice and demonstrate with case law, how the youth justice system continues to be linked to conflicts associated with several youth justice models and disparity in judicial decision making.

3.2. Forensic DNA Data Bank and the YCJA

Nothing has been as innovative and evolutionary as forensic DNA analysis in solving crime within the Canadian judicial system. Although the RCMP have been utilizing DNA analysis since 1989, there was not a nationally coordinated effort to assist police agencies in taking full advantage of this superior technology until ten years later.³ With the support of all levels of government, police agencies and many segments of the public, the *DNA Identification Act*⁴ received assent on December 10, 1998, allowing for the creation of a National DNA Data Bank. The *DNA Act* was proclaimed in force on June 30, 2000. This new legislation amended the *Code* to facilitate courts ordering DNA samples to be obtained for inclusion into the data bank. Therefore, consequential amendments to the *Code* were also made to allow DNA profiles to be taken from those convicted of certain designated offences.⁵

The RCMP, who are responsible for the data bank, maintain two types of indices: a crime scene index, containing DNA profiles taken from bodily substances found at a

³ National DNA Databank, online at < http://www.nddb-bndg.org/main_e.htm>.

⁴ *DNA Identification Act*, S.C. 1998, c.37 [hereinafter *DNA Act*].

⁵ Parliament has made a distinction between “primary” and “secondary” designated offences which are listed in s. 487.04 of the *Code*. Primary designated offences authorize that a DNA order must be made unless the convicted person has established that the exception in s. 487.051(2) of the *Code* should apply instead. For secondary designated offences, the onus is on Crown Counsel to show why an order would be in the best interests of the administration of justice. What is most interesting about the two types of offence designations is that the *Code* outlines factors for the judiciary to consider when determining whether to issue an order for secondary designated offences, specifically, the offenders criminal record, the nature and circumstances of the offence and the impact on the privacy and security of the person. Whereas primary designated offences are considered to be the more serious offences, yet section 487.051(2) of the *Code* does not provide specific criteria in deciding whether to make an order refusing to authorize the collection of a sample, rather it requires the judge to deliberate between two dual concepts: a person’s privacy and security on the one hand, and protection of society and the proper administration of justice on the other.

crime scene⁶ and a convicted offender index which allows DNA profiles to be taken from offenders where a post-conviction order has been made.⁷ The data bank compares the profiles within the convicted offender index and crime scene index to determine if a match can be made. Such a match may be utilized by police agencies to further an application in court asking for a DNA warrant to seek a new investigation of bodily samples from an individual for whom there is a match. This kind of DNA profiling can assist in excluding a person from being a suspect or aid in a criminal proceeding.⁸

This merging of science and technology with law enforcement has become a remarkably powerful tool across Canada.⁹ By August 31, 2012, there were 252,487 profiles entered into the convicted offender index and 78,385 entered into the crime scene index.¹⁰ Of particular interest are those young offenders whose profiles are entered into the convicted offender index. As of August 31, 2012 there were 32,822 young offender DNA profiles in the convicted offender index making up 11% of the total index.¹¹

Unlike the USA, where a majority of the states have mandatory data bank orders,¹² Canada relies upon judicial prudence to ensure the constitutionality of the legislation.¹³ Essentially, Parliament mandated the judiciary to exercise their discretion regarding DNA applications in a manner that attempts to balance two binary concepts: the privacy and security of the person and protection of society along with the proper administration of justice. It is this difficult feat that has resulted in judicial decision making coming under the microscope concerning DNA Data Bank orders. Since the

⁶ *DNA Act*, s. 5(3) & the *Code*, s. 487.05(1).

⁷ *DNA Act*, s. 5(4) & the *Code*, s. 487.051(1).

⁸ Department of Justice Canada, *DNA Data Bank Legislation – Consultation Paper*, 2002, online at <http://canada.justice.gc.ca/en/cons/dna_adn/new_dna-e.pdf>.

⁹ For further elaboration on the adoption of DNA technology in the Canadian criminal justice system see N. Gerlach, *The Genetic Imaginary: DNA in the Canadian Criminal Justice System* (Toronto: University of Toronto Press, 2004).

¹⁰ Email correspondence with Andre Savoie, Manager, DNA Training & Collections Unit at the National DNA Data Bank, September 2012.

¹¹ *Ibid.*

¹² C.A. Bauman, "The DNA Data Bank: Privacy Concerns and Safeguards." (2000) 34 C.R. (5th) 39.

¹³ *Supra*, footnote 8.

DNA Act has been in place, a number of appeals have challenged various sections of the legislation.¹⁴

Probably the most important and influential arguments regarding DNA orders for young offenders are whether youth are to be treated differently than adults and whether the YCJA grants enhanced procedural protections for youth when ordering a profile to be

¹⁴ The main arguments coming from either adult criminal court or youth justice court involve the following: DNA data bank orders do not contravene the *Charter*, see for example, *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.), *R. v. Murrins* (2002), 162 C.C.C. (3d) 412 (N.S.C.A.); the privacy and security of the person do not outweigh the states interests, see for example, *R. v. C.(B.V.)*, [2003] S.J. No. 313 (Q.B.), *R. v. M. (S.A.)*, [2003] B.C.J. No. 2451 (C.A.); the DNA Act contains safeguards to protect informational privacy with respect to the retention and destruction of DNA profiles, see for example, *R. v. Hendry*, [2001] 161 C.C.C. (3d) 275 (Ont. C.A.), *R. v. T. (T.)*, [2001] O.J. No. 2936 (Ont.Ct.J.), *R. v. Jordan*, [2002] N.S.J. No. 20 (C.A.), *R. v. S.(O.S.)*, [2002] A.J. No. 1135 (C.A.), *R. v. M. (I.R.)*, [2002] B.C.J. No. 2903 (S.C.); convicted persons have a diminished expectation of privacy, see for example, *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont.C.A.), *R. v. Jordan*, [2002] N.S.J. No. 20 (C.A.), *R. v. North* (2002), 165 C.C.C. (3d) 393 (Alta.C.A.), *R. v. Ku* (2002) 169 C.C.C. (3d) 535 (B.C.C.A.), *R. v. H. (K.V.)*, [2003] B.C.J. No. 2946 (S.C.), *R. v. G. (J.M.)*, [2004] A.J. No. 747 (C.A.); the judiciary fail to provide reasons for declining DNA orders, see for example, *R. v. North* (2002), 165 C.C.C. (3d) 393 (Alta.C.A.), *R. v. S. (O.S.)*, [2002] A.J. No. 1135 (C.A.), *R. v. M. (S.A.)*, [2003] B.C.J. No. 2451 (C.A.), *R. v. S. (B.T.)* [2003] B.C.J. No.360 (S.C.), *R. v. H. (K.V.)*, [2003] B.C.J. No. 2946 (S.C.); the judiciary fail to give proper consideration to relevant evidence, see for example, *R. v. Jordan*, [2002] N.S.J. No. 20 (C.A.), *R. v. G. (J.M.)*, [2004] A.J. No. 747 (C.A.); the judiciary is obligated – independent of a Crown application - to consider whether a DNA order should be issued, see for example, *R. v. T. (T.N.)*, [2004] A.J. No. 780 (C.A.); the *Criminal Code* is silent on the powers of the Appellate Court to deal with an appeal concerning a DNA order, see for example, *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont.C.A.), *R. v. North* (2002), 165 C.C.C. (3d) 393 (Alta.C.A.), *R. v. S. (O.S.)*, [2002] A.J. No. 1135 (C.A.), *R. v. M. (S.A.)*, [2003] B.C.J. No. 2451 (C.A.), *R. v. G. (J.M.)*, [2004] A.J. No. 747 (C.A.), *R. v. H. (K.V.)*, [2003] B.C.J. No. 2946 (S.C.), *R. v. D. (K.A.M.)*, [2003] B.C.J. No. 2934 (S.C.); judges refuse to make orders based on the offence being committed before the *Code* provisions came into force, see for example, *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.), the offender does not have to lead evidence in establishing that a DNA order will have an exceptional effect on his or her privacy and security, see for example, *R. v. C. (R.)*, [2003] N.S.J. No. 243 (S.C.), *R. v. M. (S.)*, [2004] A.J. No. 534 (Q.B.); and a DNA data bank order is not part of a sentence and therefore is not a form of punishment, see for example, *R. v. Briggs*, [2001] O.J. No. 685 (C.A.), *R. v. Murrins* (2002), 162 C.C.C. (3d) 412 (N.S.C.A.), *R. v. Ku* (2002), 169 C.C.C. (3d) 535 (B.C.C.A.). While some of the aforementioned issues pertain to young offenders, there are areas regarding the DNA legislation that have specific relevance to youth. For instance in *R. v. T. (T.)*, [2001] O.J. No 2936 (Ont.Ct.J.) and *R. v. S. (O.S.)*, [2002] A.J. No. 1135 (C.A.) the Courts clarified that a youth court history is not precluded from the phrase “criminal record” in the *Criminal Code* for the purposes of DNA bank orders. Of particular interest are those early cases which argued that the *Criminal Code* is modified by young offender legislation, see for example, *R. v. T. (T.)*, [2001] O.J. No. 2936 (Ont.Ct.J.), *R. v. H. (A.)*, [2001] O.J. No. 382 (Ont.Ct.J.), *R. v. F. (J.)*, [2002] O.J. No. 3342 (QL) (Ont. C.J.).

taken.¹⁵ A strict reading of the CCC DNA provisions does not indicate a difference between adults and youth, as they are dealt with concurrently in section 487.051¹⁶:

487.051 (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or the Youth Criminal Justice Act of a designated offence, the court

(a) shall, subject to subsection (2), in the case of a primary designated offence, make an order in Form 5.03 authorizing the taking from that person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1); or

(b) may, in the case of a secondary designated offence, make an order in Form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.

(2) The court is not required to make an order under paragraph (1)(a) if it is satisfied that the person or young person has established that, were the order made, the impact on the person's or young person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

(3) In deciding whether to make an order under paragraph (1)(b), the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

The impact of this section regarding primary designated offences for youthful offenders gave rise to the appeal in *R. v. C. (R.)*, a Nova Scotia case in which Justice Gass refused to make an order for a DNA sample.¹⁷ This case involved a thirteen year old

¹⁵ See for example *R. v. C. (R.)*, [2003] N.S.J. No. 243 (S.C.), *R. v. H. (K.V.)*, [2003] B.C.J. No. 2946 (S.C.), *R. v. Q. (D.A.)*, [2005] A.J. No. 433 (Prov. Ct).

¹⁶ This is how Section 487.051(1) to (3) was written prior to the 2008 CCC amendments which essentially modified some of the language to include individuals suffering from a mental disorder but continued to maintain young offender profiles in the same sections as adults.

¹⁷ *R. v. C. (R.)*, [2003] N.S.J. No. 243 (S.C.).

male with no criminal record who assaulted his mother by stabbing her in the foot with a pen after she dumped a basket of dirty laundry on him during an argument over getting out of bed and going to school. The young person was convicted of assault with a weapon which is a primary designated offence requiring a mandatory DNA order unless the young person can establish that its impact would be grossly disproportionate. The issue addressed by the court was whether an exception to section 487.051(2) of the *Code* can be made if the circumstances of the offender and the offence vary substantially from the kind of cases Parliament probably envisaged when creating the DNA legislation. Professor Bala suggested caution when ordering a young offender DNA sample, in comparison to adult offenders, considering their age as a mitigating factor as well as cautioning that the type of offence committed and whether the youth has a record ought to be taken into account.¹⁸

At trial, Justice Gass relied extensively upon the guidance provided by *R. v. Jordan*¹⁹ and *R. v. F. (J.)*.²⁰ in her reasons. These cases gave her a roadmap for outlining the factors to be used in determining whether to issue a DNA order. She pointed out the *DNA Act* does not differentiate between adult and young offenders, nor does the legislation provide any specific direction for courts in determining DNA orders for young persons. In making her decision to decline the order she applied the factors outlined in *R. v. Jordan* which included the nature of the offence, a risk to recidivate, the person's record as an indicator of re-offending and a finding that a DNA sample may be a helpful tool for investigating the offence or prior offences.²¹ The court also took exception to the notion that the rendering of a DNA sample is a minimal infringement on the offender. She found that the taking of a thirteen year old's DNA profile not only affects his physical health, but also his emotional and psychological health, given his age, level of development, understanding of the offence and his awareness of the implications for taking such a sample. Justice Gass referred to the YCJA's Preamble

¹⁸ N. Bala, *Youth Criminal Justice Law* (Toronto, ON: Irwin Law, 2003), at 496.

¹⁹ *R. v. Jordan*, *supra*, footnote 14.

²⁰ *R. v. F. (J.)*, [2002] O.J. No. 3342 (Ont. Ct. J.).

²¹ *R. v. C. (R.)*, *supra*, footnote 15, at paras. 25-30.

and underlying philosophy in surmising that taking a DNA sample is a serious intervention and is inherently invasive.²²

Furthermore, Justice Gass, in quoting Judge Hardman in *R. v. F. (J.)*, acknowledged the DNA legislation does not provide specific direction for treating young persons differently than adults, but the *YCJA* does provide this guidance. Justice Hardman's comments were made when the *YOA* was in effect but are still relevant under the *YCJA*:

In almost every aspect, the criminal system must deal with young people in a different way. There is an acknowledged principle that young people should be able to make mistakes that will not have consequences past certain defined time periods. . . The argument for the scheme include [sic] the various purposes for the D.N.A. legislation which are acknowledged to be significant in the administration of justice. It should also be noted however that, as the justice stated in *R. v. Borden*: The requirements of fundamental justice are not immutable; rather they vary according to the context in which they are invoked. In the consideration of the special circumstances of young people, it should be noted that the D.N.A. scheme may affect young people, who as a result of age, could not in law even consent to the procedure. A legal guardian would be required. It is somewhat ironic that a young person, who decides on his or her own to commit a crime, may give a court authority to order an intrusion that he or she could not consent to . . . Given the well established process of taking into account a young person's age in dealing with criminal matters, it would seem to this court appropriate, when dealing with every young person faced with a mandatory order, given the lack of special consideration in the statute, to consider the philosophy of the *Young Offenders Act* [now the *YCJA*] . . . and its principles of non-interference and its principles of dealing with the young person as an individual, prior to making the order.²³

This case is significant as it challenges the strict Crime Control reading of the *Code* DNA provisions. Justice Gass suggested that a more individuated approach should be taken with young offenders in determining the appropriateness of DNA orders. In other words, a Modified Justice model position would be an appropriate solution by taking into account not only the offence, subsequent sanction and prior record, but also the age,

²² *R. v. C. (R.)*, *supra*, footnote 15, at paras. 31 & 32.

²³ *Ibid.*, at para. 38.

social, emotional and psychological background of young offenders as guiding factors in deciding whether to order a DNA sample.

The Nova Scotia Court of Appeal²⁴ did not agree with Justice Gass' progressive interpretation of using the *YCJA* to inform the proper procedure for applying the DNA provisions in the *Code* to young persons. The appellate court overturned the decision, holding that it was wrong to assume the *YCJA* modified the application of s. 487.051 (1)(a) and (2) of the *Code*. Furthermore, the court firmly stated it was an error to presume that the taking of a sample would have a greater impact on young offenders than adult offenders. The appellate court also cited *R. v. Jordan* when explaining the onus is on the offender convicted of a primary designated offence to establish through evidence that he or she meets the exception in s. 487.051(2) of the *Code*:

The judge [Gass], in my view lacked an evidentiary foundation upon which to base a denial of the presumptively mandatory order . . . there was no evidence about R.W.C.'s psychological, emotional or mental health, nor his level of development or understanding or appreciation of the offence committed . . . there was nothing before the court which addressed this young offenders reaction to or anticipation of the prospect of the taking of the DNA. . . The denial of the otherwise mandatory DNA order must have a factual underpinning.²⁵

The Court of Appeal also held the trial judge neglected to consider certain key aspects of the Pre-Sentence Report which spoke to the instability of the young person, namely, he was on an undertaking at the time of the assault, his poor academic record, his substance use and anger management issues, as well as there being a propensity for violence within the family.²⁶ Therefore, the making of an order is not as discretionary as intimated by the trial judge; rather the judge is to make the order unless the exception is found to apply.

While the Court agreed any direct evidence about the impact of an order can take into account the young person's age and stage of development it was, however, not convinced the purposes and principles of the *YCJA* adjust the *Code* DNA provisions in

²⁴ *R. v. C. (R.)*, [2004] N.S.J. No. 53 (C.A.).

²⁵ *Ibid.*, at paras. 13, 14 and 21.

²⁶ *Ibid.*, at para. 23.

any way. The appellate court pointed out the *DNA Act* already had explicit young offender safeguards built into the legislative scheme by mandating early destruction of young offender DNA profiles.²⁷ These safeguards align with the records destruction provisions of the *YCJA*: “This is a protection specific to youthful offenders and not available in relation to samples from adult offenders and is another indication that the legislation was intended to apply equally to adult and youth offenders.”²⁸

The Court of Appeal’s precise reading of the legislation, by concluding there is no distinction between youth and adult offenders, is in keeping with a Crime Control model of youth justice whereby young people are neither afforded leniency nor special consideration. Although the taking of a DNA sample is not considered punishment, but rather the outcome of a conviction, the Crime Control model would perceive such an order as corrective and necessary to ensure public safety and accountability. Therefore, this model, would assume a high standard in proving that the taking and retention of a sample is a grave intrusion on the young person’s right to privacy, and the exception to the mandatory order will be very rare.

In its first judgment involving the *Youth Criminal Justice Act*, the Supreme Court of Canada,²⁹ in a divided decision, affirmed the trial judge’s conclusion that a DNA sample should not be ordered in this case of a 13 year old with no prior record. The Supreme Court of Canada recognized the importance of youth justice legislation in guiding youth justice courts in all offences committed by young persons. Specifically, the Court referred to s. 140 *YCJA* and s. 51 *YOA* where both Acts incorporate provisions

²⁷ Here the Appellate Court is referring to sections 9.1 and 10.1 of the *DNA Act* whereby information in the convicted offender’s index pertaining to a young offender can be permanently removed when the same offence is required to be destroyed under the non-disclosure provisions of the *YOA* or *YCJA*.

²⁸ *R. v. C. (R.)*, *supra* footnote 24, at para 18.

²⁹ *R. v. C. (R.)*, [2005] 3 S.C.R. 99.

of the *Code*, “with any modifications that the circumstances require.”³⁰ Even though the lower courts did not mention these particular *YCJA* and *YOA* sections in their decisions, it seems these sections, in addition to the respective Declaration of Principles, appear to provide a logical solution regarding the principles to apply in the making of DNA orders for young persons. The majority in the Supreme Court of Canada opined:

While no specific provision of either Act [*YCJA* or *YOA*] modifies s. 487.051(1)(a) or (2) of the *Code*, it is clear that Parliament intended their shared principles to be respected whenever young persons are brought within the Canadian system of criminal justice. In particular, Parliament has taken care to ensure that the consequences of conviction for young persons are imposed in a manner that advances the objectives of youth criminal justice legislation. This legislative policy is apparent in both Acts. To disregard it is to frustrate Parliament’s will.³¹

It seems that a plain reading of the *Code*’s DNA provisions are *prima facie* inconsistent with the *YOA* and/or *YCJA*, and the Supreme Court of Canada has sought a resolution by asserting young offender legislation must be read in conjunction with the *Code* sections when deciding to order a DNA sample.

The Supreme Court of Canada has decided that although adults and youth are cited equally in the DNA provisions of the *Code*, young persons, by the very nature of their vulnerability, level of development and reduced maturity, are provided with enhanced procedural protections, even when determining whether to authorize a DNA order:

In protecting the privacy interests of young persons convicted of criminal offences, Parliament has not seen itself as compromising, much less as sacrificing, the interests of the public. Rather . . . protecting the privacy interests of young persons serves rehabilitative objectives and thereby contributes to the long-term protection of society . . . Moreover,

³⁰ *Ibid.*, at para 35. Section 140 *YCJA* and section 51 *YOA* both state: “Except to the extent that it is inconsistent with or excluded by this Act, the provisions of the *Criminal Code* apply, with any modifications that the circumstances require, in respect of offences alleged to have been committed by young persons.” The Supreme Court of Canada included both the *YOA* and *YCJA* in their explanation as the proceedings for *R. v. C. (R.)* originally commenced under the *YOA*. Justice Fish, for the majority, stated both Acts share the same basic principles and suppositions.

³¹ *Ibid.*, at para 36 & 37.

Parliament has recognized in enacting youth criminal justice legislation that “most young offenders are one-time offenders only and, the less harm brought upon them from their experience with the criminal justice system, the less likely they are to commit further criminal acts.”³²

This decision is consistent with Modified Justice model principles of rehabilitation, responding to individual needs while reinforcing procedural fairness, due process and accountability. Essentially the Supreme Court of Canada aligns with a Modified Justice model approach by emphasizing rehabilitation over punishment and assuring minimal interference with a young person’s privacy and personal freedom.

Contrary to the Nova Scotia Court of Appeal’s interpretation, the Supreme Court of Canada’s majority have also determined that judicial discretion is an important element in deciding whether an offender who commits a primary designated offence should have a DNA sample ordered.³³ This reading of the DNA provisions seems to have particular significance for both adult and young offenders as the Court did not distinguish between the two when asserting:

Subsection (1)(a) of s. 487.051 of the *Criminal Code*, which is framed in mandatory terms, cannot be read in isolation from subs. (2). Read together, these provisions make the issuance of a DNA order mandatory only where (1) a person or young person has been convicted of a primary designated offence and (2) the burden cast upon that person or young person . . . has not been discharged. Put differently, the court is *not required* to make the order if it is *satisfied* that the person or young person has established gross disproportionality. Such is the language of discretion.³⁴

These DNA sections are, therefore, highly individualized and relative to the circumstances of the offender, who must rebut the presumption that public interests do not outweigh privacy interests. One could surmise that this kind of judicial discretion is

³² *Ibid*, at para 42 & 43.

³³ While this case is concerned with a primary designated offence, Justice Fish also cited *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), leave to appeal to S.C.C. refused [2001] 2 S.C.R. xii by concurring that judicial discretion is applicable for both primary and secondary offences, however, this discretion would be more limited for primary offences.

³⁴ *R. v. C.(R.)* (S.C.C.), *supra* footnote 29, at para. 48.

consistent with the decisions made when the YOA was governing young persons.³⁵ However, the YCJA is regulated by a more explicit and structured set of principles – both the Declaration of Principle and sentencing principles – and this constrains the judiciary in terms of what kind of consequence they can impose. By endorsing judicial discretion for DNA orders, it leaves room for judicial divergence and possible provincial and territorial inconsistency. The Supreme Court of Canada alluded to this when initially discussing an individual's personal and informational privacy:

The court must consider the impact of a DNA order on each of these interests to determine whether privacy and security of the person are affected in a grossly disproportionate manner. This inquiry is highly contextual, taking into account not only that the offence is a primary designated offence, but also the particular circumstances of the offence and the character and profile of the offender. Some of the factors that may be relevant to this inquiry are set out in s.487.051(3) [factors for secondary offences]: the criminal record of the offender, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the offender's privacy and security . . . This is by no means an exhaustive list. The inquiry is necessarily individualized and the trial judge must consider all the circumstances of the case.³⁶

One possible solution is to clearly articulate the factors for determining an order for a primary designated offence, such as those cited in the *Code* for secondary designated offences. Until now, the yardstick for measuring the impact of a person or a young person's privacy and security as being grossly disproportionate to the public interest has

³⁵ A. N. Doob , "Youth Court Judges' Views of the Youth Justice System: The results of a survey," *Report to the Department of Justice Canada*, May 2001. Professor Doob found that while judges play a central role in the youth justice system, there is considerable variation across Canada regarding judicial decision making. This divergence was revealed on almost every question of the survey from the choice of sanctions, the usefulness of counsel submissions, the prevalence of youth crime in the community, the need for a "short, sharp, shock," to the length of a custodial sentence, to name a few. Judges repeatedly explained their decisions varied because the youth, themselves, vary which seemed to reflect the conflicting principles offered by the YOA. Professor Doob noted when discussing a similar disparity for adult court cases, one judge rationalized that if one case was approached by two judges with different conclusions, "maybe both judges were correct" (at page 60). Professor Doob surmised that given the continued judicial disparity across the nation a possible remedy would be to develop measurable goals within the youth justice system.

³⁶ *R. v. C.(R.) (S.C.C.)*, *supra* footnote 29, at paras. 29-31.

been nebulous and has allowed substantial judicial variance to occur.³⁷ By enunciating specific objectives or aims that are different from, but also inclusive of those for secondary designated offences, the standard for rebutting the presumption for a primary designated offence would be clearer and the potential for discrepancy in approach and outcome might diminish.³⁸

Moreover, the finding of judicial discretion would also be amenable to adult offenders who are attempting to base a denial of the presumptively mandatory order. As well, it would be interesting to speculate whether Crown counsel or defense counsel will incorporate the sentencing principles for adults when attempting to rebut the presumption for a DNA order. Even though a DNA order is not a punishment it seems the Court may have opened the door for adult offenders to creatively attempt to use the *Code* sentencing principles, particularly the fundamental principle of proportionality, and the case law interpreting s. 12 of the *Charter*,³⁹ to justify avoidance of a DNA sample.

A number of adult and young offender cases have already referenced the Supreme Court of Canada's decision, with some of those cases not involving DNA

³⁷ See for example: *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.); *R. v. T. (T.)*, [2001] O.J. No 2936 (Ct. J.); *R. v. North* (2002), 165 C.C.C. (3d) 393 (Alta.C.A.); *R. v. Isbister* [2002] A.J. No. 246 (C.A.); *R. v. S. (O.S.)*, [2002] A.J. No. 1135 (C.A.); *R. v. M. (I.R.)*, [2002] B.C.J. No. 2903 (S.C.); *R. v. S. (B.T.)*, [2003] B.C.J. No.360 (S.C.); *R. v. H. (K.V.)*, [2003] B.C.J. No. 2946 (S.C.); *R. v. D. (K.A.M.)*, [2003] B.C.J. No. 2934 (S.C.); *R. v. G. (J.M.)*, [2004] A.J. No. 747 (C.A.). These cases demonstrate a variable pattern whereby the trial judge would not endorse the taking of a DNA sample, while the Court of Appeal would overturn the decision citing a strict reading of the *Code* and *DNA Act* provisions.

³⁸ In 2008 significant amendments were made to section 487.051(1) and (2), however modifications were not made to provide factors or criteria to assist in determining an order for a primary designated offence. The amendments merely involved a lengthy list of offences for which the taking of a sample is mandatory (e.g. 19 mandatory offences such as robbery, assault with a weapon, assault causing bodily harm), while a second list of 35 offences was generated where the onus is on the youth to satisfy the court why a sample should be not taken. There is also a third list of offences (secondary designated offences) in section 487.051(3) whereby the onus is on Crown to justify the taking of a sample. If it was Parliament's intent to widen the net of designated offences, the unintended consequence might be substantially more DNA orders for young persons.

³⁹ The "grossly disproportionate" wording in s. 487.051 (2) of the *Code* conforms to the terminology articulated by the courts in setting the test for when a punishment will be cruel and unusual under s. 12 of the *Charter* (i.e. whether the effect of the punishment is grossly disproportionate to what would be appropriate). See: *R. v. Smith*, [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97, 58 C.R. (3d) 193 and *R. v. Lyons*, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1, 61 C.R. (3d) 1.

orders. Specifically, Justice Hambly of the Ontario Superior Court of Justice alluded to the decision in *R. v. Dyck*⁴⁰ when allowing a Crown appeal, holding that Christopher's Law is valid legislation in protecting the public from convicted sexual offenders.⁴¹ Justice Hambly explained that taking a DNA sample is more of an intrusion into a person's privacy and security than annually attending a police station to provide a name, address and other basic identifying information that is required under Christopher's Law. As well, in *R. v. F. (N.)*, Judge Tweedale mentioned the Supreme Court's decision regarding the principles of the YCJA, specifically, the enhanced procedural protections and limited interference on a young person's freedom, in ruling on the inadmissibility of a statement made by a youth to a police officer.⁴²

Since the Supreme Court's judgment, there continues to be judicial disparity with regard to ordering a DNA profile for primary designated offences. For instance, Justice McEwan of the British Columbia Supreme Court accepted a Crown appeal after the trial judge refused to make a DNA order in the case of *R. v. Gontar*.⁴³ This case involved a primary designated offence of assault causing bodily harm. The Court held that Mr. Gontar did not provide evidence of gross disproportionality, and it ruled the trial judge erred in principle by exercising its discretion through considering the record of the accused as irrelevant, since it contained no violence, and the trial judge found the present offence to be out of character. Justice McEwan held the trial judge appeared to have made the decision in a manner that resembled the factors used for determining secondary designated offences and stated, "Were that so, I would certainly not consider that her decision was 'clearly unreasonable,' in the circumstances."⁴⁴ In the end, Justice McEwan ordered a DNA sample be provided. This case demonstrates the ongoing

⁴⁰ *R. v. Dyck*, [2005] O.J. No. 5313 (Q.L.), 203 C.C.C. (3d) 365, 35 C.R. (6th) 56 (S.C.J.).

⁴¹ Christopher's Law was passed by the Ontario Provincial Government on April 23, 2001 requiring convicted sexual offenders to register with police. The main objective of the Ontario Sex Offender Registry is to provide an accessible list of previous sex offenders to assist police in establishing the identity of a suspect in a sexual offence as well as monitoring sexual offenders in the community. Reporting under Christopher's Law is in addition to registering with the Federal Sex Offender Information Registry. Online: http://www.mpss.jus.gov.on.ca/english/police_serv/sor/sor.html.

⁴² *R. v. F. (N.)*, [2005] B.C.J. No. 2431 (Q.L.), 2005 BCPC 505 (Prov. Ct.).

⁴³ *R. v. Gontar*, [2005] B.C.J. No. 2635 (Q.L.) (S.C.).

⁴⁴ *Ibid.*, at para 18.

confusion over which factors are acceptable in determining gross disproportionality for a primary designated offence. Justice McEwan ruled the onus of establishing evidence on the matter clearly continues to rest with the accused.

In *R. v. M. (D.B.)*,⁴⁵ the Nova Scotia Court of Appeal declined a Crown appeal seeking to have D.B.M.'s name registered with the *Sex Offender Information Registration Act*.⁴⁶ An exemption to the *SOIRA* is similar to the rebuttable presumption of primary designated offences for DNA orders in that the impact on a person's privacy must be grossly disproportionate to the public interest to negate registration. The appellate court relied on the Supreme Court of Canada's DNA ruling, in holding that evidence of the impact such an order would have on the specific offender is not required⁴⁷ because defense counsel did not expressly lead evidence about his client (R.C.), rather he made comments about the effect of a DNA order on young people generally.⁴⁸ These cases illustrate the continued ambiguity regarding what standards apply when proving gross disproportionality, which again reflects the disparity in judicial decision making.

Although amendments to the DNA provisions of the *Code*⁴⁹ were made in 2008 there were no fundamental philosophical changes that incorporated the suggestions from the Supreme Court of Canada's decision (i.e. ensuring enhanced procedural protections for youth, status of a youth as a mitigating factor when deciding to order a DNA sample). This has left room for further judicial discretion as both legislations continue to be read in conjunction with one another when making the determination to order a DNA sample. For example, in 2009 four youth challenged the constitutional validity of the DNA legislation. In *R. v. S.(C.)*, Justice Cohen ruled the 2008 DNA amendments are inconsistent with the Supreme Court of Canada decision. In particular, when considering DNA applications for young offenders, the youth justice courts must

⁴⁵ *R. v. M. (D.B.)*, [2006] N.S.J. No. 45 (Q.L.), 205 C.C.C. (3d) 161, 240 N.S.R. (2d) 342 (C.A.), leave to appeal to S.C.C. refused 210 C.C.C. (3d) vi.

⁴⁶ *Sex Offender Information Registration Act*, S.C. 2004, c. 10 [hereinafter *SOIRA*].

⁴⁷ *Ibid.*, at para 12.

⁴⁸ *R. v. C.(R.)*, *supra*, footnote 29, at para 94.

⁴⁹ See *supra*, footnote 38.

take into account the principles and objectives of the *YCJA* which are overlooked by the DNA provisions:

Section 487.051(1) authorizes mandatory orders. Where a court is required to impose a mandatory order upon a finding of guilt, it has no possibility of balancing the interests involved through the lens of the *Youth Criminal Justice Act*. This mandatory procedure is unfair and unreasonable. Indeed it is a strange circumstance that requires a youth justice court to determine a DNA application, but prevents that court from considering the principles of the *Youth Criminal Justice Act* when doing so. In the result I find that section 487.051(1) is an unreasonable law and violates the applicants' rights.⁵⁰

She held there needs to be individualized decision making that takes into account the vulnerability of youth, their age, record and amenability to rehabilitation as well as the nature of the offence. Justice Cohen additionally ruled that for all listed offences (e.g. primary and secondary designated offences) the onus should be on Crown to justify the taking of a DNA sample which is currently not the case. While there will likely be further litigation regarding the taking of DNA samples from young offenders, this case highlights the difficulty of balancing the strict Crime Control DNA provisions with mixed model principles of procedural fairness and proportionality incorporated in the *YCJA*.

3.3. Violent Offence Definition

Since the *YCJA*'s inception, a central legal construct in the sentencing of young offenders, the violent offence, has generated considerable debate in the case law.⁵¹ One issue focused on the absence of a definition in the original *YCJA* for "violent offence" and the relationship of the term to "serious violent offence" (SVO) which is

⁵⁰ *R. v. S.(C.) et al.*, [2009] ONCJ 114, 246 CCC (3d) 77; 189 CRR (2d) 146 (Ct.J.). This decision was overturned by the Ontario Court of Appeal in *R. v. D.(K.) et al.*, [2011] ONCA 269 (3d) 461, whereby Judge Cohen's decision was scathingly dismissed and three of the four young persons were ordered to give DNA samples.

⁵¹ The judicial decisions in this section were written prior to the October 23, 2012 amendments to the *YCJA* which included for the first time a formal definition of "violent offence" in s. 2. This section is a historical legal account of the difficulties that occurred during the initial years of the *YCJA* because there was no formal definition resulting in extensive judicial confusion about what type of offence constituted a violent offence.

defined in section 2 of the YCJA.⁵² This distinction can be critical since sentencing severity can vary considerably depending on whether the conviction involves a violent offence versus a serious violent offence. A youth judge who sentences an offender to custody is required under section 39(1) of the YCJA to ensure certain justificatory criteria are present. One factor that may be used to justify a custodial sentence is a finding that the young person committed a “violent offence.” During the initial implementation of the YCJA there was ambiguity in the case law concerning section 39(1)(a) and the level of violence that was needed to commit a young person to custody. Without clarifying the appropriate level of violence required for custody, the unintended consequence of more custodial sentences may occur. As Judge Harris opined, “If one of the purposes of the Act is to reduce the high levels of youth incarceration, then it follows that a definition that requires proof of anything less than actual or attempted injurious physical contact could trigger an increase in the carceral response and net-widening - the very opposite to what was intended.”⁵³ In effect, Judge Harris raises the more general issue that without an explicit definition it is extremely difficult to apply the critical and punitive sentencing option in s.39(1)(a).

Unlike the YCJA, the YOA did not include the need to specify at any stage of the legal proceedings whether an offence should be further defined as a violent offence or more specifically a serious violent offence. While there were no statutory criteria for determining a violent offence in the original draft of the YCJA, in contrast, section 42(9) of the YCJA had always set out the procedures for a Serious Violent Offence (SVO)

⁵² The original 2003 Section 2 YCJA defines serious violent offence (SVO) as “an offence in the commission of which a young person causes or attempts to cause serious bodily harm”. As part of the sentencing process, the judge must determine if an offence is a serious violent offence. If a young person has three SVO determinations, it is presumed the young person will be subject to an adult sentence. The onus is then on the young person to justify why a YCJA youth sentence would be sufficient to hold him/her accountable. Since October, 23 2012, the definition of serious violent offence replaced the “presumptive offence” term that has essentially been eliminated from the YCJA. SVO's now pertain to offences involving murder, manslaughter, attempt murder and aggravated sexual assault. This change eliminates the confusion from what constitutes a violent versus serious violent offence.

⁵³ P.J. Harris, *Youth Criminal Justice Act Manual* (Aurora ON: Canada Law Book Inc., 2003), at 4-9.

designation by the court.⁵⁴ This process is extremely important since an SVO determination precludes the imposition of a deferred custody and supervision sentence, which is akin to an adult conditional sentence and is intended as an alternative to incarceration. More importantly, a judicially determined SVO creates an expectation that the Crown should seek an adult sentence if the youth has two prior SVO's. These two legal constructs reflect, to a considerable degree, the shift towards a Crime Control model's principle of punitiveness and the Justice model's principle of proportionality between the seriousness of the offence and severity of the sentence.

In addition, a third SVO designation also makes a young person eligible for an intensive rehabilitative custody and supervision sentence (IRCS). This is a new and unique sentence under the YCJA that illustrates both the influence of the Welfare model in the legislation as well as direct conflicts between the principles of the Welfare and Crime Control models in addressing certain serious violent crimes. IRCS is a sentence involving specialized treatment services for young persons found guilty of murder, manslaughter, attempt murder, aggravated sexual assault, or a third serious violent offence (i.e., the same offences which lead to a presumption of an adult sentence for young persons who are fourteen years or older).⁵⁵ The IRCS sentence carries with it guaranteed federal funding for program services. By making IRCS applicable to the very same offences for which a young person is presumed to be subject to an adult sentence, the direct conflict between a Welfare model approach and a Crime Control approach materializes. The stark choices faced by the court are readily apparent. Clearly, the IRCS was created as an alternative to an adult sentence. In a case involving first

⁵⁴ Section 42(9) says on application by the Crown counsel after a young person is found guilty of an offence, and after giving both parties an opportunity to be heard, the youth justice court may make a judicial determination that an offence is a serious violent offence and endorse the indictment accordingly.

⁵⁵ The IRCS sentence, in fact, applies to a somewhat broader range of young person than do adult sentences. First, adult sentences are limited to young persons who are fourteen years or older, whereas an IRCS sentence can be imposed on a young person as young as twelve years of age. Second, unlike the presumptive offences which require two previous judicial determinations of serious violent offences at different judicial proceedings, the determination of previous serious violent offences for the purposes of IRCS can be made retrospectively by the court. A. Markwart, "The Intensive Rehabilitative Custody and Supervision Sentence: An Alternative to an Adult Sentence," National Judicial Institute, [unpublished] online: National Judicial Institute:
<<http://www.nji.ca/postings/YJC/Markwart%20Intensive%20Rehabilit%20Aug15.doc>>.

degree murder for example, the court is faced with the choice of an adult sentence involving life imprisonment (albeit with mitigated parole eligibility periods) on the one hand, or retention in the youth justice system with a maximum of a ten-year sentence (six years custody) with guaranteed funding of treatment services. Interestingly, it would appear the IRCS sentence was not primarily created for crime prevention or public protection purposes by enhancing the prospects of rehabilitation services, but rather as a direct alternative to an adult sentence. If the intent of the sentence was to advance public protection by augmenting the availability of rehabilitation services, then from a public policy perspective, the sentence would not be limited to such a narrow range of offences and especially would not be limited to a third serious violent offence.⁵⁶

Nevertheless, it is not surprising there has been confusion in applying the concepts of violent offence and serious violent offence at sentencing as the latter creates a potential for the young offender to receive a greater punishment in the future while a violent offence provides the benefit of a mitigated punishment still being a possible option (i.e. a deferred custody and supervision order). Putting aside the youth justice court views regarding SVO's, the issue of what really constitutes a violent offence has been addressed by the Supreme Court of Canada.

Specifically, the top court heard appeals in two Alberta cases, *R. v. D. (C.)* and *R. v. K. (C.D.)*.⁵⁷ The Alberta Court of Appeal had earlier determined whether the trial judges misinterpreted s. 39(1)(a) *YCJA*⁵⁸ which dictates a youth cannot usually be sentenced to custody unless it is for an offence of violence. In *R. v. D. (C.)* the accused pleaded guilty to possession of a weapon for dangerous purposes, arson and breach of

⁵⁶ The October 2012 amendments eliminated the 3rd SVO designation for IRCS and changed it to: The young person has been found guilty of a serious violent offence or the young person has been found guilty of an offence, in the commission of which the young person caused or attempted to cause serious bodily harm and for which an adult is liable to imprisonment for a term of more than two years, and the young person had previously been found guilty at least twice of such an offence (s. 42(7) (a)(i)&(ii)). The new broader definition may net-widen the type of offences considered to allow for certain youth to meet the IRCS criteria.

⁵⁷ *R. v. D. (C.)*, [2004] A.J. No. 179 (QL), 184 C.C.C. (3d) 160, [2005] 1 W.W.R. 442 (C.A.) and *R. v. K. (C.D.)*, [2004] A.J. No. 237 (QL), 320 W.A.C. 393, 346 A.R. 393 (C.A.), both rev'd [2005] 3 S.C.R. 668, 203 C.C.C. (3d) 449, 34 C.R. (6th) 323.

⁵⁸ Section 39(1)(a) *YCJA* says 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.

an undertaking. The Youth Justice Court judge determined the arson offence was a violent offence and sentenced the youth to six months deferred custody and supervision followed by nine months' probation. The youth and an adult offender set fire inside the cab of a truck using gasoline, a propane bottle and a burning piece of paper causing \$25,000.00 in damage. This was a planned offence at the request of the vehicle's owner to collect insurance. In *R. v. K. (C.D.)* the young person pleaded guilty to charges of dangerous driving and possession of stolen property. The youth stole a vehicle resulting in a high speed police chase through the streets of Edmonton. The pursuit, which lasted over thirty minutes, ended when the authorities used a spike belt and the vehicle collided with a fence. The Court deemed the dangerous driving charge a violent offence and sentenced the youth to a six month deferred custody and supervision order followed by probation. Since this sentence was imposed, the young person had re-offended and was released on bail. However, one month between the appeal hearing and subsequent written judgment, the youth was again charged resulting in his bail being revoked.

Justice Ritter of the Alberta Court of Appeal ruled that neither sentencing judges erred when determining the respective arson and dangerous driving offences were violent and that a custodial sentence was available, keeping in mind section 39(2) of the Act.⁵⁹ The Appellate Court held that, "if an action causes bodily harm, is intended to cause bodily harm, or if it is reasonably foreseeable that the action may cause bodily harm, then it is violent."⁶⁰ Justice Ritter also pointed out this definition serves to moderate "pure property crimes from being capable of opening this gate to custodial sentences."⁶¹ It appears the Appellate Court has, to some extent, embraced the Crime Control model values by including the phrase "reasonably foreseeable" in their definition of a violent offence. This broadens the description of violent offence which could allow certain offences that otherwise would not be perceived as violent as meeting their definition.

⁵⁹ Section 39(2) YCJA says a youth court judge shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purposes and principles set out in section 38.

⁶⁰ *Supra* footnote 57, at para 57.

⁶¹ *Ibid*, at para 58.

In a joint hearing before the Supreme Court of Canada, the appellants' argument focused on the definition of violent offence, claiming the court should reject the Alberta Court of Appeal's definition preferring the definition that had found favour in the Nova Scotia Court of Appeal.⁶² The respondent Crown continued to endorse the Alberta Court of Appeal's description. In a unanimous judgment, the Supreme Court of Canada rejected both interpretations, preferring to follow a harm-based definition of violent offence: "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm."⁶³ Justice Bastarache ruled it is essential that the term "violent offence" and "serious violent offence" have connected meanings so as not to impede on the proper operation of the YCJA.⁶⁴ Therefore, all serious violent offences will be violent offences to allow the custodial gate to remain open and to prevent those first time offenders who have committed a serious violent offence from being ineligible for a custodial sentence.

The Supreme Court of Canada concluded that a constricted definition of violent offence is necessary as Parliament's intent when drafting the YCJA was to reduce the over-reliance on custodial sentences for young offenders by taking into account the sentencing principles in section 38.⁶⁵ Justice Bastarache also believed a narrow interpretation supports the extrajudicial measures and detention before sentencing provisions of the Act as the term violent offence – or its antonym, non-violent offence - is used in both places. The Court's definition will permit extrajudicial measures to be considered adequate for more offences and allow less youth to be detained in custody

⁶² *R. v. D. (T.M.)* [2003] N.S.J. No. 488 (C.A.). The Nova Scotia Court of Appeal defined "violent offence" as, "an offence in the commission of which a young person causes or attempts to cause bodily harm, meaning a hurt or injury to a person that interferes with the person's health or comfort and that is more than merely transient or trifling" (at para 25).

⁶³ *R. v. D. (C.)*; *R. v. K. (C.D.)*, (SCC), *supra*, footnote, 57, at para 17.

⁶⁴ *Ibid.*, at para 23-25.

⁶⁵ The Supreme Court of Canada referenced two sentencing principles in section 38, namely: s. 38(2)(d) "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." and s.38(2)(e)(i) "... the sentence must be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1)."

pending trial.⁶⁶ Therefore, such a narrow definition compliments and respects the objectives, purpose and overall scheme of the legislation.⁶⁷

Justice Bastarache did agree with the Alberta Court of Appeal that a restricted definition of violent offence must exclude pure property crimes by concluding:

This makes sense because if violence to property was captured by the definition of “violent offence”, the gate-keeping effect of s. 39(1)(a) would be severely diminished, since many Criminal Code offences involve some type of actual or potential “violence” to property. . . this narrow interpretation of “violent offence” compliments the existence of s. 39(1)(d) . . . I believe it is correct that custodial sentences should only be an option for offenders guilty of property offences in “exceptional cases.” It if seems incongruous to some that a general act involving the destruction of property or cruelty to animals is excluded simply because no person was physically harmed, I believe it is for Parliament to amend the YCJA if it deems it is required.⁶⁸

Section 39(1)(d) allows a custodial sentence for non-violent offenders in exceptional circumstances. To meet the provision in section 39(1)(d) of an “exceptional case” the offence must be indictable and include aggravating factors. It appears the onus on Crown Counsel to endorse a hybrid offence as indictable will be an important consideration, especially for non-violent, property related crimes to ensure the window for custody remains open at sentencing. If section 39(1)(d) is “clearly intended to be exercised only in exceptional circumstances”⁶⁹ one can only surmise whether the Supreme Court has opened the door for further judicial discretion and provincial variation regarding property offences, particularly in relation to first time offenders. By dismissing arson and dangerous driving as violent offences, does the Supreme Court subtly infer

⁶⁶ *Supra* footnote 57, at para 43. Additionally, Bill C-10 amendments to the YCJA, provide for a separate pre-trial detention criteria that no longer overlaps with the sentencing criteria in section 39(1) YCJA. The amendments include yet another definition involving a “serious offence” which states under s. 2: “an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more.”

⁶⁷ See *R. v. R. (S.)*, [2006] O.J. No. 284 (Ct. J.). Judge Kowarsky of the Ontario Court of Justice declined a young person bail for six offences including three armed robberies. At the bail hearing Judge Kowarsky referenced the Supreme Court’s definition of “violent offence” to affirm the robberies met the violent offence provision in order to rebut the presumption against detention on the secondary ground.

⁶⁸ *R. v. D. (C.)*; *R. v. K. (C.D.)*, (SCC), *supra*, footnote, 57, at para 51.

⁶⁹ N. Bala, *supra* footnote 18, at p. 450.

that those crimes would meet the standard for exceptional cases?⁷⁰ Similar to the term “violent offence” being undefined in the Act, the expression “exceptional cases” is also vague and may require further clarification to preclude judicial disparity.

The Ontario Court of Appeal in *R. v. W. (R.E.)*⁷¹ has since discussed the issue of what constitutes an “exceptional case” for the purposes of sentencing a young person to custody. This case involved a 14 year old, with no prior record, who was sentenced to six months secure custody followed by two years’ probation for two counts of being an accessory after the fact to murder. While living with an adult male by the name of Moore, who had an extensive criminal record which included a conviction for a homicide offence, the young person stole money and drugs from Moore. Moore suspected two men had committed the theft and killed them. The young person did not know Moore planned to kill the two men but subsequently watched Moore dismember the bodies with an electric saw. The youth assisted Moore in disposing the body parts and on his own accord discarded the electric saw. Justice Rosenberg applied the grammatical and ordinary meaning rule of statutory interpretation, used by Justice Bastarache in *R. v. D. (C.)* and *R. v. K. (C.D.)*, to decipher the meaning of “exceptional cases.”⁷² The Appellate Court noted the term “exceptional” is uncommon in criminal legislation as it appears only six times in the *Criminal Code* and only twice in the *YCJA*.⁷³

Justice Rosenberg held a narrow definition should also pertain to section 39(1)(d) for similar reasons cited by the Supreme Court regarding Parliament’s intent to restrict the use of custody for young offenders. The Appellate Court surmised most cases warranting custody will be met by sections 39(1) (a) to (c) by implying, “Section 39(1)(d) acts as something of a residual category and should not be interpreted so as to render the limits implicit in the other parts of subsection (1) ineffectual.”⁷⁴ A second reason for keeping with a narrow interpretation of “exceptional cases” involves the premise this

⁷⁰ *R. v. D. (C.); R. v. K. (C.D.)*, (SCC), *supra*, footnote, 57, at para 90 & 93.

⁷¹ *R. v. W. (R.E.)*, [2006] O.J. No. 265 (Q.L.), 205 C.C.C. (3d) 183, 79 O.R. (3d) 1 (C.A.).

⁷² *Ibid.*, at para 20-22.

⁷³ *Ibid.*, at para 30.

⁷⁴ *Ibid.*, at para 39.

section concentrates on the offence and not the background of the young offender.⁷⁵ Therefore, Justice Rosenberg identifies with Justice model principles of accountability and proportionality to explain how an “exceptional case” will be substantiated:⁷⁶

The scheme of the YCJA suggests that the exceptional case gateway can only be utilized in those very rare cases where the circumstances of the crime are so extreme that anything less than custody would fail to reflect societal values. It seems to me that one example of an exceptional case is when the circumstances of the offence are shocking to the community.

Accordingly, the Appellate Court upheld the sentencing by finding this case to meet the standard for an exceptional case given that accessory to murder would not measure up to the violent offence sentencing provision, in addition to the circumstances of the offence being horrific and having a profound impact on the community. This case exemplifies an acceptable illustration of what kind of offence constitutes an exceptional case, however, other cases have attempted to use section 39(1)(d) but have been refused, particularly for non-violent offences and first offenders, yet other cases have used this section to impose custodial sentences for weapons and arson offences.⁷⁷

As indicated earlier, the Supreme Court decided on a harm-based definition of violent offence rather than a force-based approach to ensure all serious violent offences are contained under the term violent offence. Additionally, Justice Bastarache explained that a force-based definition would fail to include all presumptive offences like murder, attempted murder and manslaughter because:

. . . the commission of these offences will not always require the actual, attempted or threatened application of force. We know this because none of the provisions in the Criminal Code that set out the elements for murder, attempted murder and manslaughter . . . requires that an

⁷⁵ *Ibid*, at para 40.

⁷⁶ *Ibid*., at para 43.

⁷⁷ See *R. v. J. (C.D.)*, [2005] A.J. No. 1190 (C.A.); *R. v. B. (P.T.)*, [2006] O.J. No. 2327 (Ct.J.). *R. v. T. (C.S.)*, [2008] O.J. No. 1308 (Ct. J.); All three cases were denied the exceptional case ruling for drug trafficking offences. Although two cases involving possession of a firearm were deemed exceptional cases. See *R. v. R. (A.)*, [2007] O.J. No. 1202 (Ct. J.) and *R. v. J. (M.)*, [2007] O.J. No. 283 (Ct.J.). And finally the British Columbia Court of Appeal upheld a case of a youth found guilty of theft and arson of a truck based on s. 39(1)(d). See *R. v. T. (S.)*, [2009] B.C.J. No. 1206 (C.A.).

offender actually apply, attempt to apply or threaten to apply force to the victim before the offence is made out. Instead, the focus is on the harm (i.e. death) caused or attempted regardless of the means. This is also confirmed by the fact that assault, the definition of which includes the actual, attempted or threatened application of force to a person and therefore reflects the proposed force-based definition of "violent offence", is not an included offence in attempted murder. . .⁷⁸

A harm-based definition that concentrates on the bodily harm caused or attempted by a young person will, as aforementioned, make sure all serious violent offences are violent offences and also guarantee all presumptive offences will be considered violent offences. A further consideration for a proposed harm-based definition is reflected in the gating provisions⁷⁹ of the Act. In determining a continuation of custody application, the youth justice court shall consider evidence of violent behaviour such as a history of offences causing physical or psychological harm to another person or explicit threats of violence. Justice Bastarache noted the Act already considers such examples of physical or psychological harm and threats as "violent behaviour." Accordingly, it would logically follow these offences would also be encompassed as violent offences to meet the objective of s. 39(1)(a).⁸⁰

The Supreme Court of Canada's ruling is less reflective of the Crime Control principles originally espoused by the Alberta Court of Appeal. The Supreme Court took a more neutral perspective positioning their definition midway between the Justice model and Modified Justice model principles. By narrowing the definition, the Supreme Court of Canada expected to eliminate a misuse of this provision for certain crimes. More importantly the highest court undoubtedly set a standard for imposing a custody sentence proportionate to the seriousness of the offence.

Although the Supreme Court of Canada defined "violent offence" more narrowly in order to avoid the inclusion of pure property crimes, the Conservative government, in

⁷⁸ *R. v. D. (C.); R. v. K. (C.D.)*, (SCC), *supra*, footnote, 57 at para 59. Justice Bastarache also cited a Manitoba Court of Appeal case, *R. v. Younger* (2004), 187 Man. R. (2d), 121, 2004 MBCA 113, which confirmed a murder can occur without the direct application of force – the act of abandoning a child in cold weather.

⁷⁹ See sections 98(4) and 104(3) YCJA.

⁸⁰ *R. v. D. (C.); R. v. K. (C.D.)*, (SCC), *supra*, footnote, 57 at para 66 & 84. See also *R. v. McCraw*, [1991] 3 SCR 72.

amending the *YCJA*, continued to endorse Crime Control principles by crafting a "violent offence" definition that broadens the highest Courts interpretation.⁸¹ This expanded definition could include offences previously excluded as a result of the Supreme Court of Canada's decision, such as arson and dangerous driving where no-one was actually harmed. Again, the Conservative government is amending the *YCJA* to more Crime and Justice model principles thereby allowing for a significant number of offences to be eligible for a custodial sentence which is contrary to the Act's intention when originally drafted.

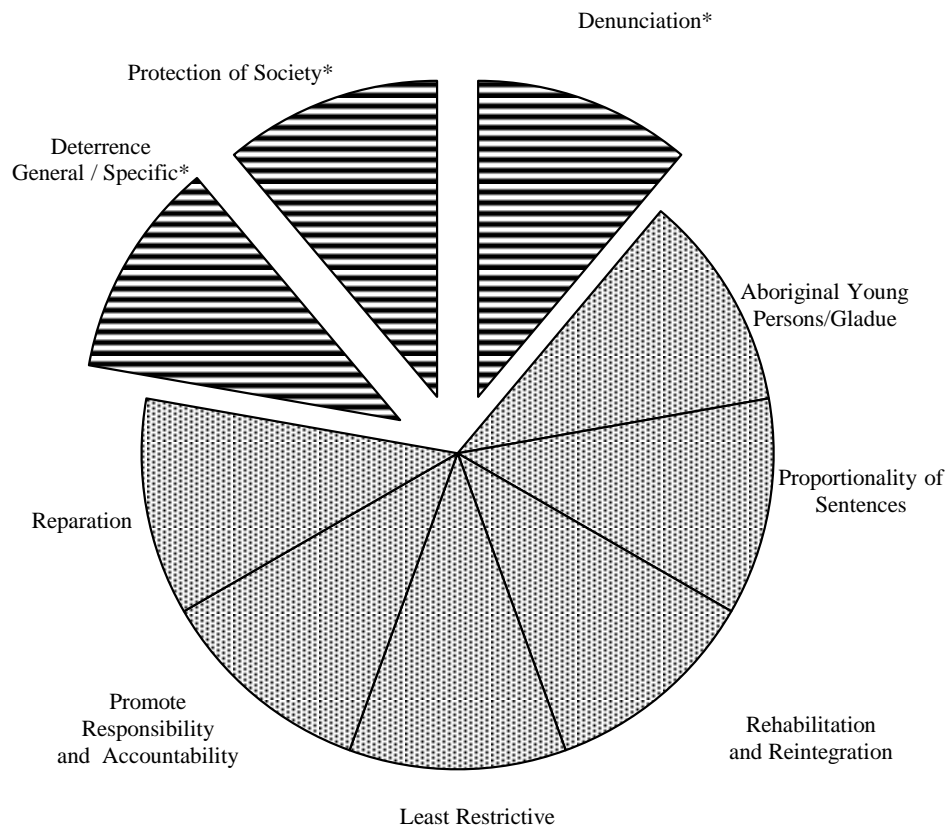
3.4. Deterrence Principle

Since 1989 Canada's courts accepted the belief that general deterrence had some importance when sentencing young offenders under the *YOA*, due to the Supreme Court of Canada's ruling in *R. v. M. (J.J.)*.⁸² While this temporarily solved judicial disagreements about general deterrence as a factor in youth court sentencing, the same controversy was raised again under the *YCJA*. In particular, subsection 50(1) of the *YCJA* specifically states certain adult sentencing provisions of the *Criminal Code* do not apply to the sentencing of young offenders. Figure 1 illustrates the similarities in sentencing between adult and young offenders. When the Act was originally written, general and specific deterrence, protection of society and denunciation were not express considerations when sentencing young offenders. However, since the inception of the *YCJA* Canadian courts have been divided in their decisions about deterrence having an appreciable effect on a young person or other youths.

⁸¹ Bill C-10 amendments to the *YCJA* include for the first time a formal definition of "violent offence" in s. 2: (a) an offence committed by a young person that includes as an element the causing of bodily harm; an attempt or a threat to commit an offence referred to in paragraph (a); or an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

⁸² *R. v. M. (J.J.)*, *supra*, footnote 3. The Supreme Court of Canada affirmed general deterrence as applicable in sentencing young offenders, but to a lesser extent than in the sentencing of adults

Figure 1. Comparing Adult and Youth Sentencing Principles



Note: * These principles were not part of youth sentences when the *YCJA* came into force in 2003. Since October 23, 2012, deterrence and denunciation were added to section 38(2) sentencing principles and section 3 (declaration of principle) was amended, identifying protection of the public as a primary goal.

Initially, several judges rejected deterrence as a factor in sentencing. An early decision by Judge Swail in *R. v. M. (H.A.)* stated, “One of the purposes of sentencing under the *Criminal Code of Canada* that is not reintroduced into the *Youth Criminal Justice Act*, however, is the principle of general deterrence. Accordingly, that principle is

not to be introduced in a [YCJA] sentencing.”⁸³ Judge Werier also concluded in *R. v B. (A.E.)*:

. . . I did not consider general or specific deterrence to be an objective of sentencing . . . I do believe that deterrence may well be an outcome when a youth court Judge imposes a meaningful consequence on a young person. If the sentence I have imposed serves to deter other young persons, or A.E.B. herself, this will be a consequence of the sentence, but is not a specific objective of my sentence, as it might have been if I were sentencing an adult.⁸⁴

Judge Lynch in *R. v. D. (K.)* remarked, “. . . when I look at the *Youth Criminal Justice Act*, deterrence is not something that is given high or any profile.”⁸⁵ Judge Meyers came to the same conclusion in *R. v. P. (B.W.)*, “. . . in my opinion, Section 50(1) YCJA, precludes consideration of deterrence as a sentencing principle.”⁸⁶

Professor Bala concurred with the above decisions and argued that while the YCJA does not allow judges to include the deterrence principle, the broader youth justice system can consider deterrence in its policies and practices. Bala, however, asserts “. . . the sentence imposed on a specific youth should not be made more severe than proportionality requires to serve a deterrent function.”⁸⁷ It appears Professor Bala implies that the deterrence principle or function can be implicitly part of the sentencing rationale as long as the overall sentence remains proportionate.

⁸³ *R. v. M. (H.A.)*, [2003] M.J. No. 147 (Q.L.) at para. 33, [2003] 9 W.W.R. 533, 174 Man. R. (2d) 119 (Prov. Ct.).

⁸⁴ *R.v. B. (A.E.)* (2003), BCPC 446, at para. 12.

⁸⁵ *R. v. D. (K.)*, [2003] NSJ No. 165 (Q.L.) at para. 14, 214 N.S.R. (2d) 100 (S.C.).

⁸⁶ *R. v. P. (B.W.)*, [2003] M.J. No. 331 (QL), at para. 65, 176 Man. R. (2d) 218 (Prov. Ct.) aff'd 187 C.C.C. (3d) 20, [2006] 5 W.W.R. 676 330 W.A.C. 80 (C.A.). aff'd [2006] 1 S.C.R. 941, 209 C.C.C. (3d) 97, 38 C.R. (6th) 1.

⁸⁷ N. Bala, *supra*, footnote 18, at p. 408.

Yet another interpretation of the deterrence issue has emerged in *R. v. P. (T.D.)*.⁸⁸ In reasons for sentencing a youth, with no prior record, to probation for two robberies, Judge Whelan in *R. v. P. (T.D.)* stated:

The YCJA has codified the sentencing principles applicable to young persons. These principles are different from and more directive than those principles applicable to sentencing of an adult offender, Aboriginal or otherwise . . . This, together with the absence of the adult principles of deterrence and denunciation, gives weight to the argument that sentencing under the YCJA is much more individual in nature . . . Accountability, it seems has replaced deterrence or denunciation, perhaps because these latter principles are seen to be of limited utility in the sentencing of young persons.⁸⁹

However, the following cases will illustrate that the opposite view is also evident; deterrence can be an explicit basis for part of a sentence. Judge Gorman in *R. v. P. (C.M.)*⁹⁰ held there remains a definite role for deterrence since sentences should reinforce respect for societal values and in some instances, societal interests should be above those of the young person. Judge Gorman commented further, “can it be doubted that sentencing pursuant to the Act might in rare cases require a consideration of general deterrence . . . in my view, general deterrence can in limited circumstances play a role in determining the appropriate sentence to be imposed . . .”⁹¹ This deterrence theme was a central issue in *R. v. K. (T.)* where Judge Krelove noted, “I also have concerns with respect to Mr. T.K.’s views of the victim as set out in the pre-sentence report. Both general and specific deterrence are important considerations in this sentencing matter.”⁹² While this case acknowledged the harm to the victim and accountability of the offender, it did not make reference to section 50(1) nor provide reasons for deciding deterrence as being important considerations at sentencing.

⁸⁸ *R. v. P. (T.D.)* (2004), 250 Sask. R. 3, [2004] 3 C.N.L.R. 318 (Prov. Ct).

⁸⁹ *Ibid.*, at para. 32.

⁹⁰ *R. v. P. (C.M.)*, [2003] N.J. No. 277 (QL), 59 W.C.B. (2d) 292 (Nfld. & Lab. Prov. Ct.).

⁹¹ *Ibid.*, at para. 45.

⁹² *R. v. K. (T.)*, [2003] O.J. No. 2877 (QL) at para 12 (Ont. C.J.).

Similarly, Judge Auxier in *R. v. N. (B.)* concurred with Judge Gorman's aforementioned opinion in *R. v. P. (C.M.)*. Judge Auxier stated, "I agree with his conclusion. I will consider general deterrence as one factor, albeit a minor one, in determining the appropriate sentence."⁹³ Other than this singular comment, Judge Auxier did not elaborate on her reasons for endorsing general deterrence. This case involved a 17 year-old youth who was sentenced to nine months custody and supervision followed by 15 months intensive support and supervision for assault causing bodily harm. The youth and his co-accused accosted a 42 year-old heroin addict over a drug debt resulting in the victim being stabbed by the co-accused. Judge Auxier's decision was appealed on three grounds, one of which she erred in relying on the principle of general deterrence. While the British Columbia Court of Appeal acknowledged the divided decisions made in several provincial youth justice courts when considering general deterrence as a *YCJA* sentencing factor, Justice Mackenzie ruled general deterrence is not completely excluded as a factor for sentencing under the *YCJA*:

The theory underlying the observations of Mr. Justice Cory on deterrence in *J.J.M.*, supra, has been criticized on the ground that empirical evidence suggests that longer sentences for young offenders have no deterrent effect on other youth (see A.N. Doob and C. Cesaroni, *Responding to Youth Crime in Canada* (2004), pp 249-51) . . . I accept that the absence of any reference to general deterrence in the sentencing guidelines under the *YCJA* implies a reduced emphasis on general deterrence under that statute compared to adult sentencing under the *Criminal Code*, but on principle, I do not think that the silence of the *YCJA* requires sentencing judges to completely disregard general deterrence in particular cases where it may realistically have some result. In my view, the Supreme Court of Canada's direction in *J.J.M.*, supra, to reduce the emphasis on general deterrence but not exclude it entirely, remains applicable.⁹⁴

Justice Oppal (as he then was) concurred with his colleague in his comments, "I think it would be unrealistic and unwise to conclude that the principle of general deterrence has

⁹³ *R. v. N. (B.)*, (2004), BCPC 0022, at para. 27.

⁹⁴ *R. v. N. (B.V.)* (2004), (2004), 186 C.C.C. (3d) 21 at paras.14-15, 322 W.A.C. 100, [2004] B.C.J. No. 974 (QL) (C.A.), aff'd [2006] 1 s.C.R. 941, 209 C.C.C. (3d) 97, 38 C.R. (6th) 1.

no application in dealing with young offenders.”⁹⁵ Accordingly, the Crime Control principle of deterrence, in British Columbia at least, has been resurrected under the YCJA.

However, the Manitoba Court of Appeal in *R. v. P. (B.W.)*⁹⁶ upheld the Manitoba Provincial Court⁹⁷ decision that deterrence is not a legitimate sentencing principle under the YCJA. This case involved manslaughter where a fifteen-year old Aboriginal male struck the victim in the head with a pool ball covered in a sock and was given a serious violent offence designation. The Manitoba Court of Appeal had the benefit of the aforementioned judicial debates about whether deterrence has a place in the YCJA. Justice Hamilton concluded:

While the arguments of the Crown with respect to the continued applicability of the Supreme Court of Canada’s ruling in *M.(J.J.)* merit careful consideration, I am persuaded that deterrence is not a principle of sentencing young persons under the YCJA as it is for sentencing adults under the *Criminal Code*.⁹⁸

Justice Hamilton agreed with Judge Werier in *R. v. B. (A.E.)*⁹⁹ that, “deterrence may very well be an effect of the sentence,”¹⁰⁰ and reasoned:

Under the YOA, the protection of society and the public was an important principle. While the long-term protection of the public and respect for societal values remains important under the YCJA, Parliament has directed that this is achieved through rehabilitation, reintegration and accountability whenever possible . . . A judge cannot sentence one young person with the aim of sending a message to other youth. This would be at variance with the required focus on the young person being sentenced. I am also of the view that specific deterrence is not a principle of sentencing in light of the exclusion of this principle under s.50 (1) of the

⁹⁵ *Ibid.*, at para. 23.

⁹⁶ *R. v. P. (B.W.)* (C.A.), *supra*, footnote 86.

⁹⁷ *R. v. P. (B.W.)* (Prov. Ct), *supra*, footnote 86

⁹⁸ *R. v. P. (B.W.)*, *supra*, footnote 86, at para. 59.

⁹⁹ *R. v. B. (A.E.)* *supra*, footnote 84.

¹⁰⁰ *R. v. P. (B.W.)*, (C.A.), *supra*, footnote 86, at para. 62.

YCJA. Having said that, the sentence, and the judicial process, itself, may very well have a deterrent effect on the young person and others.¹⁰¹

It appears that the B.C and Manitoba appellate courts have fundamentally different views of the role of deterrence in sentencing. This difference can be seen as reflecting the complexity and confusion of the YCJA's mixed models of youth justice since Justice Hamilton appears to be interpreting the YCJA foremost in terms of the Welfare model central principles of rehabilitation and reintegration. In effect, Justice Hamilton stated specific deterrence under the YCJA is only appropriately obtained through Welfare model principles and, therefore, the general deterrence of other youth through an explicitly punitive sentence, a central Crime Control principle is not allowed.

Both the British Columbia and Manitoba Court of Appeal decisions were appealed to the Supreme Court of Canada regarding the inclusion of a deterrence principle in young offender sentencing. While awaiting this decision the Courts continued to debate the merits of this principle. The Alberta Court of Appeal in *R. v. K. (P.K.)*¹⁰² overturned the sentencing judge's decision claiming the sentence of 18 months' probation and 100 hours of community service for assault causing bodily harm violated the proportionality principle in the YCJA. The offence involved an unprovoked vicious attack comprising over 50 punches and kicks rendering the adult victim unconscious. The Appellate Court found the judge erred when declining a deferred custody and supervision order (DCSO) after finding the offence was a serious violent offence by replacing a custodial sentence with a community sanction. The Court asserted that if a type of custody sentence (i.e. DCSO) was precluded then a sentence for a serious violent offence would suggest a weightier consequence not a lighter one.¹⁰³ Specifically, in relation to the deterrence principle the Court of Appeal opined:

Some custody is also important to teach this respondent some consequences, and [t]o offer some measure of individual deterrence. That matches some of the express objectives of the Act. It seems to us doubtful that this respondent fully realizes the seriousness of this crime. It was not a fight, and went far beyond a mere assault. It was much

¹⁰¹ *Ibid*, at para. 64.

¹⁰² *R. v. K. (P.K.)*, [2006] A.J. No. 1 (Q.L.), 206 C.C.C. (3d) 222, 360 W.A.C. 74 (CA.).

¹⁰³ *Ibid*, at para. 17.

graver than the great majority of the offences which are commonly encountered in Youth Court.¹⁰⁴

Other than referencing the proportionality principle, the Appellate Court did not explain how deterrence compliments the YCJA's objectives.

The Western provinces were at odds with one another regarding whether deterrence should be included as an explicit goal when sentencing young offenders. Roberts and Bala surmise that even though deterrence is not mentioned in the Act, the idiom "meaningful consequences" could be perceived as encompassing deterrence.¹⁰⁵ As Roberts succinctly concluded, the phrase "meaningful consequences" could very well be "deterrence in disguise" for some judges.¹⁰⁶

In a unanimous judgment, the Supreme Court of Canada accepted the Manitoba Court's decision that deterrence does not apply to youth sentencing.¹⁰⁷ Justice Charron concluded Parliament, when drafting the YCJA, declined to incorporate deterrence as a guiding principle in sentencing young offenders. Given that the words "deterrence" or "deter" are absent in the new legislation, this omission is of considerable significance as, "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 and by reserving custodial sanctions solely for the most serious crime."¹⁰⁸ The deliberate exclusion of the deterrence principle in the YCJA confirms Parliament's initial intention to have a criminal justice system for young persons that is distinctly separate from that of adults. Furthermore, Justice Charron declined any reference to the previous 1993 YOA Supreme Court of Canada deterrence decision in *R. v. M.(J.J.)*. The Court

¹⁰⁴ *Ibid.*, at para.26.

¹⁰⁵ J. V. Roberts and N. Bala, "Understanding Sentencing Under the *Youth Criminal Justice Act*" (2003), 41:2 Alberta Law Review, at p. 399.

¹⁰⁶ J.V. Roberts, "Sentencing Juvenile Offenders in Canada" (2003), 19 Journal of Contemporary Criminal Justice, at p. 420.

¹⁰⁷ *R. v. P.(B.W.)* (S.C.C.), *supra*, footnote 86.

¹⁰⁸ *Ibid.*, at para. 39.

found this decision was insignificant and not relevant to the present youth sentencing regime under the YCJA.¹⁰⁹

The Supreme Court of Canada decision seems commensurate with a Modified Justice model approach to young persons. Specifically, when analyzing certain phrases – found in the Declaration of Principle (section 3) and the general purpose of sentencing (section 38) - such as meaningful consequences, accountability, protection of the public and respect for societal values, Justice Charron rejected British Columbia's argument that these terms allowed for a more punitive, deterrent sanction. Rather, Justice Charron interpreted these phrases as being offender oriented and not towards the general public by endorsing an, "individualized process by focusing on underlying causes, rehabilitation, reintegration and meaningful consequences *for the offender*."¹¹⁰ It appears the Supreme Court of Canada has rebuffed British Columbia's strict Crime Control model reading of the YCJA by declining their interpretation of the aforementioned phrases as being "deterrence in disguise."¹¹¹

The Supreme Court of Canada's exclusion of both general and specific deterrence¹¹² as a sentencing principle is consistent with Parliament's original intent to reduce the use of custody as outlined in the Preamble to the legislation.¹¹³ Perhaps the essence of their decision comes from the following analysis:

Unlike some other factors in sentencing, general deterrence has a unilateral effect on the sentence. When it is applied as a factor in sentencing, it will always serve to increase the penalty or make it harsher; its effect is never mitigating. The application of general deterrence as a

¹⁰⁹ *Ibid*, at para. 21.

¹¹⁰ *Ibid*, at para. 31.

¹¹¹ J.V. Roberts, "Sentencing Juvenile Offenders in Canada", *supra*, footnote 106, at p. 420.

¹¹² Charron J. devoted little analysis to the issue of specific deterrence, simply noting near the end of the judgment the absence of a reference to specific deterrence in the YCJA leads to the conclusion that it is not to be taken as a relevant consideration in devising an appropriate sentence; *R. v. P.(B.W.) (S.C.C.)*, *supra*, footnote 86, at paras. 39-40.

¹¹³ The original YCJA Preamble expressly ascribes the goal of reducing the use of custody: "[And Whereas] Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and *reduces the over-reliance on incarceration for non-violent young persons*" [emphasis added].

sentencing principle, of course, does not always result in a custodial sentence; however, it can only contribute to the increased use of incarceration, not its reduction. Hence, the exclusion of general deterrence from the new regime is consistent with Parliament's express intention to reduce the over-reliance of incarceration for non-violent young persons. . . . In its narrower sense, specific deterrence calls for the incapacitation of the offender in order to prevent the further commission of crime, usually by separating the offender from society through incarceration. It is plain from the preceding analysis on general deterrence that, in this sense, specific deterrence, as a distinct factor in youth sentencing, is also excluded under s.50(1) and cannot be implied from any of the provisions of the YCJA.

However, Justice Charron was aware that sentencing a young person under the new Act can result in some kind of deterrent value as, "[t]he detection, arrest, conviction and consequences to the young person may well have a deterrent effect on others inclined to commit crime. It also does not mean that the court must ignore the impact that the crime may have had on the community." However, aligning with a Modified Justice model approach to sentencing young persons, Justice Charron was very firm that:

A consideration of all relevant factors about the offence and the offender forms part of the sentencing process. What the YCJA does not permit, however, is the use of general deterrence to justify a harsher sanction than that necessary to rehabilitate, reintegrate and hold accountable the *specific young person before the court*.¹¹⁴

The Supreme Court of Canada adopted an individualized sentencing process that takes into account not only the background of the young person, the offence and prior record, but more importantly fashions a sentence to assist in the rehabilitation and reintegration of the young offender. This decision reflects the complexities of the YCJA particularly when crafting an appropriate sentence for young persons, but it also illustrates how the original legislation exemplified a Modified Justice model approach to youth justice.

However, the unanimous decision by Canada's highest court was quickly undermined by the Conservative government less than a year later as Justice Minister Rob Nicholson made the following comments during second reading of since dissolved Bill C-25 in November, 2007:

¹¹⁴ R. v. P.(B.W.) (S.C.C.), *supra*, footnote 86, at para.38.

Last year the Supreme Court of Canada ruled that the *Youth Criminal Justice Act* does not allow deterrence and denunciation to be considered as specific objectives of the courts when they are sentencing youth. These are important objectives we believe for judges to have when considering an appropriate sentence. Deterrence means imposing a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct. Denunciation refers to societies condemnation of the offence. My proposed sentencing amendment would allow courts to consider both deterrence and denunciation as objectives in youth sentences . . . Many Canadians are concerned about youth crime and believe that changes to sentences can be very helpful. They want to stem the reported recent increase in violent youth crime . . .

115

Members of the Conservative government have been outspoken critics of the *YCJA* despite the Acts success in reducing the use of courts and custody without increasing the overall youth crime rate. While ignoring the Supreme Court of Canada's decision, the Conservative government recently amended the *YCJA* to include deterrence (and denunciation) as sentencing principles for young offenders as a means to satisfy public and political pressure to "get tough" on youth crime. As a result, the adult and youth sentencing principles as previously described in Figure 1 essentially mirror one another with very little differentiation now that the youth legislation identifies protection of the public as a primary goal rather than a long-term goal when originally drafted. Chapter 7 will elaborate on the deterrence principle by using qualitative data and scholarly research to explain why deterrence is not an effective sentencing principle for youth.

3.5. Adult Sentencing for Youth

For years the most controversial area of youth justice legislation has been the adult sentencing of young offenders. Much of the debate arises from those youth who commit the most serious and heinous of offences requiring the Court to balance the rehabilitation of the young person versus protection of society. This difficult imposition has garnered much disagreement, especially under the *YOA* where two separate

¹¹⁵ House of Commons Debates, No. 021 (21 November 2007) at 1535 (Hon. Rob Nicholson).

amendments¹¹⁶ were made in an attempt to move closer to a more punitive, Crime Control approach for serious and violent offenders. Professor Bala noted the inter-provincial disparity under the YOA when applying the adult transfer provisions. He found Alberta and Manitoba had the highest transfer rates by, “emphasizing that societal interests in accountability, deterrence and incapacitation all favoured transfer for youths facing serious charges, especially homicides.”¹¹⁷ In contrast, appellate courts in Ontario, Quebec and Saskatchewan were more hesitant to transfer; rather, they preferred the rehabilitative potential of young persons’ remaining in the youth system and were concerned about the harmful and negative effects of a youth serving a lengthy sentence in an adult institution.¹¹⁸ Bala concluded that regardless of the legislative amendments to the YOA, transfer rates did not change nor did the perceptions of the Courts in dealing with adult sentences for young offenders.

This judicial disparity has continued under the YCJA even though the process for imposing an adult sentence is dramatically different from the procedures under the YOA. Prior to the YCJA coming into force, the Quebec Court of Appeal heard a *Reference*

¹¹⁶ Amendments to the YOA adult transfer provisions occurred in 1992 and 1995. The 1992 amendments increased a youth sentence for murder from three years to five years less a day allowing for jury trials as guaranteed by the *Charter*. Additionally, those youth who received an adult sentence for murder were given life sentences; however, parole eligibility was mitigated between five to ten years. In 1995 a further lengthening of youth sentences resulted in ten years for first degree murder and seven years for second degree murder. More importantly a reverse onus situation was created whereby a sixteen or seventeen year old offender was presumed to be automatically transferred to adult court when charged for murder, attempted murder, manslaughter or aggravated sexual assault. The onus was on the youth to demonstrate to the Court why the case should not be dealt with in adult court. For all other non-presumptive offences and for all offences committed by fourteen and fifteen year olds, the onus remained with the Crown to satisfy the judge why a case should be transferred to adult court.

¹¹⁷ N. Bala, *supra* footnote 18, at p. 506.

¹¹⁸ *Ibid*, at p. 506.

case¹¹⁹ challenging the constitutionality of certain sections of the Act. While the Appellate Court dismissed most of the concerns advanced in questions by the Quebec provincial government, it did find certain adult sentencing provisions were unconstitutional. In particular, the *Reference* case held that the Act violated the *Charter* by placing the onus on the youth found guilty of a presumptive offence to justify the imposition of a youth sentence rather than an adult sentence. The Court also found unconstitutional the young person having to justify the maintenance of a publication ban for a presumptive offence even where he or she was not subject to an adult sentence. The federal government did not appeal this decision and announced a plan to make the necessary amendments commensurate with the *Reference* opinion.

With regard to these specific provisions, the Quebec Court of Appeal seems to align with a Modified Justice model approach of procedural fairness, appropriate due process, evaluating each case individually and more importantly, removing the onus on the youth by having the Crown satisfy the Court that an adult sentence would be more apposite. In effect the Quebec *Reference* case has challenged those “get tough,” Crime Control provisions of the *YCJA* for serious and violent offenders.

Since the Quebec Court of Appeal’s decision, two other Appellate Courts have waded into the interpretation of the adult sentencing sections, resulting in further inter-provincial disparity. The British Columbia Court of Appeal in *R. v. T. (K.D.)*¹²⁰ overturned the sentencing judge’s decision that a youth sentence would be sufficient to hold the young person accountable for a manslaughter conviction. The youth was seventeen years old with no prior record when he killed the adult son of a woman his father was seeing. He received twenty months custody followed by a supervision period of twelve

¹¹⁹ The Quebec Court of Appeal in *Reference Re Bill C-7* decision is known as *Quebec (Ministre de la Justice) v. Canada (Ministre de la Justice)* (2003), 10 C.R. (5th) 281 (C.A.). Professor Bala describes a *Reference* case as: “Unlike an ordinary appeal that arises out of an actual case, such as a conviction in youth court, and requires a decision that affects a specific youth, a reference case is placed before an appeal court based on the government asking the court for its opinion on one or more stated, general questions. In this case the government of Quebec asked the Court of Appeal in that province a series of questions about the constitutional validity of the *YCJA*.” N. Bala, “The Development of Canada’s Youth Justice Law” in *Understanding Youth Justice in Canada*. (Toronto: Pearson Prentice Hall, 2005), at p.63, note 20.

¹²⁰ *R. v. T. (K.D.)*, [2006] B.C.J. No. 253 (Q.L.), 206 C.C.C. (3d) 44, 37 C.R. (6th) 243 (C.A.).

months. K.D.T. asked to remain in a provincial custodial facility rather than transfer to a youth detention centre as he believed he had little in common with younger inmates.¹²¹

Of particular interest, the sentencing judge and the Court of Appeal alluded to a historical YOA Supreme Court of Canada decision from 1989; specifically, *R. v. M. (S.H.)*.¹²² In *R. v. M. (S.H.)*, Justice McLachlin (as she was then) considered the nature of the responsibility on the applicant at a transfer hearing by explaining, “the transfer hearing as an exercise in weighing and balancing the relevant considerations to the satisfaction of the court that a transfer to adult court was appropriate.”¹²³ The courts in British Columbia continue to find the decision making process described by Justice McLachlin as relevant and appropriate to the onus procedures under s. 72(2) YCJA. While both courts agreed that a 1989 Supreme Court of Canada decision was still applicable, the British Columbia Court of Appeal differed with the sentencing judge who put too much weight on the ability of a youth sentence to rehabilitate K.D.T. Moreover, while the sentencing judge endorsed the Quebec decision, Justice Braidwood was not persuaded by the *Reference* case; rather:

I would not characterize the onus under s. 72(2) as imposing an excessive burden of proof on an applicant. . . While it is true that the framework in the YCJA is, in some respects, different from that in the YOA, it is not sufficiently distinct to indicate that there is a different onus being placed on the convicted youth under s.72(2) than the onus on the accused youth at a transfer hearing. If the onus was constitutionally acceptable at the pre-trial stage, where s. 7 [*Charter*] rights play a more significant role, then it is also constitutional at the sentencing stage.¹²⁴

Justice Braidwood surmised that the YCJA does not represent the first presumptive offence regime as several Courts in Canada decided there were no constitutional issues from the presumptive offence scheme created by the 1995 amendments to the YOA.

The appeal court found that an adult sentence would be more appropriate and subsequently sentenced K.D.T. to two years less one day followed by two years

¹²¹ *Ibid.*, at para. 46.

¹²² *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, 50 C.C.C. (3d) 503, 71, C.R. (3d) 257.

¹²³ *Ibid.*, at para. 26.

¹²⁴ *R. v. T.(K.D.)*, *supra*, footnote 120, at paras. 59 and 68.

probation. The British Columbia Court of Appeal supports a strict Crime Control reading of the adult sentencing provisions by continuing to buttress the presumptive offence regime for serious violent offences. This court maintains it is not an unreasonable burden for the convicted youth to bear the responsibility of satisfying the court that an adult sentence is not appropriate.

Six weeks after the B.C. Court of Appeal judgment, the Ontario Court of Appeal in *R. v. B. (D.)*¹²⁵ decided the Quebec *Reference* case reached the correct conclusion. *R. v. B. (D.)* involved a seventeen year old male youth who was with a group of friends at a shopping mall where they began exchanging words with another group. The eighteen year old victim was simply a bystander when D.B. “sucker punched” him in the head and continued to stomp on the victim until he was unconscious and subsequently died of his injuries. The young offender had a prior record and a history of behavioural and mental health issues. The trial judge sentenced the youth to a maximum three year intensive rehabilitative custody and supervision order (IRCS) for manslaughter. To allow a three year IRCS order to achieve the desired goal of rehabilitation, the trial judge did not give credit for the one year spent on remand.

The Ontario Court of Appeal was indifferent to the British Columbia Court of Appeal’s reasons for judgment in *R. v. T. (K.D.)*. Justice Goudge did not agree with the B.C. appellate court’s rationale that s. 72(2) does not place a burden of proof on the convicted youth or the constitutionality of the onus being acceptable at the sentencing stage of the proceedings. He also dismissed the reasoning used by British Columbia from *R. v. M. (S.H.)*:

With respect, I differ on both points. Whether the onus imposed by the section is one of proof or persuasion, it nonetheless constitutes a burden that young offenders, rather than the Crown, must bear if they are to avoid the much more serious potential consequences of an adult sentence. Moreover, as I have said, the onus provision in the YOA that is analogous to the one here did not become effective until 1995 and has not been approved by the Supreme Court of Canada. Indeed when the court did address the onus provision in the YOA in *R. v. M. (S.H.)* . . . the

¹²⁵ *R. v. B. (D.)*, [2006] O.J. No. 1112 (Q.L.). 206 C.C.C. (3d) 289, 37 C.R. (6th) 265 (C.A.).

provision then in effect placed the onus on the party seeking to transfer the case to adult court.¹²⁶

The Ontario Court of Appeal also dealt with the privacy provisions of the Act when a young offender receives a youth sentence for a presumptive offence. Justice Gouge concurred with the Quebec *Reference* case's holding the privacy provisions put a real burden on the youth to ensure his or her privacy by applying for a publication ban:

I agree with the Quebec Court of Appeal that the stigmatizing and labeling of a young offender that can result from publicizing his or her identity sufficiently compromise the psychological security of that young person to engage the security of the person interest protected by s. 7 of the *Charter*. That principle is reflected in the assertion by that court that the principle that the law protects the identity of a young person is a cornerstone of Canadian youth justice. The very importance attached to the privacy owed to young offenders underlines the damage that publication can do to the young person's psyche, his developing self-image and his sense of self-worth.¹²⁷

Essentially the Ontario Court of Appeal held the obligation of the youth to justify imposing a youth sentence rather than an adult sentence and to justify maintaining the ban on publication violate the s. 7 *Charter* rights guaranteed to the young offender. In so doing the Appellate Court dismissed the Crown's sentencing appeal regarding these two issues. Akin to the Quebec Court of Appeal, Ontario's appellate court appears to embrace the Modified Justice model values of focusing on rehabilitation yet reinforcing procedural equity and accountability by having the sentence adequately fit the circumstances of the young person in conjunction with the seriousness of the offence.

As with the deterrence principle, the adult sentencing and privacy provisions have garnered much inter-provincial variation which cogently illustrates how confusing and problematic the *YCJA* had become since its proclamation. In May 2008, the Supreme Court of Canada was asked to reconcile the aforementioned issues in the *YCJA* that violate section 7 of the *Charter* in *R v. B.(D.)*. In a divided decision, the highest court ruled young people who commit presumptive offences should not

¹²⁶ *Ibid.*, at para 68.

¹²⁷ *Ibid.*, at para 76.

automatically attract an adult sentence nor should they have to justify retaining the protection of a publication ban if given a youth sentence for a presumptive offence.¹²⁸

Justice Abella endorsed the Quebec *Reference* and Ontario Court of Appeal decisions when concluding:

What the onus provisions *do* engage, in my view, is what flows from *why* we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgement. This entitles them to a presumption of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment . . . A young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing, namely, the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case.¹²⁹

The Supreme Court of Canada concluded Crown should be required to justify the loss of both a youth sentence and a publication ban.

While the decision in D.B. was controversial, it was correctly resolved as the restrictive judicial approach in the judgment of Justice Abella is consistent with Parliaments original intent when crafting the *YCJA*, particularly the principles in the Act which seem to align with the Modified Justice model construct. Specifically, principles that emphasize the special needs, age and vulnerabilities of youth including the rehabilitative possibilities for young people, while recognizing youth should not be held as accountable for their offences as adults. This decision validates a mixed model approach by collectively assessing the overall needs and offending behaviour yet does not unjustly burden the young person of applying due process provisions in the Act. Four years later and in marked contrast to the deterrence decision, the Conservative government did not discount the Supreme Court of Canada decision and accordingly revised the adult sentencing and privacy provisions of the *YCJA* in Bill C-10. The new *YCJA* amendments introduce a constitutionally valid and procedurally coherent scheme

¹²⁸ Justifying the ban on publication does not apply if a young person has received an adult sentence.

¹²⁹ *R. v. B.(D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.), at paras. 41 and 82.

of dealing with young offenders who commit offences that could receive an adult sentence.

3.6. Discussion

It is common after the introduction of a new national youth justice law for provinces and territories to take several years to balance the conflicting principles and priorities that guide our responses to youth criminality. This chapter introduces the theme that the *YCJA* can be better understood by utilizing analytic youth justice models. These models reduce the lengthy and complex legally worded sections of youth justice laws to core principles. A considerable amount of the scholarly debate about the *YOA* and the 1908 *JDA* in Canada, and similar discussions in other countries, developed through reference to various youth justice models. For example, in Canada regarding the *YOA*, it was argued early on that this law would engender considerable confusion and controversy because of the inherent problems of deriving a law based on mutually exclusive principles of dominant youth justice models.¹³⁰

In reviewing certain key sections of the *YCJA*, it appears the same caution applies to this law. The provincial court cases and subsequent decisions made by the Supreme Court of Canada reveal the confusion about the meaning of specific legal constructs such as whether the *YCJA* modifies the *DNA* provisions of the *Code*, the definition of violence offence, the importance of a deterrence principle and the constitutionality of key Crime Control values for presumptive offences. As was evident during the *YOA*, substantial provincial variation had become apparent in how the *YCJA* is administered. Such variations have clearly resulted in different provincial/territorial youth justice systems and fundamental constitutional issues. If the *YOA* mixed model experience is predictive of the *YCJA* mixed model, then intense legal, scholarly, public and political debate will continue as it has over the past decade on how the *YCJA* should be interpreted and implemented. However, as Bala and other scholars contend, the *YCJA* is more focused and directive than the *YOA*. In other words, this complex law can

¹³⁰ R.R. Corrado "Introduction" in R.R. Corrado, N. Bala, M. LeBlanc & R. Linden, eds., *Juvenile Justice in Canada*. (Toronto: Butterworths, 1992).

be interpreted as having integrated principles from the five youth justice models in a relatively consistent manner. Given the Supreme Court of Canada decisions yield an indication of the complexity of the YCJA, and the Conservative government's recent amendments to the Act which lean more towards Crime Control and Justice model initiatives, this Act will certainly keep the highest court busy determining what in fact is the best approach for dealing with young offenders.

Chapter 4. Methodology

4.1. YPO Survey in 2004

4.1.1. Sample

A sample of 156 youth probation officers (YPO's) throughout British Columbia participated in a study about their experiences during the first year of implementation of the *Youth Criminal Justice Act (YCJA)*. The research gathered demographic information about the participants as well as information pertaining to youth probation officer's views about the youth justice system, the media, the *YCJA* and community programs. In addition, this questionnaire asked participants to read notes from five case files and give sentencing recommendations about the young offender based on the information provided.

To be eligible to participate in the study, respondents had to be actively involved in the handling of young offender cases, either through direct supervision or case management. Other criteria for inclusion were those who had previously been YPOs and were presently direct supervisors of YPOs, and additionally, those who were working in the provincial policy analysis department where YPOs frequently consult regarding young offender legislation. Of the 156 participants nine were eliminated because they either did not meet the aforementioned probation officer eligibility criteria, the YPO submitted an incomplete survey, or declined to partake in the study. Therefore, the sample was composed of 147 present and former YPOs from across British Columbia, reflecting an inclusion rate of 94% of the total population of YPOs in the province.

There was a similar number of male (52.9%) and female (47%) officers, with the majority being Caucasian (88.2%). The average age was 41 years and most were married or living common-law (70%). The majority had attained a bachelor's degree

(84%) level of education. Respondents had been employed a median of 10 years with the highest number of years being 37 and the lowest one year. At the time of the study, 67% of the sample actively supervised a generic caseload while 8% were supervisors of local probation offices, each of whom had previous line probation officer experience. The remaining officers worked in specialty units (13%) (e.g., conferencing, sex offender, violent offender units) as well as case management and policy departments (12%) (e.g., youth justice consultant, policy analyst and youth custody case management). Equally important, 84% said they worked in a multi-disciplinary office with social workers, and 59% indicated they worked together with mental health workers.

Table 2. YPO Demographics

	Percentage
Gender	
Male	52.9%
Female	49.0%
Ethnicity	
Caucasian	88.2%
Aboriginal	2.0%
Other	9.8%
Age	
25-34 years	30.0%
35-49 years	49.0%
50+ years	21.0%
Marital Status	
Married or Common Law	70.0%
Never Married	19.0%
Separated or Divorced	11.0%
Education	
University Degree MA	6.0%
University Degree BA	84.0%
College or High School Diploma	10.5%

YPOs in British Columbia work under the provincial Ministry of Children and Family Development (MCFD) which is responsible for a diverse range of child and family services including for example, child protection, mental health, services to special needs children, and youth justice services. This Ministry is divided into five geographic regions. While each region includes both rural and urban communities, 45% of respondents worked predominantly in a large urban centre in the southern part of British Columbia where the majority of the province's population of four million is concentrated. More than half of the officers (55%) worked in mid-size cities, small towns and remote rural communities.

4.1.2. Five Case Studies and Survey Questionnaire

The 147 YPOs were presented with five young offender cases and asked a series of questions regarding their approach to the case studies. The five serious and/or violent young offender cases were selected from Canadian trial and appellate case law. The cases were chosen because they represented¹ profiles of complex multi-problem young offenders requiring the most challenging application of the principles included in the *YCJA*. While the content of the five cases were retained, the names, ethnicity and cities of origin were altered and realigned with the geography and demography in British Columbia. This study was conducted between January and March 2004, approximately ten months after the *YCJA* had been implemented. Given the YPOs had a median 10 years of employment, their overall experience working with young offenders in conjunction with understanding the new Act was sufficient to provide realistic responses to the cases. The respondents were given all five samples requiring officers to read a three page summary of each case and answer a series of questions pertaining to sentencing options, factors considered when making a recommendation as well as what type of youth justice model represented their approach in each case (see Appendix A, B & C). The YPOs did not know what model type they were selecting (e.g. Appendix C: Crime Control, Corporatist, Welfare, Justice, Modified Justice) as each model was

¹ See original case law: *R. v. D. (K.)*, [2003] N.S.J. No. 165 (N.S. S.C. (Fam.D.)); *R. v. S. (B.R.)*, [2003] S.J. No. 357 (Sask. P.C.); *R. v. A. (E.S.)*, [2003] A.J. No. 571 (Alta. P.C.); *R. v. M. (H.A.)*, [2003] M.J. No. 147 (Man. P.C.); *R. v. S. (S.)*, [2003] B.C.J. No. 2366 (B.C. P.C.); *R. v. S. (S.)*, [2004] B.C.J. No. 320 (C.A.).

assigned a number and arbitrarily listed. Other demographic extralegal variables such as age, gender, years of employment, and region/work location were not utilized in this study as they were not significant in either the theoretical orientation of YPOs or in their sentencing recommendations. Chapter 5 will provide a brief description of the five cases followed by an examination of the theoretical approach taken by the youth probation officers. Chapter 6 will look more closely at the purpose and utility of the pre-sentence report in relation to the five cases regarding YPO sentencing recommendations and the factors involved in making those recommendations.

4.2. Qualitative Interviews in 2012

4.2.1. *Sample*

Qualitative data was collected in October/November 2012 with a purposive sample of ten provincial and territorial senior level executives that are considered key experts in the field of youth justice offering a cross national perspective regarding the YCJA. The objective of the qualitative study was to learn the individual opinions and viewpoints about the deterrence sentencing principle being included in the new amendments to the YCJA. The participants were contacted via email to introduce the study and asked for their cooperation. Confidentiality of their responses was ensured and they gave their consent to participate. Each telephone interview took approximately one hour with some participants also submitting written answers in addition to the telephone interviews.

4.2.2. *Measures*

The senior executives were sent via email a consent to participate form as well as a description of the study and the fourteen questions (see Appendix D) one week prior to participating in the telephone interviews. All questions yielded responses from the participant's personal viewpoint and do not represent the youth justice position of their province/territory. Participants were very clear they did not want their identity or the identity of their province/territory known in the study. All participants in this study were randomly coded with a number to ensure complete confidentiality of their responses.

The fourteen questions allowed participants to liberally provide their own opinion about the deterrence principle when asked whether the participants respective province/territory were included in helping draft the Bill C-10 YCJA amendments as well as specific questions about their thoughts on the Supreme Court of Canada's deterrence decision; whether the deterrence principle would cloud the sentencing process for judges in relation to the numerous sentencing principles available; does the deterrence principle conflict with other key mandatory sentencing provisions; whether custody counts would change because of this principle and finally would the deterrence principle impact specific young people such as Aboriginal, female and mental health youth.

4.2.3. Limitations

The objective of the qualitative interviews was to gain in-depth knowledge from field experts regarding the inclusion of the deterrence principle as part of the YCJA sentencing process. While this objective was met, generalization of the results is limited given the purposively collected small number of participants.² An additional limitation was the anonymity and confidentiality of their responses. As the participants were assured of complete anonymity, it was not possible to disclose identifying information when discussing the results of the interview such as grouping certain provinces/territories that favour the deterrence principle versus certain geographical areas being adamantly against the addition of this principle for young offenders. Although the individual opinions in the sample are not reflective of all senior youth justice officials in Canada, they do provide important conceptual and operational explanations as to how the deterrence principle might impact the youth justice courts and the

² Purposive samples are used when special knowledge or expertise about some group or select individuals who represent the population is required. The primary feature of this sampling method is determined according to the needs of the study and not according to external criteria such as random selection. As Ted Palys explains: "Purposive or theoretical sampling thus merely extends the admonition that researchers should be guided by the objectives of the study and should recognize that while "representativeness" may at times be a crucial requirement, at other times kneeling before the gods of randomness impedes rather than facilitates understanding." T. Palys and C. Atchinson, *Research Decisions: Quantitative and Qualitative Perspectives* (Toronto: Thomson Nelson, 2008) p. 139. See also M. Crouch and H. McKenzie, "The Logic of Small Samples in Interview-Based Qualitative Research" (2006), 45(4) *Social Science Information* 483, for an in-depth explanation on small sample size in qualitative research.

administration of youth sentences across the country. Finally, due to the responses being elicited in October 2012, and the Act's amendments only coming into force on October 23, 2012, the senior executive's hypothetical application and personal opinions of the deterrence principle may or may not occur, either operationally in their area or generally across Canada. Until judicial case law across Canada provides commentary regarding the decisions applied at sentencing, only then will the inclusion of the deterrence principle be evident.

Chapter 5. Youth Probation Officers' Decision Making

5.1. Conceptual Framework

The roles of youth probation officers (YPOs) have, over the past century, vacillated philosophically between rehabilitative, caring interventions and those oriented towards public safety, accountability and control. Under the *JDA*, YPOs acted in the “best interest of the child” by providing information to assist juvenile court judges in informal and non-criminal adjudications, and supervision of these decisions. In contrast, the *YOA* shifted the YPO role to reflect regulatory, due process, and public safety principles. Under the *YOA*, YPOs increasingly became central figures in just about every stage of the youth justice system (e.g. diversion, bail supervision, court report writing and post-sentence supervision). Yet the mixed model law of the *YOA* with its incoherent set of philosophical principles and over-reliance on the court process resulted in major provincial and territorial discrepancies. In particular, the decisions made by youth justice professionals such as judges, Crown prosecutors and YPOs when sentencing young offenders often resulted in custodial dispositions for minor offenders and status type offences.¹

The *YCJA* continues to allow for considerable discretion and individual interpretation regarding the importance and relevance of the various overarching principles and objectives that are built into the Act, especially those complex provisions

¹ R.R. Corrado and A. Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada" in R.R. Corrado, N. Bala, M. LeBlanc & R. Linden, eds., *Juvenile Justice in Canada*. (Toronto: Butterworths, 1992).

governing sentencing.² This chapter will continue to use the five distinct theoretical models of youth justice described in Chapter 2 and 3 to hypothesize that YPOs will not be consistent in their interpretations and applications of the more complicated sentencing sections of the *YCJA* concerning young offender cases typical of the challenges faced in their youth justice roles. To test this hypothesis, this chapter will report on a study conducted with 147 YPOs involving an analysis of their theoretical orientation under the *YCJA*. Explaining differing approaches to the application of the Act requires an exploration of the values and philosophical frameworks of YPOs that influence their decisions, and an understanding of the extent of the discretion granted by the legal and policy structure within which decisions are rendered.

5.2. YPO Ideology

There is a long theoretical history both asserting and explaining that discretionary decision-making increases the importance of ideological bias of the individual decision-

² See for example, *J.P. v. Green* [2009] BCSC 943 which highlights the complexity of the *YCJA* pertaining to the calculation of youth sentences. J.P. was convicted of second degree murder and sentenced at the age of twenty to seven years custody and conditional supervision under the *YCJA*. He was serving his sentence in an adult facility. J.P. challenged the way remission is applied, arguing it should only apply to the custodial portion of his sentence. The BC Supreme Court decided in his favour. The result of this decision is that any youth who, because of their age, serves their sentence in an adult facility, will end up serving a shorter period of time in custody (unless any remission is forfeited). J.P. also succeeded in Federal Court by challenging his parole eligibility being based only on the custodial portion of the sentence, resulting in earlier parole eligibility. Both decisions are inconsistent with the intention of the legislation in terms of the language and interaction of provisions of the *YCJA*, *Prisons and Reformatories Act*, and *Corrections and Conditional Release Act* as they pertain to persons serving a youth sentence in an adult facility. See also *R. v. W. (K.T.J.)*, 2009 B.C.P.C. 4754-3-C regarding whether a young person has a right to a bail hearing immediately after being arrested on a warrant for allegedly breaching the community portion of a conditional supervision order. The issue has to do with the time period right after arrest and the legislated 48 hour time period given to the Provincial Director to review the suspension and decide whether to release the young person back into the community or refer the matter to youth justice court pending a review. Judge Auxier determined that the young person does not have the right to a bail hearing during the Provincial Director 48 hour review window. A bail hearing can only take place when the matter is referred to the youth justice court for review which is consistent with an earlier decision by Judge Whelan in *R. v. P. (S.A.)*, [2007] S.J. No. 548. Again both cases illustrate the complexities of the legislation and its intention to be significantly different from provisions (e.g. conditional sentence breach proceedings) applied to adults in the *Criminal Code*.

makers.³ This literature also suggests that the type of youth justice model favoured by professionals working with young offenders reflects their ideological bias. For example, crime control-oriented professionals lean towards protecting the public through incapacitation and punishment, while decreasing their emphasis on rehabilitation. Meanwhile, those favouring the Justice model ideology downplay corporatist principles of non-judicial diversion and conferencing in favour of strict adherence to due process rights of accountability and sanctions proportionate to the seriousness of the offence.⁴ Accordingly, it is important to examine how YPOs' ideological biases affect their approach with young offenders.

Under the YCJA, YPOs have diverse and complex roles. For example, in British Columbia, YPOs work closely with Crown Counsel in conducting extra-judicial sanction inquiries to assist the latter on how to proceed as well as preparing breach of probation reports for Crown approval. Equally important, YPOs in British Columbia provide oral and/or written pre-bail reports for court; write judicially ordered pre-sentence and adult sentencing hearing reports, custodial review reports and convene court-ordered conferences.⁵ In addition, YPOs work with young offenders and various resource networks well after the completion of court proceedings which usually involves supervising bail, probation and intensive support and supervision orders, coordinating access to community treatment programs, supervising the community portion of a custody and supervision in the community sentence and playing a key and multi-faceted role in youth custodial institutions vis-à-vis case planning and transition to the community following custody.

³ J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971); M.A. Bortner, *Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice* (New York: New York University Press, 1982); R. Harris and D. Webb, *Welfare, Power and Juvenile Justice: The Social Control of Delinquent Youth* (London: Tavistock, 1987); A.N. Doob and L.A. Beaulieu, "Variation in the Exercise of Judicial Discretion with Young Offenders" (1992), 34(1), *Canadian Journal of Criminology* 35.

⁴ R.R. Corrado and S.D. Turnbull, "A Comparative Examination of the Modified Justice Model in the United Kingdom and the United States" in Corrado et al, *Juvenile Justice in Canada*, *supra* footnote, 1.

⁵ These examples highlight the duties of YPOs in British Columbia. Each province and territory will differ to some extent regarding probation officer roles and processes (e.g. pre-sentence reports are common across the country, but conferencing specialists are very limited).

While there is an expectation that YPOs provide non-ideological recommendations to the court, there is the long standing assertion that they are not “disinterested experts.”⁶ Under the complex mandates of the *YCJA*, YPOs strive to balance their “officer of the court” mandate with the responsibility of supervising young offenders, attempting to ensure the youths’ best interests through rehabilitative, treatment-based ideals, as well as enforcing court orders to promote accountability and public safety. In effect, the more diverse and complex the roles of the YPOs, the more likely that personal, usually ideological bias, becomes important in their approach:

. . . to truly understand the process of individualized justice as implemented within the modern juvenile court it is necessary to examine the behaviour, attitudes, and propensities of those who administer juvenile justice . . . ‘Individualized’ refers as much to the interpreter of juvenile characteristics as it does to the juvenile. The art of interpretation reveals more about the artist than the subject.⁷

There have been very few studies that explain a YPOs’ orientation with young offenders.⁸ Therefore, there is a need to explore the hypothesis that a YPOs’ ideological bias or commitments to the five models are important determinants of their approach with youth. This is accomplished by examining whether these models are associated with their responses to actual *YCJA* cases. In addition, it is essential to determine whether laws based on the Modified Justice model, such as the *YCJA*, are difficult for youth probation officers to apply in a consistent manner. Differing YPO ideologies, favouring either a Welfare, Corporatist, Justice or Crime Control model, all evident under the *YCJA*, decrease the likelihood that similar and consistent orientations will prevail when a sample of YPOs respond to the same set of actual cases. Since YPOs make important decisions under the *YCJA*, such as whether to forward a breach of probation to Crown Counsel, requesting a warrant of suspension for a youth serving the community portion of a custody and supervision in the community sentence as well as

⁶ J. Pitts, *Working With Offenders* (London: Macmillan, 1999) at p. 71.

⁷ M.A. Bortner, *supra* footnote 3, at p. 249.

⁸ Initial studies in this area are found in Y. Cohn, “Criteria for the Probation Officer's Recommendations to the Juvenile Court Judge” (1963) 9(3) *Crime and Delinquency* 262; R.M. Carter, “The Presentence Report and the Decision-Making Process” (1967), 4 *Journal of Research in Crime and Delinquency* 203.

offering recommendations in pre-sentence reports, it is valuable to ascertain the personal ideologies held by different YPOs and these may influence their decisions and recommendations.

5.3. Case Studies

A brief description of each case is provided followed by a determination of the theoretical approach taken by the youth probation officers. Table 1 summarizes what percentage the five models were selected as the most appropriate response to each case.

Table 3. Percentage of Probation Officers Categorizing the Appropriate Response to Each Case

	Case 1 (Kara)	Case 2 (Carlos)	Case 3 (Edward)	Case 4 (Andy)	Case 5 (Amir)
Welfare	25.2	10.2	14.3	12.2	2.8
Corporatist	11.6	4.1	3.4	3.4	0.7
Modified Justice	61.2	61	65.3	67.3	37.5
Justice	1.4	5.4	3.4	4.1	13.9
Crime Control	0.7	19	13.6	12.9	45.1

5.3.1. Case 1: Kara

This case involved a fifteen year old Caucasian female youth who pleaded guilty to assault and uttering threats to cause bodily harm. The offences were in relation to an assault on a male staff member at the youth treatment centre where Kara had been residing for eighteen months. Kara had a horrendous and tragic background, having been raised by alcoholic parents prone to violence, abuse and neglect which included being locked in cupboards for lengthy periods of time. Abandoned by her father, Kara was eventually placed with the social services ministry at age five (twenty-two therapeutic and hospital placements).

Kara had not been in a regular school setting since Grade 2 due to her aggressive behaviour and limited cognitive abilities, which fell into the borderline range of being intellectually deficient. She had been diagnosed with several mental health conditions and is prone to self harm. Kara's last placement was a highly structured adolescent treatment centre, which was detrimental to her overall development, resulting in an increase in institutionalized aggressive behaviour patterns.

The psychiatrist who had been treating Kara for many years described her criminal involvement as "diminished responsibility" because of her cognitive and emotional limitations. The male victim of her assault suffered a five inch scratch on his cheek with slight scarring. Kara had a prior history of similar offences, including eight assaults against other staff members, arising in the same treatment centre six months prior.

Nearly two thirds (61.2%) of YPOs resorted to the Modified Justice model as best representing their approach in Kara's case in contrast to only one quarter (25.2%) for the Welfare model. Despite the apparent relevance of the Corporatist model where non-judicial sanctions, the possibility of a conference to coordinate an immediate and comprehensive community based treatment plan, and avoiding lengthy and costly court proceedings, only 11.6% of respondents were identified with this model. In the case of a mentally disturbed young person, such an approach would be expected to have little or no effect on recidivism.

The youth probation officers acknowledge that under the YCJA, Kara does not fit into a singular Welfare model stream. Rather most YPOs *perceived* Kara as requiring more than a treatment focused approach due to the obvious need to consider the issue of mental health and special needs and consequent diminished responsibility for her persistent violent behaviour. As well, key justice personnel were seen as necessary to ensure treatment and support, including an alternative placement for Kara, which was likely seen as assisting in ameliorating her already negative institutionalized behaviour and promoting greater community involvement.

5.3.2. Case 2: Carlos

Sixteen-year old Carlos was convicted of robbing a convenience store while wearing a face mask. The robbery was part of an initiation into a local gang. Carlos and two co-accused obtained \$20.00 in change and \$300.00 worth of cigarettes. The victim, a clerk, had been robbed twice before with the most recent victimization being only two weeks prior. Carlos was also charged with breaching a previous probation order on a subsequent night after he was found passed out from alcohol intoxication in a backyard garden face down in the mud.

Carlos was born in Honduras and was the second of four children. His family immigrated to Canada when Carlos was six. Carlos was thirteen when his father committed suicide using a firearm in the family home while in the presence of his wife and oldest daughter. Carlos' mother was so traumatized she was unable to speak for seven months. Carlos refused any counselling and began to act out his grief during the following three years with addictions, crime and the adoption of anti-social peers. Prior to his father's suicide, Carlos was an above average student but he terminated school after the loss of his father.

Carlos' youth record involved multiple offences of theft, possession of stolen property, weapons, obstruction, attempted robberies and breaches of bail and probation. His response to youth justice services (custody and community) had been poor. Carlos said his initiation into the gang was more important than the consequences of the robbery and he feared reprisal and discipline from the gang. He expressed remorse for his actions and was well aware his behaviour had negatively impacted the store clerk who was victimized in the robbery.

Again, close to two thirds (61%) of the YPOs responses represented the Modified Justice model with far less support for the other four models. It was somewhat unexpected that, despite Carlos' extensive prior record of violence and the failure of less punitive sentencing experiences to prevent his recidivating there was not more support for a crime control approach in terms of a recommendation for a lengthy and punitive custodial sentence to ensure public safety and individual deterrence. Instead, participants recognized a modified justice principle that, even for serious and violent offenders, limited accountability is attributed to youth as compared to adults. In effect,

this case illustrates the not uncommon difficulties of a Central American immigrant family suffering the long term traumatic impact of a generational civil war on “peasant” and working class families, the tragic suicide of Carlos’ father, the subsequent serious substance use, and the joining of a gang, at least in part, as a surrogate family all as critical mitigating experiences which explained the less punitive responses of YPOs, in addition to the view that treatment and community reintegration objectives were also important. In other words, the Modified Justice model characteristically calls for a mitigated proportionate sentence to ensure violent behaviour is sanctioned but not to the point where punishment adversely affects the impact of treatment.

5.3.3. Case 3: Edward

Further support for the modified justice model comes from responses to a case involving seventeen year old Edward, charged with one count of sexual interference. While staying overnight at a friend’s home and sleeping on the couch in the living room, his friend’s sister, age twelve, was asleep on another couch; she awoke to find Edward’s penis in her hands. This sexual assault offence occurred on the last day of a 24 month probation order Edward had been serving for a prior sexual assault.

Edward is the younger of two sons. There had been significant problems within the family structure arising from unclear rules and boundaries being set for the boys. Brother Tim had left home at seventeen to escape his overbearing and controlling mother, whose behaviour had been described as erratic and unpredictable. After the offence, Edward disclosed his mother walked around the house naked, insisted he watch her while she bathed, and she gave him uncomfortable back massages, with inappropriate whispering in his ear and tickling of him. This occurred in the absence of their father, but in his presence, their mother would revert to being a strict disciplinarian. Attempts to explain their mother’s behaviour to their father were dismissed by him as fabricated and ridiculous. For two years, Edward’s means of coping had been the weekly use of alcohol and drugs. Edward attended a modified educational program at the local high school, but he was failing due to truancy. His mother covered her son’s absenteeism with excuses.

Edward had previously completed a forensic outpatient sex offender treatment program, but was still assessed as high risk to re-offend. Mental health professionals described Edward as having *cognitive distortions* resulting in his perception of forced sex as normal and his fantasizing about sexually abusing others. Edward did not feel guilty for his aberrant behaviour; rather, his assaults were viewed as exploitive and he displayed no remorse. Edward had poor problem solving abilities and low self-esteem; he displayed impulsivity, and he tended to be a follower, showing elevated scores on an anti-social subscale measurement.

Given the seriousness of the offense, the young age of the victim, the prior history of sex offending, the non-response to treatment, the complete lack of a sense of responsibility and remorse, and the apparent high likelihood of recidivism (possibly including an escalation in the seriousness of the sexual offending), it was expected that a substantial percentage of YPOs would have supported either a Crime Control model emphasizing protecting potential victims through incapacitation or a Justice model approach recommending a lengthy custodial sentence to convey both responsibility for the seriousness of the second sexual offence and to conform to the principle of proportionality. Yet, again, nearly two thirds (65.3%) indicated the Modified Justice model as more appropriate: focusing on offender characteristics and rehabilitation while, at the same time, reinforcing procedural fairness and accountability through sentences that are proportionate to the seriousness of the offence. In other words, it appeared most YPOs accepted the implicit YCJA inclusion of key developmental and theoretical perspectives of serious criminal offending regarding the impulsive basis for Edward's sexual offending during late adolescent as being different from an adult's similar offending history. Under the YCJA, this difference would not only mitigate the punitive severity of the recommended sentence, but also be seen as requiring a continued treatment emphasis despite its previous ineffectiveness.

5.3.4. Case 4: Andy

This case involved a seventeen year old Aboriginal youth who was raised by an alcoholic father prone to physically abusing his mother. When Andy was four years old his mother left his father after an altercation resulting in physical violence. His father immediately quit drinking and never became involved in another relationship. Andy's

mother re-married when he was seven. When Andy was sixteen, his father was diagnosed with cancer and died a year later.

Two weeks after his father's death, Andy engaged in an extremely serious and very violent assault. On the night of the offence, Andy had been drinking with his friends and talking about his father. When Andy was walking home, he was confronted by the victim, who initially attacked him. As Andy had been robbed many times in this neighbourhood, he started to fight back and went far beyond what was necessary to defend himself in terms of kicking and stomping the victim after he was on the ground. The victim became unconscious and subsequently suffered a severe brain injury, facial swelling, broken nose, punctured lung, fractured rib, and liver lacerations. The victim required numerous plastic and facial surgeries, and had to spend one year in a chronic care rehabilitation facility where his prognosis was poor. He was unable to swallow properly, had limited speech which was not expected to improve, used a walker, was cognitively impaired, and would always require supported living in the community.

A psychological assessment of Andy revealed symptoms of depression and anxiety-based disorders. His early exposure to family violence, his father's alcoholism, repression of his father's death, his own substance use that started six months before the offence, his poor choice of peers, and moderately disrupted schooling are all related to an elevated risk to re-offend. Andy's only court history stemmed from breaching his bail order on two occasions by being out past his curfew. These bail breaches resulted in Andy being remanded into custody for three months while awaiting sentencing. Andy demonstrated considerable remorse for the aggravated assault on his victim. Andy asserted he consumed so much alcohol that he only vaguely remembered most of the assault, but he was aware that anger over his father's death is not an excuse for his offending behaviour.

While multi-problem profiles are typically evident for serious and/or violent youth, in Canada, such profiles for Aboriginal young offenders are more prevalent than among

non-Aboriginal young offenders⁹. The unique cultural context of Aboriginal young offenders was not explicitly recognized under Canada's previous youth justice YOA legislation, even though it was unmistakable that a disproportionate number of Aboriginal youths were given custodial sentences, even where they had not been convicted of violent offences.¹⁰ Moreover, the lack of intervention programs often resulted in Aboriginal young offenders' problems not being effectively addressed under the YOA. Because of their over-representation in custody and the predominance of early incarceration experiences, there was, and still is, a major concern that Aboriginal communities would suffer long-term negative consequences as a result of too many of their youth continuing on as serious adult offenders.

The Government of Canada acknowledged this unique position and social disadvantage of Aboriginal youth by incorporating provisions into the sentencing principles of the *YCJA* similar to those of the *Criminal Code of Canada* for adult offenders, which recognize the inherent special needs of Aboriginals. The *YCJA* explicitly acknowledges the distinctive cultural context of Aboriginal young offenders and this concern is reflected in the principles and policy objectives of reducing the disproportionate number of Aboriginal youth who are processed through the formal youth justice system and, most importantly, reducing the highly disproportionate number of Aboriginal youth sentenced to custody.

YPOs have a critical role with Aboriginal young offenders because their pre-sentence reports typically influence judicial sentencing.¹¹ The *YCJA*'s sentencing philosophy and specific criteria both inhibit the use of custody for property and less

⁹ R. R. Corrado and I.M. Cohen, "Probation Officer's Perceptions on the Best Practices and Resource Needs of Aboriginal Young Offenders under the Youth Criminal Justice Act," (User report 2004-05) Ottawa: Ministry of Public Safety and Solicitor General; J. Rudin, "*Aboriginal Peoples and the Criminal Justice System*," (2005) Report for the Ipperwash Inquiry. Online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf

¹⁰ R. R. Corrado and I.M. Cohen, "A Needs Profile of Aboriginal Youth in Prison," (2002), 14(3) *FORUM on Corrections Research* 20.

¹¹ J. Bonta, G. Bourgon, R. Jessemann and A.K. Yessine, "Presentence Reports in Canada" (User Report 2005-03), Ottawa: Public Safety and Emergency Preparedness Canada; D.Cole and G. Angus, "Using Pre-Sentence Reports to Evaluate and Respond to Risk" (2003), 47 *Criminal Law Quarterly* 302.

serious violent offences, and emphasize community-based alternatives especially for Aboriginal youth. In addition, YPOs are central in identifying, coordinating and ensuring appropriate community alternatives are made available as options for the court.

In the case of Andy, more than two thirds (67.3%) of the YPOs selected the Modified Justice model as opposed to substantially less support for the Welfare model (12.2%) and Crime Control model (12.9%) while the Justice and Corporatist approaches received minimal support. It seems the Modified Justice model approach is seen as commensurate with the YCJA's provisions of recognizing and implementing culturally sensitive rehabilitative strategies linked to the multiple needs profiles of many Aboriginal young offenders.

5.3.5. Case 5: Amir

This was a tragic case of criminal negligence causing death and impaired driving causing death. While seventeen year old Amir had no previous criminal record his prior driving history reflected two traffic tickets for excessive speeding, and a stern warning by police officers a few months before the offence. On the night of the offence, Amir had been drinking at a party and was driving his new sports car when he decided to get involved in a high speed street race with another youth. Amir lost control of the vehicle and crashed, causing the death of his friend in the right front passenger seat.

Born in Tehran, Iran, Amir comes from a very privileged but not a troubled family background. When Amir was fifteen years old the family moved to British Columbia. Amir experienced difficulties adjusting to Canadian culture and language and had expressed a desire to return to Iran. This was compounded by a poor educational experience where the objectives of school and the language were significant barriers. Amir's parents compensated for his loathing of Canada by purchasing the sports car.

Amir completely denied being the driver of the car even though police evidence contradicted his version of events. He did not attend his friend's funeral because of the ongoing negative tension within the Iranian community and the victim's family. With a lengthy trial and subsequent appeal, Amir was on bail for two years pending the outcome of the court proceedings.

The nature and context of this offence marked a striking difference in the YPOs' response to this case in comparison to the previous four cases. It seems the seriousness of the offence and the absence of taking responsibility raised doubts about the need for or appropriateness of rehabilitation of this young person. Accordingly, the YPOs responded by splitting between two models: Crime Control (45.1%) and Modified Justice (37.5%). The remaining three models were significantly under-represented as relevant approaches to be considered in this case.

Under the Crime Control model, the maintenance of social order through laws designed to punish behaviour and thereby establish public protection take precedence over the interests of the offender. Probation Officers regard Amir's case as one requiring accountability, punishment and incarceration as a means of protecting the public and to some extent deterring the young person. However, the Modified Justice model is an alternative to the Crime Control model, allowing the recognition of diminished responsibility by young persons. A mixed model approach would sanction based on the severity of the offence and prior driving record, which in this case were both key elements. However, mitigating issues such as family and educational background are moderating factors, making punishing the young person less important in comparison to what would be appropriate for an adult offender under similar circumstances. Therefore, it appears reasonable to assert the probation officer sample was divided in their approach to Amir, as some focused on public protection and punishment while others preferred a more balanced and progressive consideration and selected the Modified Justice model.

5.4. Discussion

This study reflected the views of practicing YPOs in the province of British Columbia one year after the implementation of the *YCJA*. Despite being presented with five different cases that diverged widely in relation to offender characteristics (e.g. age, gender, and needs), offenders admitting responsibility for the offence, and the seriousness of the offence, YPOs consistently and appropriately (i.e. as directed by the *YJCA*) utilized a Modified Justice model orientation. Approximately two thirds of the YPOs surveyed indicated they would take a mixed model approach to four of the five

cases presented to them. In comparison with the far more frequent use of custody under the YOA, arguably, the option of punishing was less evident in the YPOs' response to the five cases. In effect, differences involving more consistent use of mixed model principles in their approach under the YCJA were obvious and YPOs avoided the over-reliance on the formal court process and custodial dispositions. In this study, the only example where the YPOs were clearly divided between the Modified Justice and Crime Control models was in Amir's case; the youth committed a driving offence resulting in the death of an innocent person and denied responsibility for his actions. This is a case that could focus completely on public protection and deterrence of the young person, but even in this scenario, approximately one-third of the YPOs utilized a Modified Justice approach, indicating a reluctance to apply the more punitive approach to Amir's conduct.

It is also noteworthy that a quarter of those surveyed suggested a welfare approach to Kara's case would provide the best outcome. Kara was the only female young offender presented to the YPO's. She had a background that included many factors that may be viewed as providing causal explanations for her actions. In essence, she was failed by the system in that she was not given the kind of treatment one would expect to be provided to a child with such a difficult upbringing. In her case, the young offender lashed out at the system, and the victim was an agent within that very system. Only one respondent promoted a crime control response in such a case, a response that others likely thought would exacerbate her life circumstances. However, the majority of YPOs adopted a mix-model philosophy with this case, which mimicked the premises underlying the YCJA. The Act establishes a regime that fosters divergent approaches to youth crime, depending on the facts of the case and the background of the offender.

Equally important, the YPOs were also universal in their approach with Carlos, Edward and Andy. These three cases were significantly different in terms of offence type (e.g. robbery, sexual offence and assault causing bodily harm), and young offender characteristics (e.g. an immigrant youth with a tragic family history of suicide; a youth with considerable mental health issues, likely stemming from an extremely dysfunctional parent-child relationship; and an aboriginal boy with a family history of alcoholism and abuse), yet over two-thirds of the YPOs cited the Modified Justice model as an appropriate theoretical framework for dealing with these adolescents. This underscores

the utility of a mixed model perspective when examining the very diverse developmental, cultural and familial backgrounds of young offenders.

Notwithstanding modest variability, YPOs confirmed a more consistent utilization of a mixed-model philosophy explicitly embodied in the *YCJA*. This Act, more than the *YOA*, identifies specific approaches to youth crime, that is, a tri-furcated system, depending on the seriousness of the offences and the needs of the young offender. Despite their individual ideological differences and the discretion to choose from a wide range of varied and potentially conflicting principles under the *YCJA*, YPOs were very consistent in their responses. The Modified Justice model approach under the *YCJA*, and the discretion left to YPOs, did not lead to the inconsistencies and over-reliance of custody evident under the *YOA*. In effect, YPOs overwhelmingly applied the same ideologies and principles to the provided cases. This study emphasizes that although the *YCJA* is more dogmatic than the *YOA*, the *YCJA* still allows for an individualistic approach by YPOs in responding to the variability in the types of youth offending, youth backgrounds, and the need for protection of the public. In effect, the hypothesis that youth probation officers would not be consistent in their interpretations and applications of the more complex sections of the *YCJA*, when faced with five hypothetical cases typical of the challenges faced in their youth justice roles is not supported by this study.

5.5. Limitations

While this study utilized actual cases from across Canada, it nonetheless involved hypothetical responses. There are obvious differences when responding in a research context and responding in typical or real-time YPO case work. The latter involves various pressures and complexities which do not exist in a research environment.

Another limitation concerning the generalizability of the empirical results of this study are the differences within and between provincial and territorial *YCJA* youth justice systems. There are significant variations in the structure of youth justice systems in Canada, despite the *YCJA* being a federal law. Certain provinces and territories emphasize different principles and models (e.g. welfare, corporatist) of youth justice

depending on, for example, the age, ethnicity, and geographical location of the youth. Therefore, in allowing flexibility and a progressive approach to individualized justice when working with young offenders, the Modified Justice model is likely to be manifested differently in each province and territory.

Chapter 6. Pre-Sentence Report Recommendations

6.1. Introduction

The pre-sentence report (PSR) traditionally has been a distinct and essential document to assist judges in determining appropriate sentencing outcomes in Canada and other common law jurisdictions. Nearly a half century ago, one judge explained that, “of all the administrative aids available to the judge, an adequate, comprehensive and complete presentence investigation is the best guide to intelligent sentencing,”¹ while a jurist similarly concluded the pre-sentence report to be, “one of the most important developments in Canadian criminal law during the twentieth century.”² This report – also known as a ‘social inquiry report’ or ‘pre-sentence investigation’ in the international literature – has been an essential policy and research source primarily because it is considered a relatively reliable document of an offenders’ biographical and criminal history as well as an analysis/assessment of the degree of societal risk and likelihood of recidivating. The PSR routinely provides basic information to youth justice, typically youth probation/corrections officials required for individual case management plans usually focused on treatment needs and protection of the public. For researchers, the PSR historically has provided one of the few low cost means of measuring key theoretical concepts central to the numerous theories concerning criminal offending and related risk behaviour. More importantly, judges require detailed and steadfast offender information, which has commonly been provided to a certain degree by the PSR. Therefore, the PSR is essential to criminal justice sentencing, and is arguably an integral step in this process.

¹ A. Murrah, "Prison or Probation - Which and Why?" in B. Kay and C. Vedder, eds., *Probation and Parole* (Springfield, IL: Charles C. Thomas, 1963), p. 67.

² J. Hogarth, *Sentencing as a Human Process*, (Toronto: University of Toronto Press, 1971), p. 246.

While the PSR has long been recognized as important for the above reasons, there have been relatively few studies in Canada concerning its use in youth justice contexts. As stated in previous chapters, these contexts have changed substantially, at least theoretically, because of the changes in the federal youth justice laws, and the related provincial/territorial laws and their respective youth justice systems. The central themes of this chapter are: first, identifying the legal, risk and protective factors that influence youth probation officers PSR recommendations in BC; and second, to assess whether the expected high degree of correspondence between the pre-sentence report recommendations and actual sentencing decisions is evident. These two themes have dominated research on the PSR³ along with the more general theme of the extent to which the individual PSR factors are associated with judicial sentencing decisions.⁴

Typically, there are several sentencing options available to judges (e.g. probation, fines, restitution, and custody) that are also considered by probation officers in their recommendations. Focal concerns theory will be utilized to explain whether youth probation officers are able to align their recommendations with eventual sentences despite the challenges of interpreting a highly complex law such as the YCJA. This study further compares the youth probation officer sample previously introduced in chapter 5 regarding their sentencing recommendations in the five court cases and the final judicial sentences.

³ R.M. Carter and L.T. Wilkins, "Some Factors in Sentencing Policy" (1967), 58 *Journal of Criminal Law and Criminology and Police Science* 503; J. Mott, "Decision Making and Social Inquiry Reports in One Juvenile Court" (1977), 7 *British Journal of Social Work* 421; C. Campbell, C. McCoy and C.A.B. Osigweh, "The Influence of Probation Recommendations on Sentencing Decisions and Their Predictive Accuracy" (1990), 54 *Federal Probation* 13; J.J. Shook and R. C. Sarri, "Structured Decision Making in Juvenile Justice: Judges' and Probation Officers' Perceptions and Use" (2007), 29 *Children and Youth Services Review* 1335; P. Maurutto and K. Hannah-Moffat, K., "Understanding Risk in the Context of the Youth Criminal Justice Act" (2007), 47(4) *Canadian Journal of Criminology and Criminal Justice* 465; T.L. Freiburger, and C.M. Hilinski, "Probation Officer's Recommendations and Final Sentencing Outcomes" (2011), 34(1) *Journal of Crime and Justice* 45.

⁴ N. Papandreaou, S. McDonald and A. Landauer, "An Experimental Investigation of Some Factors Influencing Pre-Sentence Reports" (1980) 13 *Australian and New Zealand Journal of Criminology* 271; Y. Cohn, "On the Presentence Investigation" (1982), 46 *Federal Probation* 46; J. Rosecrance, "Extralegal Factors and Probation Presentence Reports" (1987), 3(2) *Journal of Contemporary Criminal Justice* 28; C. Rush and J. Robertson, "Presentence Reports: The Utility of Information in the Sentencing Decision" (1987), 11(2) *Law and Human Behaviour* 147.

6.2. Focal Concerns Theory

The focal concerns theory was originally developed by Martin Miller⁵ and expanded on more recently by Steffensmeier and colleagues⁶ to understand the relationship between legal and extralegal variables and sentencing decisions.⁷ This theory contends that judges consider three focal concerns when making sentencing decisions: blameworthiness, protection of the community and practical constraints and consequences.⁸ Blameworthiness refers to the convicted individual's culpability and is usually associated with "just deserts" or a retributive philosophy of punishment. In essence, the punishment should fit the seriousness/harm of the crime. In addition to offense severity, the offenders' criminal record and their specific roles in the commission of the offence (e.g. leader, organizer or follower) are considered to be important in assessing blameworthiness.

The second focal concern, protection of the community, is based on similar attributes considered for blameworthiness, but the focus is instead on the need to incapacitate the offender. Overwhelmingly, criminal justice laws require criminal justice professionals, particularly judges, to consider the primacy of public safety and preventing recidivism in the context of high uncertainty about an offenders' future behavior.⁹ According to focal concerns research, these predictions regarding the dangerousness of

⁵ M.W. Miller, "Lower Class Culture as a Generating Milieu for Gang Delinquency" (1958), 14(3) *Journal of Social Issues* 5

⁶ J. Kramer and D. Steffensmeier, "Race and Imprisonment Decisions" (1993), 34 *The Sociological Quarterly* 357; D. Steffensmeier and S. Demuth, "Ethnicity and Sentencing Outcomes in U.S. federal Courts: Who is Punished More Harshly" (2000), 65 *American Sociological Review* 70; D. Steffensmeier and S. Demuth, "Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons" (2001), 39(1) *Criminology* 145.

⁷ D. Steffensmeier, "Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants" (1980), 26(3) *Crime and Delinquency* 344; D. Steffensmeier, J. Kramer and J. Ulmer, "Age Differences in Sentencing" (1995), 12 *Justice Quarterly* 583; B. Johnson, J. Ulmer and J. Kramer, "The Social Context of Guideline Circumvention: The Case of Federal District Courts" (2008), 46 *Criminology* 711.

⁸ J. Steffensmeier, J. Ulmer, J. Kramer, "The Interaction of Race, Gender and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male" (1998), 36 *Criminology*, 763; D. Steffensmeier and S. Demuth, "Ethnicity and Sentencing Outcomes in U.S. federal Courts: Who is Punished More Harshly" (2000), 65 *American Sociological Review* 705.

⁹ *Ibid.*

the offender are influenced by characteristics of the offender such as family history, education, employment, extent of criminal record and use of a weapon when committing offences.¹⁰ Protection of the community through the assessment of risk, therefore, is the key theme of the second focal concern.

The third focal concern, practical constraints and consequences, involves both organizational and certain offender factors in sentencing decisions. Organizational considerations include the costs incurred by the criminal justice system such as transportation, available prison/custody space and community resource availability. Practical consequences for the offender that judges may weigh include concerns about the offender's age, physical and mental health condition, special needs, victim reparation, and disruption of ties to other family members if given a custodial sentence.¹¹ These concerns typically mitigate the length and type of sentence imposed especially if the young offender takes responsibility for the offence and acknowledges the harm done to the victim. Although these are the three main focal concerns, an individual's prior criminal record and severity of current offence have historically been the primary focus in determining sentences.¹²

The relationships among the three focal concerns are complex in the context of procedural rights, limited time and resources, and the adversarial disagreements about the offenders' risk/protective characteristics, incomplete information about the latter, and restraints imposed by the multiple sentencing principles embedded in a specific governing law such as the YCJA.¹³ Albonetti¹⁴ further contends that judges, not infrequently, make decisions based on certain stereotypes, which over time become

¹⁰ J. D. Unnever and L. A. Hembroff, "The Prediction of Race/Ethnic Sentencing Disparities: An Expectation States Approach" (1988), 25 *Journal of Research in Crime and Delinquency* 53; D. Steffensmeier and S. Demuth, *supra*, footnote 6;

¹¹ J. Kramer and D. Steffensmeier, *supra*, footnote 6.

¹² J. Steffensmeier, J. Ulmer, J. Kramer, *supra*, footnote 8.

¹³ T.L. Freiburger, and C.M. Hilinski, *supra*, footnote 4; G.E. Higgins, G.F Vito and E. L. Grossi, "The Impact of Race on the Police Decision to Search During a Traffic Stop: A Focal Concerns Theory Perspective" (2012), 28(2) *Journal of Contemporary Criminal Justice* 166.

¹⁴ C.A. Albonetti, "An Integration of Theories to Explain Judicial Discretion" (1991), 38 *Social Problems* 247; C.A. Albonetti, "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992" (1997), 31 *Law & Society Review* 789.

reinforced, and therefore, difficult to change despite new information that contradicts or is inconsistent with the initial stereotype profile. Another problem with stereotyping can be explained in part by the considerable disparities in risk and protective factors associated with the offender's individual position in society (i.e. socio-economic status, gender, race, or ethnicity).¹⁵ This becomes evident when examining ethnicity within the context of the Canadian criminal justice system. For example, well over one-third of youth in the Canadian criminal justice system are Aboriginal with incarceration rates five times higher than other youth in the general population.¹⁶ As well, Aboriginal youth continue to be over-represented in most of the vulnerable at-risk groups as one in five have been in social services care in contrast to less than one in thirty for non-Aboriginal youth.¹⁷ Similar to the perception of Black and Hispanic young offenders in the United States, the visible presence of criminogenic profiles has been asserted by some theorists as the basis for increased blameworthiness, protection of the public, and the consequent demand that judges impose lengthier custodial sentences for minority young offenders who fit this negative stereotype.¹⁸

Although the focal concerns theory was developed to understand disparities in judicial sentencing, this theory is utilized in this study to also explain possible parallel disparities in probation officers' PSR recommendations. In other words, it is asserted the three focal concerns will influence the recommendations made by probation officers. Even though the probation officers are responsible for conducting interviews and gathering extensive information for the PSR and have more time than judges to consider the most appropriate sentencing recommendation(s), the youth probation officers will also rely on perceptual shorthand when applying the three focal concerns in their PSR decision-making. Thus the variables related to the three focal concerns and the profiles

¹⁵ B. Johnson, J. Ulmer and J. Kramer, *supra*, footnote 7.

¹⁶ Representative for Children and Youth British Columbia, "Kids, Crime and Care: Youth Justice Experiences and Outcomes" (2009), *Representative for Children and Youth and Provincial Health Officer*.
Online: <http://www.rcybc.ca/Images/PDFs/Reports/Youth%20Justice%20Joint%20Rpt%20FINAL%20.pdf>.

¹⁷ *Ibid.*

¹⁸ J. Kramer and D. Steffensmeier, *supra*, footnote 6; D. Steffensmeier and S. Demuth, *supra*, footnote 6.

related to perceptual shorthand (e.g. socio-economic status, age, gender, and race) will similarly impact probation officer recommendations much the same as judicial decisions.

6.3. Empirical Studies on the Relationship Between PSR Recommendations and Sentences

Previous research has typically found a high level of agreement between the influence of probation officer's recommendations in the PSR and final sentencing outcomes.¹⁹ Maurutto and Hannah-Moffat's aggregate analysis reported a strong correlation between recommendations and judicial decision making in Canada (80%), United States (92%), United Kingdom (78%) and New Zealand (77-80%) suggesting the significance of PSRs in affecting the sentencing process. The strength of this relationship across so many national jurisdictions has been interpreted to support a

¹⁹ Perhaps the most frequently cited initial studies in assessing PSR sentencing recommendations have been by Robert Carter and his colleagues. Carter has conducted three significant studies, the first known as the Federal Probation San Francisco Project. This study analyzed 600 cases that involved PSR's and how often the judges accepted the recommendations and what factors most influenced the decision. Carter and colleagues found the top five factors that were most influential in order of significance were prior record, remand status prior to sentencing, criminal history, current offence details and employment history. His research found 93% of the recommendations for probation were accepted when the court ordered probation. Judges followed the custody recommendations 86% of the time. See R.M. Carter, "It Is Respectfully Recommended" (1966), 30(2) Federal Probation, 38; J. Lohman, A. Wahl and R. M. Carter, *The San Francisco Project* (Berkeley, CA: University of California Press, 1966). Carter's second study in the State of Washington examined 455 PSR's and found the courts accepted the probation recommendation 72% of the time yet only followed the probation/jail recommendation 27% of the time. See R. M. Carter, "The Presentence Report and the Decision-Making Process" (1967), 4 Journal of Research in Crime and Delinquency, 203. His third study spanned a four year time period (1964-67) examining federal courts in a Northern district of California and found judges endorsed the probation officer's recommendations for probation over 97% of the time. See R.M. Carter and L.T. Wilkins, "Some Factors in Sentencing Policy" (1967), 58 The Journal of Criminal Law, Criminology, and Police Science 503. These studies highlight large agreement between the court and probation officer when the recommendation was for probation. For more current studies, see, C. Rush and J. Robertson, "Presentence Reports: The Utility of Information to the Sentencing Decision" (1987), 11 Law and Human Behavior 147; J.B. Stinchcomb, and D. Hippensteel, "Presentence Investigation Reports: A Relevant Justice Model Tool Or a Medical Model Relic?" (2001), 12 Criminal Justice Policy Review, 164; J.H. Griggs, "Targeting Risk-Related Needs in the Presentence Investigation Report to Improve Offender Community Reentry" (2004), 16 Federal Sentencing Reporter 188; J. Phoenix, "Pre-Sentence Reports, Magisterial Discourse and Agency in the Youth Courts in England and Wales. (2010), 12(3) Punishment & Society 348.

causal influence of PSR's and judicial sentences.²⁰ Equally important, Bonta and his colleagues found the judiciary was satisfied with PSRs 87.4% of the time and 95.2% favoured the inclusion of treatment recommendations.²¹ As well, Norman and Wadman, in a random sample of 101 PSR's, found near universal (92%) judicial alignment with probation officer's recommendations.²² Rush and Robertson's hypothetical study also reported that judicial decisions were influenced by the probation officer's recommendations. In their study, judges were given five sections of a PSR in random order and were asked to provide sentencing decisions after having read each of the five sections. This allowed for the assessment of whether new information changed or confirmed what the judges already decided. In 77% of the cases, judicial decision making aligned with the probation officers' recommendations. Of particular interest, in approximately half (51%) of the agreed upon cases, judges indicated a different sentence prior to reading the section pertaining to the probation officer's recommendations.²³ In effect, the judges changed their initial decisions and adopted the probation officers' sentencing recommendations.

Somewhat surprising, this research has stimulated a policy and theory debate. Critics of the close alignment of PSRs and judicial sentencing maintain, as a result, that some judges, "lean on them too heavily, and routinely sentence in accordance with the recommendations contained in the reports," concluding in many cases, it may have been the probation officer who was, "really the person determining the sentence."²⁴ Cohen, for example, argued that the recommendation section of PSRs be removed because, "it promotes the possibility of a confrontation between the officer and the court, which can either accept or reject the recommendation . . . The judge would feel free of being

²⁰ K. Hannah-Moffat and P. Maurutto "Youth Risk/Need Assessment: An Overview of Issues and Practices" (Ottawa: Department of Justice Canada, Research and Statistics Division, 2004); K. Hannah-Moffat and P. Maurutto, " Re-contextualizing Pre-Sentence Reports: Risk and Race" (2010), 12 Punishment & Society 262.

²¹ J. Bonta, G. Bourgon, R. Jesseman, and A. K. Yessine, "Presentence Reports in Canada" Ottawa : Public Safety and Emergency Preparedness Canada (User Report 2005-03).

²² M. Norman and R. Wadman, "Probation Department Recommendations in Two Utah Counties" (2000), 64(2) Federal Probation 47.

²³ C. Rush and J. Robertson, *supra*, footnote 19.

²⁴ N.G. Holten and L.L. Lamar, *The Criminal Courts: Structures, Personnel, and Processes*. (New York: McGraw-Hill, 1991), pp. 308-309.

directed by the probation officer and would make the decision in accordance with his perception of the role as judge.”²⁵ Walsh also questioned the heavy reliance on probation officer recommendations claiming that, “probation officers are the source of disparate sentences rather than judicial disparity being the source of disparate recommendations.”²⁶

Other studies have hypothesized that elements related to personality congruence between probation officers and judges and probation officer PSR writing styles are responsible for acceptance or rejection of the PSR by judges. In an early Canadian study, Gabor and Jayewardene found judicial attitudes, susceptibility to persuasion, and the degree of familiarity between the probation officer and the judge – a factor influencing the respect and regard the judge has for the probation officer including how the probation officer wrote the report – were critical factors in whether a PSR was accepted or ignored at sentencing.²⁷ In 156 cases assessed, only 43% of probation officer recommendations were followed. Of the cases where the recommendations were not followed, 60% of judges imposed a more severe sentence than recommended in the PSR. This near four decade old study, however, was one of the few that did not report overwhelming correspondence between PSRs and sentences.

Carter and Wilkins suggested three hypotheses to explain the typically high level of agreement between the probation officer recommendation and judicial sentencing decision. First, probation officers likely anticipate the judge’s decision and react accordingly. Second, similar decisions may simply represent the obvious choice of sentence for the offender (e.g. the most apparent sentence for a serious violent offender with a lengthy prior record would be incarceration). Third, probation officers employ the same criteria as judges when deciding the appropriate recommendation.²⁸ The latter hypothesis is particularly important in certain countries e.g. Canada and England, where

²⁵ Y. Cohen, "Recommended: No Recommendation" (1984), 48(3) Federal Probation, at pp. 70-71.

²⁶ A. Walsh, "The Role of the Probation Officer in the Sentencing Process: Independent Professional or Judicial Hack?" (1985), 12 Criminal Justice and Behavior, at p. 291.

²⁷ T. Gabor and C.H.S. Jayewardene, "Pre-sentence Report As a Persuasive Communication" (1978), 20(1) Canadian Journal of Criminology 18.

²⁸ R.M. Carter and L.T. Wilkins, *supra*, footnote 19.

youth criminal justice laws have highly structured and prescriptive sentencing guidelines. In effect, probation officers and judges both have limited discretion under these types of laws.

Most theoretical perspectives and research on the efficacy of PSRs in sentencing have focused on judges and probation officers and far less so with either defense counsel or prosecutors. Yet the latter two youth justice officials can and often do have essential roles in terms of what is included in certain parts of the PSR and in “speaking to sentence” in Canada (i.e. stating their preferred sentences to the judge). More specifically, prosecutors have articulated the significance of the reports legal facts including the offenders’ response about the offence, any prior criminal history and the sentencing recommendations while disregarding social circumstances as immaterial. In contrast, defense counsel utilize the PSR background history of offenders and their own observations of the defendant to explain why a more mitigated sentence is appropriate and justified from a focal point theoretical perspective.²⁹ In other words, there are several key stakeholders beyond the probation officers who affect how PSRs are used during sentencing.

6.4. PSR Recommendations

The majority of a pre-sentence report is factual and includes a chronological history of the young person’s development and current circumstances, however, the evaluative/summary section consists of the more subjective synthesis of the probation officer’s observations along with the most critical component, the sentencing recommendations. The sentencing recommendations are used in this study to test the hypothesis that there is a strong agreement between probation officers’ recommendations and judicial sentencing decisions.

²⁹ B.B. Weintraub, "The Role of Defense Counsel at Sentencing" (1987), 51 Federal Probation 25; R. Kingsnorth, D. Cummings, J. Lopez, and J. Wentworth, J, "Criminal Sentencing and The Court Probation Office: The Myth of Individualized Justice Revisited" (1999), 20 The Justice System Journal 255; G.W. Carman and T. Harutunian, "Fairness at the Time of Sentencing: The Accuracy of the Presentence Report" (2004), 78 St. John's Law Review 1.

Section 40(2) *YCJA* outlines the types of information to be provided in a pre-sentence report. Section 40(2)(f) establishes the provincial director has the discretion to determine the contents of the report including any suitable recommendations.³⁰ In British Columbia, the Youth Justice Policy and Program Support Division of the Ministry of Children and Family Development provide the YPOs with an extensive community youth justice operations manual that outlines in specific detail what is required in a PSR for young persons.³¹ The individual YPO, nonetheless, has some latitude regarding the writing style and form of the report, as long as the operations manual sections are addressed. Most importantly, the summary and sentencing options section must provide an accurate synopsis of the report and not contain new information that was not written in a previous section. The youth probation officer is also bound by the 38 and 39 *YCJA* sections' sentencing principles; in particular, a custodial sentence cannot be recommended if the criteria in section 39 are not satisfied. Also, if the criteria for custody are met, YPO's must include alternatives to custodial sentences in the summary section as mandated by section 39(2) *YCJA*.³² Because the summary and sentencing options section are considered the most important section of the report by practitioners, it is often the first section lawyers and judges read. Consequently, YPOs typically follow the expected legal and policy requirements of the highly complex *YCJA*.

Similarly, YPOs refer to Section 42(2) *YCJA* when providing sentencing options in the summary section of the PSR (see appendix A for complete list of youth sentences). This section allows for the imposition of a single sentence or multiple

³⁰ Section 40(2)(f) *YCJA* reads, "any information that the provincial director considers relevant, including any recommendation that the provincial director considers appropriate."

³¹ Section F, Article 3.04 of the MCFD Community Youth Justice Programs Manual of Operations outlines the following areas of investigation for PSR's: social history pertaining to the youth and family, education and employment history, leisure activities and peer associates, physical and mental health, substance use, offence history, response to previous youth justice services, attitude toward current offence(s), victim and community information and a summary and sentencing options section.

³² Section 39(2) *YCJA*: ". . .a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38."

sanctions that are not in conflict with one another.³³ For example, YPOs can recommend both a community sanction such as restitution and a probation order. It is also common for YPOs to recommend a period of probation to allow a longer period of community supervision after the supervision in the community portion of the custodial sentence has expired. Section 42(2) YCJA is examined in the current study because YPOs were allowed to select more than one option when deciding what sentence(s) they would recommend for each of the five case studies.

6.5. Methods

As mentioned above, this study examines both the relationship between certain legal and extralegal variables and youth probation officers' hypothetical recommendations and the relationship between these hypothetical sentencing recommendations and the actual judges' sentencing decisions in the five cases. The study data involved information from 147 YPOs who read five separate case studies (summarized in Table 4). The YPOs were asked to select the appropriate sentencing options they would have recommended to the court in their pre-sentence reports (see Appendix A). The YPOs were also asked to check off which factors they considered when making their recommendation(s) to the court (see Appendix B). The twenty-six factors are a combination of sentencing principles (e.g. proportionality, degree of responsibility, youth is aboriginal, time spent on remand, criminal history) stipulated in Section 38(2)&(3) YCJA as well as a number of youth justice policy considerations that YPOs must investigate when preparing PSR's (e.g. alcohol and drug history, peer associates, victim and/or community reparation). The twenty-six factors were subsequently grouped according to the three focal concerns of blameworthiness, community protection and practical constraints (see Table 6).

³³ Section 42(2) YCJA states: "... the court shall ... impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder ... the court shall impose a sanction set out in paragraph (q) or (r)(ii)(iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate."

Table 4. Summary of Five Case Studies

	Case 1 – Kara	Case 2 – Carlos	Case 3 – Edward	Case 4 – Andy	Case 5 – Amir
Offence	Assault Uttering Threats	Robbery/w/ mask Breach of Probation	Sexual Interference	Aggravated Assault	Criminal Negligence Causing Death Impaired Driving/Death
Age	15 years	16 years	17 years	17 years	17 years
Family Background	Alcoholic, violent parents Victim of severe abuse/neglect In care since age 5	Born in Honduras Immigrated to Canada when Carlos was 6 Father committed suicide in presence of wife and oldest daughter Mother did not speak for 7 months Carlos and older sister took on parenting role of two youngest siblings	Born/raised in mid-size city in B.C. Youngest of two sons. Overbearing/controlling mother Extreme boundary violations by mother Older brother left home at 17 to escape mother Edward copes by using Alcohol and drugs	Aboriginal Alcoholic, violent father Mother left and commenced new relationship – father stopped drinking when she left. Father/son relationship improved Father diagnosed with cancer and died a year later	Born in Tehran, Iran Immigrated to B.C. in 1999 Privileged background Now 20 years old - difficult time adjusting to Canada – misses Iran Father bought Amir a car to compensate for his son wanting to return to Iran.
Education	Limited cognitive abilities Home schooled since grade 2 due to aggressive behaviour	Grade 9 education Stopped attending school when father died Was an A+ student Taking Grade 10 classes in custody	Grade 9/10 modified program Skips class weekly Poor problem solving Negative peer group - follower	Grade 11 Left school - completed a youth employment program Attends Aboriginal Youth Centre Interested in becoming an electrician	Grade 11 education Suspended from school in Grade 12 – poor attendance & minimal effort – partly due to language/cultural difficulties Did not return to school after accident
Mental Health	Multiple diagnosis: ADHD, ODD, Conduct Disorder, PTSD & Attachment Disorder; Self harm High risk for aggression	Carlos has not attended counseling to address the loss of his father.	Previously attended sex offender treatment program – was assessed at high risk to re-offend	Youth Forensic Psych. Assessment – no history of violent acting out behaviour Risk factors: A/D Acting out grief of father dying	No prior involvement

	Case 1 – Kara	Case 2 – Carlos	Case 3 – Edward	Case 4 – Andy	Case 5 - Amir
Court History	Assault X 8	Theft, PSP, attempted robbery, breaches, UAL, concealed weapon, obstruction	Sexual assault, Theft under Breach of Probation	Breach of Undertaking	No prior record 2 excessive speeding tickets before accident
Response to Previous Youth Justice Services	8 assault charges from physical confrontations with staff at treatment centre over a 4 month period.	Poor performance No indicators of change Not interested in talking to PO about father's suicide	Reported weekly but remained guarded. Present offence started disclosing issues about mother's erratic behaviour.	Breached curfew twice – remanded	Bail for two years pending outcome of court proceedings
Attitude Towards Offence	Offence stems from Kara being physically restrained by staff when refusing to go to bed. Kara understands what she did was wrong but her behaviour is out of despair & institutionalization	Gang initiated robbery Worried about gang retaliation 8 weeks remand	No remorse Minimized his behaviour Says he needs help with A/D and not sexual offending	Alcohol involved Feeling angry about father dying Initially thought he was being robbed Very remorseful	Denies being the driver in a high speed street race Takes no responsibility for accident – insists victim was driving. Had 4 drinks on night in question
Victim Impact	Male staff suffered 5 inch scratch on cheek – slight scar	Victim very traumatized Wants to quit job but would impact employment insurance. Only working day shift	12 year old girl Never responded to letters and telephone calls from YPO	Severe head injury Unconscious, broken nose, broken rib, punctured lung, liver damage Plastic/facial surgery Limited speech Impaired cognition Unable to swallow solid food – not expected to improve Dependent living	Victim's family devastated Tension in Iranian community

6.6. Results

In order to simplify the presentation of the YPO data, values lower than 50% are not shown. Table 5 compares the YPO sentencing recommendations with the actual decision made by the sentencing judge. In the first case of Kara, the YPOs and judge agreed with a community sentence but the type of sanction was different. One week after the *YCJA* came into force in April 2003, Judge Lynch in *R. v. D.(K.)*³⁴ imposed a reprimand³⁵ in this case which is the mildest sanction that can be given to a youth in response to a finding of guilt. A reprimand – a new sentencing option in the *YCJA* - is generally appropriate for the least serious of offences, and, in Kara's situation, reflected Judge Lynch's disappointment with the health care professionals who had mismanaged her overall care by continuing to have had her criminally charged:

The purpose of sentencing under the Youth Criminal Justice Act is not to make her transition to the community easier because she has been institutionalized by the placement of the Department of Community Services. That is not the purpose of the sentence that I am supposed to impose today. I am not supposed to impose a sentence as an appropriate and consistent reminder of societal expectations, especially when they have described her responsibility as a diminished responsibility . . . She has acknowledged the wrongness of her actions. I also have to be careful with regard to accountability because the sentence is supposed to give meaningful consequences to her and I have to be mindful of the cognitive limits.³⁶

³⁴ *R. v. D.(K.)* [2003] N.S.J. No. 165 (QL).

³⁵ A judicial reprimand and an absolute discharge are the two least intrusive sentences. A reprimand and an absolute discharge both amount to no further action after court - there is no paperwork to sign, no conditions to follow, no court order. Both are essentially a discussion between the judge and the young person about the offence with the expectation the youth will not offend again. A reprimand is less onerous than even an absolute discharge, as the record of a reprimand can only be referred to for two months after the young person was found guilty. The record of an absolute discharge can be referred to for one year after the young person was found guilty. In British Columbia, reprimands are used quite sparingly with the most reprimands being given during the initial two years of the *YCJA*.

2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
98	72	55	61	57	47	65	49	50	9

Data Source: Nerina Holderness, Youth Justice Systems Analyst, Youth Justice Policy and Program Support, MCFD, November 12, 2012.

³⁶ *R. v. D. (K.)*, [2003] N.S.J. No. 165 (N.S. S.C. (Fam.D.)), at paras.12 and 18.

Although the YPOs in this case selected probation and/or ISSP as sentencing options, Judge Lynch declined all similar suggestions by Crown, the psychiatrist and probation officer for probation and community work service sanctions. Judge Lynch explained these requests were nothing more than, “a hammer over her head to ensure that she is going to be more compliant in her placement. That is not something that I am willing to do and not what I see my role under the YCJA.” Kara’s case exemplifies those youth who have been in the care of social services the majority of their lives as a result of serious traumatic histories and suffer from a mental health disability. An all too common scenario occurs with adolescents similar to Kara who are institutionalized and staff attempt to physically restrain the young person which results in the youth assaulting staff. Staff then become frustrated believing there is no other effective alternative but to press criminal charges against the young person hoping the youth justice system will provide a meaningful consequence in order to curb the assaultive behaviour.³⁷ Judge Lynch’s sentence was a purposeful and deliberate message that under the YCJA, this option is no longer available to staff responsible for caring and controlling young offenders with serious social and mental health issues.

Despite this study being conducted ten months after the YCJA came into effect, three-quarters of the YPO’s recommended a conference³⁸ as an appropriate option for Kara. Conferencing is a relatively novel and new advisory provision in the Act. It would have provided an opportunity for Kara to apologize for her behaviour and also would have given the victim and other staff an opportunity to discuss different approaches with

³⁷ See, for example, R. v. C. (C.), [2004] O.J. No. 3885 (Ct J.); R. v. M. (S.), [2006] O.J. No. 2486 (Ct. J.); Judge Katarynych’s response when dismissing a charge against a youth for grabbing a group home staff’s wrist for approximately five seconds clearly highlights this message: “I doubt very much that Parliament intended to have Canada’s criminal law brought to bear on a youth in the circumstances displayed by this incident. The law rightly does not concern itself with the sort of triviality displayed by this incident. It is a waste of police, prosecutorial and court resources. It also makes the law, if applied literally and without regard to context, look like the proverbial ass. Invocation of the criminal law is serious business. It is not a child management tool for childcare workers. The de minimis principle allows a judge faced with triviality such as that displayed by this incident to remind those in charge of foster children that the law does not concern itself with triviality.” see, R. v. K. (D.), [2007] O.J. No. 1200 (Ct. J.).

³⁸ Section 41 YCJA states: “When a youth justice court finds a young person guilty of an offence the court may convene or cause to be convened a conference under section 19 for recommendations to the court on an appropriate youth sentence.”

Kara to mitigate future assaultive behaviour. Also, because Kara had eight prior convictions over a four month period and under similar circumstances which resulted in community work service dispositions, the YPOs hypothetical conferencing suggestion could be considered an alternative means of responding to certain types of less serious youth offending behaviour.

Table 5. Comparison of YPO and Judicial Sentencing Options

Options	Case 1 (Kara)		Case 2 (Carlos)		Case 3 (Edward)		Case 4 (Andy)		Case 5 (Amir)	
	YPO	Judge	YPO	Judge	YPO	Judge	YPO	Judge	YPO	Judge
Conference	76.0%		53.0%	✓			53.5%			
Reprimand		✓								
Driving or Weapon Prohibition								✓		✓
Probation	68.7%		66.2%	✓	72.2%		72.8%	✓	63.1%	
ISSP	54.7%		80.1%		85.3%		66.7%			✓
Custody & Supervision in Community			80.8%	✓	54.7%		71.4%		68.5%	✓
DCSO						✓		✓		

Note: Although there were 19 sentencing options to choose from, this table only reflects what options were actually selected by the YPO's and sentencing judge. See Appendix A for entire list of sentencing options. A checkmark ✓ is used to denote the actual sentence given by the judge in each case.

As is evident in Table 6, the factors that affected the YPO recommendations and final judicial sentencing decision are almost identical. Kara's family background, mental health history and special needs are rated the highest by the YPO's and also deemed important by Judge Lynch. The YPO's conferencing suggestion and Judge Lynch's reprimand reflect an attempt to utilize the new provisions in the YCJA to respond to Kara's minor offence. Again, the added complexity with Kara's case is that most traditional sentences would have had very little impact on decreasing her violent behaviour because of her poor cognitive and coping abilities. Kara's diminished capacity

was certainly acknowledged by Judge Lynch when commenting, “I have to respect the special requirements that she brings with her to the Court.”³⁹

In the second case of Carlos, there is also considerable agreement between the YPO’s suggestions and final sentencing decision. Well over three-quarters of the YPOs believe a custodial sentence is appropriate followed by either probation or an intensive support and supervision program (ISSP) order in the community. As evident in Table 6, several legal and extralegal variables are significantly related to a recommendation for custody. YPOs chose 4 of the 5 factors related to blameworthiness and 7 out of 11 community protection variables were selected over 85% of the time indicating the YPOs seriously considered the nature of the offence, Carlos’ poor youth justice response, the gang influence and how the crime continued to affect the victim. Although the YPOs viewed Carlos as responsible and accountable for the offence and his concern for the victim, they still perceived his involvement in the current offence and his criminal history as central in their decision making.

While only half of the YPOs suggested a conference, the actual sentence given by Judge Whelan in *R. v. S.(B.R.)*⁴⁰ utilized a sentencing conference with the lawyers, young person, parent, YPO and addictions counsellor to determine the most appropriate sanction. Although the young offender met the criteria for custody, the judge heard from the lawyers and YPO that no reasonable alternative to custody was appropriate in this case, and, therefore the only issues were the level and amount of custody while taking into account the eight weeks spent on remand. Judge Whelan was explicitly cognizant of the gang influence on adolescents when fashioning her sentence:

Gangs would not attract young persons and thrive but for the life circumstances experienced by the disadvantaged and vulnerable young persons. When B.R.S. became vulnerable he was drawn to the life that a gang offered . . . As B.R.S.’s mother said, “The gang is more powerful than her or the justice system because it metes out discipline immediately.” . . . I do not consider the link to gang activity in this case to

³⁹ *R. v. D. (K.)*, *supra*, footnote 36, at para.18.

⁴⁰ *R. v. S. (B.R.)* [2003] S.J. No. 357 (Q.L.).

Table 6. Factors Considered by YPO's and Sentencing Judge

Factors	Case 1 (Kara)		Case 2 (Carlos)		Case 3 (Edward)		Case 4 (Andy)		Case 5 (Amir)	
	YPO	Judge	YPO	Judge	YPO	Judge	YPO	Judge	YPO	Judge
Blameworthiness										
Proportionality	77.0%	✓	94.7%	✓	88.8%	✓	90.2%	✓	95.4%	✓
Offence is Violent	71.7%		91.4%			✓	99.3%	✓	54.3%	✓
Prior Record	80.9%	✓	97.4%	✓	95.4%	✓	82.4%		60.3%	✓
Degree of Participation			94.7%	✓	80.9%		84.3%		74.8%	✓
No Remorse				✓	97.4%	✓			86.1%	✓
Community Protection										
Family Background	89.5%	✓	90.8%	✓	87.5%		94.1%	✓	67.5%	✓
Education History			59.9%				53.6%	✓		✓
Employment History								✓		
Alcohol & Drug History of Youth			86.8%	✓	74.3%		92.2%	✓	80.8%	✓
Peer Associations			90.1%	✓		✓	55.6%			
Response to Previous YJ Services	80.3%	✓	96.7%	✓	86.3%	✓	66.7%			
Failure to Comply with Community Sentence(s)			91.4%		52.0%					
Victim Impact	67.1%	✓	90.8%	✓		✓	95.4%	✓	79.5%	✓
Impact on Victim's Family			55.3%				64.1%	✓	97.4%	✓
Public Protection			84.9%		89.5%		60.1%		66.9%	
Deterrence		☒	64.5%	☒	50.7%		54.9%	☒	74.2%	☒
Practical Constraints and Consequences										
Accountable & Responsible	66.4%	✓	87.5%				89.5%	✓		
Acknowledges Harm to Victim	75.7%	✓	80.9%				97.4%	✓		
Acknowledges Harm to Community										
Best Interest/Needs of Young Person	92.8%	✓	82.2%		67.8%					
Youth is Aboriginal							77.1%	✓		
Youth's Physical & Mental Health History	96.7%	✓	52.0%		87.5%	✓	77.2%			
Mental Health History of Family Members						✓				
Victim Reparation				✓						
Remand Custody			74.3%	✓				✓		
Sentence not greater than adult sentence			53.3%	✓				✓		✓

Note. A checkmark (✓) indicates what factors were deemed important by the judge in the sentencing decision. An "☒" indicates the judge commented or ruled against deterrence being a principle in sentencing youth under the YCJA.

be aggravating. Rather it represents the vulnerability of this youth and the need to address the underlying causes for his being drawn to associate with an anti-social group. He has taken the important step of disassociating himself from the gang.⁴¹

A ten-month open custody followed by six months' probation sentence was given by Judge Whelan which closely aligned with the recommendations offered by the YPO's.

Case three involved Edward who had committed a sexual offence. Unlike the previous cases, there were substantially different responses by the YPOs and sentencing judge yet both decisions kept the young person in the community. Specifically, 85% of the YPOs recommended an intensive support and supervision program order (ISSP) as a viable community option, and 72% also suggested probation whereas only half of the YPOs selected custody. The ISSP order⁴² is a new sentencing option under the YCJA and is considered an elevated form of probation. However, in British Columbia, ISSP essentially predates the YCJA; as one to one workers (historically called DARE workers) have provided supplementary rehabilitative support to probation officers for nearly forty years. It has been asserted that intensive support and supervision programs can be an effective and efficient way to provide an intermediate sanction between probation and incarceration.⁴³ ISSP services allow youth who are at a higher risk of criminal behaviour to remain in their home communities, with their families and caregivers. ISSP is intended to complement the case supervision provided by the youth probation officer. In British Columbia, the Ministry of Children and Family Development provide specific training to designated ISSP workers whose services include developing one on one relationships with the youth, connecting them to appropriate community resources (e.g. school placements, employment, counselling) and provide additional monitoring of court orders such as curfew checks or escorting a

⁴¹ *Ibid* at paras. 17, 20 and 28.

⁴² Section 42(2)(l) YCJA allows the youth justice court to order an intensive support and supervision program order if the provincial director has determined a program exists to enforce the order.

⁴³ See, MCFD Community Youth Justice Programs Manual of Operations, Section G, Article 9.03.

youth to appointments or programs.⁴⁴ Given the high percentage of blameworthy and public protection factors selected by the YPOs, the ISSP recommendation appears to confirm the focal concern of having Edward remain in the community with elevated supervision and additional supports not ordinarily offered by standard probation orders.

Judge Lipton was the sentencing judge in this case in, *R. v. A. (E.S.)*,⁴⁵ and determined the offence was inherently violent, and, therefore, met one of the key criteria for custody. This case was complicated further not only because this young offender had a previous conviction for sexual assault and had received sex offender therapy for the past two years, but he was also still considered to be at high risk to commit additional sexual offences according to a psychiatric report. Equally important, this young offender agreed with the psychiatric assessment and that he should not remain in the community. According to the focal concern of blameworthiness, Judge Lipton was averse to impose a community sentence for the following reasons:

I have reluctantly come to the conclusion that a non-custodial sentence such as an intensive supervision and support order would not provide an alternative to custody that ensures the young person receives the necessary counselling and therapy so as to effectively rehabilitate him and ensure his reintegration into society. The previous attempts to rehabilitate the young person in a non-custodial setting did not work and the likelihood of reoffending is high.⁴⁶

Justice Lipton sentenced the youth to a six month deferred custody and supervision order (DCSO), one of the new sentencing options available under the YCJA:

One of the features that makes this sentence palatable under the circumstances is that it allows the young person to stay out of custody if he complies with the terms of the DCSO. It is available in this case because the offence has been labelled as a “violent offence” and not a

⁴⁴ For an in depth description of the ISSP services offered in British Columbia, see Guidelines for Intensive Support and Supervision Programs, Section O, MCFD Community Youth Justice Programs Manual of Operations.

⁴⁵ *R. v. A. (E.S.)*, [2003] A.J. No. 571 (QL).

⁴⁶ *Ibid* at para 34.

“serious violent offence.” . . . it is my opinion this form of sentence affords the young person the ability to rehabilitate himself outside of custody.⁴⁷

A DCSO is essentially a custodial sentence served in the community with custody only becoming an option if the youth breaches or is about to breach the order. While somewhat similar to the conditional sentence orders for adults there are definitive legislative differences between the *Criminal Code* and *YCJA* provisions that govern conditional sentences and DCSO's. In particular, the maximum DCSO is only six months compared to two years for an adult conditional sentence order. Adults can receive a conditional sentence for some serious violent offences,⁴⁸ but a DCSO is not an option if a youth commits an offence that causes or attempts to cause serious bodily harm.⁴⁹ The result could be a custodial sentence for the youth while the adult serves time in the community, which is contrary to the youth sentencing principle that states a youth sentence cannot be greater than what an adult would receive if convicted of the same offence under similar circumstances.⁵⁰

In Edwards's case, the YPOs and the sentencing judge used options that are new to the *YCJA*. The YPOs were suggesting ISSP as an alternative to probation in order to have Edward remain in the community by elevating the level of supervision and

⁴⁷ *Ibid*, at para. 35.

⁴⁸ Amendments to the *Criminal Code* in 2007 and 2012 preclude conditional sentence orders for specific types of offences such as serious personal injury, terrorism and organized crime, thereby reducing the number of adults who would otherwise qualify for a conditional sentence.

⁴⁹ Bill C-10 amendments changed the eligibility criteria for a DCSO. Section 42(5) states: the court may make a deferred custody and supervision order . . . if (a) the young person is found guilty of an offence other than one in the commission of which a young person causes or attempts to cause serious bodily harm.

⁵⁰ A judge in British Columbia Provincial Court held that precluding a DCSO for a serious violent offence and limiting the period to six months violated Section 15 of the *Charter* because they discriminate against youth. This decision was overturned by the BC Court of Appeal which acknowledged the DCSO as more restrictive than the adult conditional sentence but was not a violation of human dignity nor discriminatory. The Appellate Court focused on the entire Act with its emphasis on rehabilitation and limited accountability when cautioning against, “artificially isolating a single provision from a comprehensive criminal justice regime intended to benefit youth and thereby finding a constitutional violation. It is necessary to broadly compare the two sentencing regimes to determine whether, under the Act, there is correspondence with the needs and circumstances of the youth”. *R. v. M. (J.S.)* [2005] B.C.J. No. 1831 at para. 31 (C.A.).

services required to help him. Comparable to the YPOs, the judge was also looking at a means to have Edward remain in the community by using a much stricter and more punitive sentence such as a DCSO, yet provide him with the same supports and services that would be offered by a community sanction. In other words, while the YPO options and final sentencing decision differed, both decisions provided Edward with virtually equivalent services in the community.

This next case involves an Aboriginal youth convicted of a very serious aggravated assault. The case of Andy allows for an example of Canada's key race youth justice theme. As shown in Table 5, the YPOs and judge agree on custody being part of the sentencing process, however, it is the type of custody imposed that is different. Close to three-quarters of the YPOs recommended a custody and supervision in the community sentence with probation (73%) or ISSP (67%) also being included in the sentencing scheme. A significant number of factors from all three focal concerns were engaged in the YPOs decision making. In particular, 99% selected the offence as being violent and a similarly high percentage of YPOs focused on the victim impact (95%) and Andy's acknowledgement of harm to the victim (97%) as being important factors in deciding what sentence to recommend. This case exemplifies a diverse approach with respect to sentencing as the YPOs selected a number of factors from all three focal concerns suggesting legal (e.g. offence type, severity, prior record) and extralegal variables (family background, substance use, mental health history, accountability and responsibility) strongly influenced the YPO's recommendations. Even though three-quarters of the YPO's found Andy's Aboriginal heritage as important, it was not as critical a factor than those related to the nature of the offence and harm done to the victim.

Nonetheless, Judge Swail in *R. v. M. (H.A.)*,⁵¹ pointed out there were no representations made to the Court highlighting the matter involved an Aboriginal youth who had been subject to some of the disadvantages of being raised as an Aboriginal in a poor urban area and to take this into account when crafting a sentence.⁵² As aforementioned in previous chapters, Aboriginal youth in Canada are significantly over

⁵¹ *R. v. M.(H.A.)*, [2003] M.J. No. 147 (Q.L.).

⁵² *Ibid*, at para. 53.

represented in the youth custody system. Original drafters of the YCJA clearly took into consideration the unique constitutional, social and legal status concerns of Aboriginal youth by specifically referencing this in the overarching Declaration of Principle and in the sentencing principles found in section 38(2)(d).⁵³

Based on the categorization of Judge Swail's reasoning presented in Table 6, factors associated with community protection and practical constraints including Andy being Aboriginal were important in the sentencing decision. Specifically, Andy's family circumstances regarding the death of his father, his heavy alcohol consumption at the time of the offence and his future goals of school and employment in addition to immediately taking responsibility for his offending behaviour and repeated concerns for the victim as well as time spent on remand supported the judge's decision to keep him in the community. Judge Swail considered the offence to be violent rather than a serious violent offence which allowed for a six month deferred custody and supervision order (three month remand credit) followed by eighteen months' probation, a weapons prohibition and a DNA order.

Again the YPOs and sentencing judge were overwhelmingly parallel in their decision making criteria regarding custody followed by a community based order, however; in this case, it was the type of custody that differed. Surprisingly, the issue of Andy being Aboriginal was not a paramount sentencing consideration by either the YPOs or those Court professionals, including the judge. It could be inferred that a non-custodial sentence was not proportional to both the offence and the ensuing permanent debilitating injuries suffered by the victim, and, therefore balancing rehabilitation of the young person with public protection through a custodial sentence was viewed as a more appropriate sanction.

The final case of Amir, a seventeen year old with no criminal record who was found guilty of criminal negligence causing death and impaired driving causing death

⁵³ Section 3(1)(b)(iv) states, "respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements." Section 38(2)(d) states: 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 person's".

elicited a varied response by the YPOs. In other words, no definitive recommendation dominated as the YPOs selected both custody and supervision in the community (69%) and probation (63%). The blameworthiness and public protection focal concerns were preeminent in this case while any mitigating factors were completely dismissed, assumedly because Amir continued to deny his responsibility for the car accident that killed his friend. The impact on the victim's family (97%) was the dominant factor selected by the YPOs followed by proportionality (95%) and no remorse (86%).

The YPOs focus on blameworthiness and public protection were echoed by Judge Moss in *R. v. S. S.*⁵⁴

Remorse is, at best, a neutral consideration in this sentencing process as S. continues to deny being the driver when his BMW went out of control and crashed. He is within his legal rights to do so despite the ongoing grief this gives the Y. family. Accordingly, an assumption of responsibility by the offender is not present as a factor in mitigation of sentence.⁵⁵

Similar to the YPOs acknowledgement of substance use (81%), Judge Moss also found that alcohol intoxication at the time of the offence was a seriously aggravating factor. However, Judge Moss mentioned Amir's privileged family upbringing and the complete lack of supervision as mitigating factors, "Parents who purchase high powered vehicles for their children must share some of the blame."⁵⁶

Other than ensuring the sentence given was not greater than an adult sentence, Judge Moss also discounted the focal concerns of practical constraints and consequences. Instead, the principal issue was the circumstances surrounding the offence, which is largely concentrated on blameworthiness:

There is no question that the criminally negligent driving of S. caused the death of P.Y. He was prepared to drink to the point of impairment and then involve himself in a dangerous high speed drag race on a major West Vancouver street with disastrous consequences. The judicial determination sought by the Crown that these offenses constitute a serious violent offence is granted. It is the only reasonable exercise to

⁵⁴ *R. v. S.S.* [2003] B.C.J. No. 2366 (QL).

⁵⁵ *Ibid*, at para. 8.

⁵⁶ *Ibid*, at para. 15.

the Court's discretion, given the reckless disregard for public safety involved.

Yet Judge Moss did consider the mitigating factor that Amir had no criminal record when sentencing him to a one year custody and supervision order with a specific request to have the four month supervision in the community portion subject to an ISSP order with strict conditions. A DNA order and ten year driving prohibition were also ordered.⁵⁷ This case clearly illustrated that the seriousness of the offence, and its tragic consequences as well as the absence of any responsibility as the primary issues for both the YPOs and sentencing judge when deciding an appropriate sentence.

6.7. Discussion

Across the five cases there was a moderate level of agreement between the YPO recommendations and the judicial sentences. When the judges deviated most frequently from YPOs it most often was in favor of a lighter sentence (e.g. Kara, Edward and Andy). It is possible judges in these types of cases that involved new *YCJA* sentencing options (e.g. reprimand, ISSP and DCSO) focused more than the YPOs on mitigating factors and a philosophy of keeping the young offender in the community rather than custody. As previously mentioned, the study took place not long after the *YCJA* came into force, thereby limiting the YPOs understanding of how judges would interpret and apply the new sentencing options for certain types of offences. In effect, such moderately serious cases like Kara and Edward tend to require the most subtleties in applying the wide range of often conflicting focal concerns embedded in the new sentencing options.

Not surprising though, given the assertion made in this thesis that the *YCJA*, even more than the *YOA*, is focused on Justice Model themes for moderate to serious offences, legal variables had a very strong influence on the recommendations made by the YPOs and the judges' sentences. In the Carlos and Amir cases, legal factors were

⁵⁷ The youth appealed his sentence, however the British Columbia Court of Appeal upheld the trial judges' sentence. See *R. v. S.S.* [2004] B.C.J. No. 320 (C.A.) (QL).

primary regarding the decisions to sentence the two youth to custody. This was consistent with the focal concerns perspective that suggests legal variables (offense type and severity, prior record) do influence the perception of blameworthiness and dangerousness. Proportionality, one of the legal factors associated with blameworthiness was rated highly by the YPOs and judges in all five cases. This likely reflects the effect of s. 38(2)(c) YCJA i.e. sentences must be proportionate to the seriousness of the offence and degree of responsibility of the young person. Arguably, this section represents an explicit shift to a more Justice model sentencing scheme for young offenders than under the previous YOA. A major criticism of the latter was that it was too lenient because it failed to specify when judges should utilize the proportionality and responsibility principles more and minimize best interest, intervention principles.

Given this change in principles, it was not surprising that extralegal variables such as gender, race and socio-economic status, did not appear influential for a youth to receive a harsher sentence. Specifically, for Kara, her gender was not as critical, however, her mental health extralegal factor was important in the YPOs decision making in this case. Similarly the sentencing judge also viewed her psychiatric care, well-being and institutional placement by social workers as more important than the actual offense. In Andy's case, race was an important factor for slightly more than three quarters (77%) of the YPOs yet it was not as salient as the nature of the offence and subsequent victim impact. As well, the sentencing judge noted the lawyers and YPO did not take into consideration that Andy was Aboriginal during the pre-sentence stage of the proceedings indicating the offence type (e.g. aggravated assault) superseded family and cultural ancestry. As mentioned above, this omission is somewhat surprising given the YCJA includes mandatory provisions regarding sentences for Aboriginal young offenders.

It was predicted that YPOs would utilize perceptual shorthand involving stereotypical extra-legal risk and need factors of young offenders in determining their sentencing recommendations in the PSRs, yet this construct did not appear to be evident in this study. Perhaps, the YCJA has fulfilled the intent of its legislative framers to avoid the ambiguity, vagueness, and somewhat contradictory sentencing principles of the YOA by setting forth explicit principles with accompanying detailed sections and subsections to more completely guide judges and YPOs in their decision-making.

Paradoxically, the length and complexity of the *YCJA* possibly has simplified the purpose and task of YPO PSRs and further enhanced the expected high correspondence with related judicial sentencing decisions for certain types of cases.⁵⁸ Yet, for the other more moderate offence cases, the decision-making patterns of YPOs did not necessarily align with the actual sentences given by the judges. For these case types, it is possible that judges and YPOs more frequently differed in terms of their focal concerns. In effect, while at the opposite extreme involving very serious offences, the *YCJA* is unambiguous regarding the focal concerns, while, for moderate offences, it is simply too difficult to make recommendations consistent with judicial sentences because the numerous factors interact in a complex web. This complex interaction includes substantial differences across (and even within provinces/territories) in administrative structures, processes and resources.

As stated above, a major limitation of the generalizability of these findings to the current relationship between YPO PSR recommendations and judges sentencing decisions in Canada is that this study was conducted during the first year the *YCJA* took effect. A replication study would likely result in more frequent agreements between the YPOs and judges for several reasons. For example, the novel sentence options such as the reprimand and DCSO are now common-place. As well, the alternative to custody program services provided by the provinces and territories are likely more available than originally offered during the Act's initial inception. Finally, the sentencing reforms introduced in the *YCJA* intended to reduce judicial disparity with prescriptive sentencing guidelines, particularly those involving custody, would be far better understood a decade later especially with the advantage of case law decisions to help interpret those provisions that have often created diverse sentencing views among the courts across Canada.

⁵⁸ J. Rosecrance, "The Probation Officers' Search for Credibility: Ball Park Recommendations" (1985), 31(4) *Crime and Delinquency* 539; J. Lin, J. Miller and M. Fukushima, "Juvenile Probation Officers' Dispositional Recommendations: Predictive Factors and Their Alignment with Predictors of Recidivism" (2008), 31(1) *Journal of Crime and Justice* 1.

Chapter 7. Conclusion

Canada's youth criminal justice system has historically been one of successive reform. From the creation of a formal youth justice system with the 1908 *Juvenile Delinquents Act* to the significant legal rights, uniform age jurisdiction and determinant sentencing introduced in the 1982 *Young Offenders Act*, each change brought significant improvements, yet continued to garner criticism politically and academically. When the federal Liberal government introduced the *YCJA* in 2003 to appease all facets of the political continuum on how to deal with young offenders, this law quickly met with similar criticism as its predecessors, even though, in the past ten years, it achieved what it intended to accomplish by reducing the over-reliance on the formal youth justice system by diverting non-serious offenders without an increase in reported youth crime and restricting the use of custody to serious and violent young offenders.

The central aim of this thesis was to explore the theoretical, political and policy implications of the *YCJA*. Firstly, this thesis illustrated that an exceptionally complex law such as the *YCJA* is better understood when applying theoretically established youth justice models (e.g. Welfare, Justice, Crime Control, Corporatist, and Modified Justice). Employing these models reduces the legislation to a set of characteristics and descriptors, essentially simplifying a multifaceted phenomenon. The *YCJA* is a continuation of Canada's youth justice story of incrementally moving along the theoretical continuum of a pure Welfare model under the *JDA* towards a Modified Justice model under the *YOA*. The *YCJA* has advanced the mixed model ideology by asserting the need for societal protection from violent crime, yet emphasizing principles of proportionality, reintegration, timely intervention and de-institutionalization for non-violent offences. Along with a separate and distinct sentencing criterion that provides prescriptive guidance to the courts, the *YCJA* exemplifies a contemporary law inclusive of elements from all the youth justice models.

A second critical theme in this thesis was showing how the *YCJA* mixed model law resulted in considerable confusion by youth justice decision makers because of the competing and inconsistent principles and objectives embedded in the Act. Judicial disparity was very apparent during the first few years of the *YCJA* as described in Chapter 3, requiring immeasurable involvement of appellate courts and the Supreme Court of Canada to help resolve and appropriately interpret specific sections of the Act in order to administer the law consistently across Canada. This has become common practice in Canada after introducing new national youth justice law to debate the principles and objectives of key concepts that guide our response to youth criminality. If the last decade is any indication, the *YCJA* mixed model experience will continue the legal, scholarly and political debate over how the various competing principles should be interpreted and applied.

Yet, the YPO theoretical decision-making study in Chapter 5 illustrated that the Modified Justice model was a progressive approach to cases typically faced in their youth justice roles. A mixed model orientation was consistently utilized by the YPO's in four of the five cases presented to them. The only case whereby the YPO's were divided was an example of a serious driving offence causing the death of another youth. While two-thirds suggested a Crime Control philosophy, approximately one-third selected a Modified Justice model approach indicating an unwillingness to be more punitive. This study established a YPO mixed model philosophy that supports divergent approaches to youth crime depending on the facts and background of each young offender which replicates the themes underlying the *YCJA*. Equally encouraging, in BC at least, is that the YPOs adapted very well to the *YCJA* thereby, rejecting the key hypothesis in this thesis, i.e., because the *YCJA* is such a complex law incorporating elements from most classic youth justice models, there would be considerable confusion at the YPO case level. Quite likely, this hypothesis was not supported because the positive impact of the extensive preparations that BC's Ministry of Children and Family Development engaged in regarding the YPOs understanding of the *YCJA*'s implementation was underestimated. In addition, it also appears likely that the over twenty year Modified Justice model experience in BC created a strongly defined YPO culture that facilitated the transition to the more complex *YCJA*.

Third, with youth incarceration rates for most jurisdictions significantly declining or at a historic national low,¹ it is hard to decide whether to adopt cautious optimism or remain cynical about the YCJA; in particular the recent Bill C-10 reforms which attempt to shift the Act to a more punitive, Crime Control model. As with most law reform efforts, particularly in the area of youth justice, the effect of the Bill C-10 Conservative initiative will depend more on judicial interpretation and provincial/territorial operationalization than political intent or philosophy. Although the Minister of Justice believes the omnibus crime bill which includes the Bill C-10 YCJA amendments will have a fundamental impact on crime in Canada, and insisting this is what the public wanted,² the actual effect of any legislative change on youth crime will likely be negligible given the juvenile justice systems already embedded within each province and territory. As Corrado³ established early on regarding the JDA and YOA, the provinces and territories implemented these laws in such fundamentally different ways that he categorized according to the above discussed models of youth justice. Most recently this perspective was extended to the Bill C-10 reforms of the YCJA, i.e., these reforms will largely be symbolic because several provinces/territories, notably BC and Québec, will resist a Crime Control model of sentencing.⁴ While this thesis did not discuss why the provinces/territories adopted different youth justice systems, there is little doubt, for example, according to scholars such as Québec's Professors Jean Trepanier and Marc Alain that Québec's youth justice laws have been deeply embedded in its distinctive cultural and political history. Similarly, during the last twenty-five years, BC has steadily implemented policies to reduce the number of young offenders in custody. This trend occurred independently of the political parties that formed the governments in this province. Going forward, even

¹ C. Munch, "Youth Correctional Statistics in Canada, 2010/2011", Juristat (Ottawa: Minister of Industry, 2012).

² See: "Q&A: Rob Nicholson Defends Omnibus Crime Bill," The Globe and Mail (18 March 2013), Online: <http://www.theglobeandmail.com/news/politics/qa-rob-nicholson-defends-omnibus-crime-bill/article9868674/>

³ R.R. Corrado, "Introduction" in R.R. Corrado, N. Bala, M. Leblanc & R. Linden, eds., *Juvenile Justice in Canada*. (Toronto: Butterworths, 1992).

⁴ R.R. Corrado, K. Gronsdahl, & A. Markwart, "Youth Justice System and Approaches in British Columbia," in M. Alain, R.R. Corrado, & S. Reid. eds., *Implementing and Working with the YCJA Across Canada: A View from the Ground*. (Toronto, ON: University of Toronto Press, final preparation).

with the impending BC provincial election in 2013 which corresponds with the tenth anniversary of the *YCJA*, there is little likelihood BC will shift its philosophical mixed model approach and direction when administering and operationalizing the federal *YCJA*.

7.1. Thesis Limitations

While the theoretical and policy themes in this thesis apply to other provinces/territories, the quantitative assessments of YPO adaptations to the *YCJA* do not. Because other key decision-makers were not interviewed (e.g. judges, lawyers, youth custody administrators), generalizations about youth justice in BC are necessarily limited to YPOs. Also, as mentioned in the methods chapter, had the results supported the hypothesis about *YCJA* complexity and YPO confusion, a limitation of this study is that the interviews took place a year after the Act's implementation. In effect, a more recent set of interviews would have been needed.

Appendices

Appendix A.

List of YPO Sentencing Options

Of the sentencing options listed below, which option(s) would you recommend to the court? (e.g. Custody & Probation or just a Fine or just an Absolute Discharge) (Please check ✓ No or Yes for each sentencing option).

	(1) No	(2) Yes
Court ordered Conference	<input type="checkbox"/>	<input type="checkbox"/>
Reprimand	<input type="checkbox"/>	<input type="checkbox"/>
Absolute Discharge	<input type="checkbox"/>	<input type="checkbox"/>
Conditional Discharge	<input type="checkbox"/>	<input type="checkbox"/>
Fine – Maximum \$1000	<input type="checkbox"/>	<input type="checkbox"/>
Compensation – refers to \$	<input type="checkbox"/>	<input type="checkbox"/>
Restitution – refers to property	<input type="checkbox"/>	<input type="checkbox"/>
Compensation to Innocent Purchaser	<input type="checkbox"/>	<input type="checkbox"/>
Compensation in Kind/Personal Service	<input type="checkbox"/>	<input type="checkbox"/>
Community Work Service	<input type="checkbox"/>	<input type="checkbox"/>
Prohibition, seizure or forfeiture	<input type="checkbox"/>	<input type="checkbox"/>
Probation	<input type="checkbox"/>	<input type="checkbox"/>
ISSP	<input type="checkbox"/>	<input type="checkbox"/>
Custody & Supervision in the Community Order	<input type="checkbox"/>	<input type="checkbox"/>
Custody and Conditional Supervision Order for Presumptive Offences of attempted murder, manslaughter and aggravated sexual assault	<input type="checkbox"/>	<input type="checkbox"/>
Deferred Custody and Supervision Order	<input type="checkbox"/>	<input type="checkbox"/>
Custody and Conditional Supervision for 1 st & 2 nd degree murder	<input type="checkbox"/>	<input type="checkbox"/>
IRCS – Intensive Rehabilitative Custody and Supervision	<input type="checkbox"/>	<input type="checkbox"/>
Receive an Adult Sentence	<input type="checkbox"/>	<input type="checkbox"/>

Appendix B

Sentencing Factors

What factors did you consider when making your recommendation? (Check ✓ all that apply)
Of the factors considered which ONE was the MOST IMPORTANT? (Check ✓ only ONE)

	Check ✓	✓ ONE most Important Factor
Sentence is proportionate to the seriousness of offence(s).	<input type="checkbox"/>	<input type="checkbox"/>
Offence is violent.	<input type="checkbox"/>	<input type="checkbox"/>
Prior record/youth court history of young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Degree of participation by the young offender in the commission of offence(s)	<input type="checkbox"/>	<input type="checkbox"/>
Young offender is accountable and responsible for offence.	<input type="checkbox"/>	<input type="checkbox"/>
Young offender acknowledges harm done to victim.	<input type="checkbox"/>	<input type="checkbox"/>
Young offender does not acknowledge harm done to victim or express remorse.	<input type="checkbox"/>	<input type="checkbox"/>
Young offender acknowledges harm done to community.	<input type="checkbox"/>	<input type="checkbox"/>
Best interest and needs of the young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Family background/history.	<input type="checkbox"/>	<input type="checkbox"/>
Consideration of young offender being Aboriginal	<input type="checkbox"/>	<input type="checkbox"/>
Educational history of young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Employment history of young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Medical/Psychiatric history of young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Medical/Psychiatric history of family members.	<input type="checkbox"/>	<input type="checkbox"/>
Alcohol/drug history of young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Peer associations.	<input type="checkbox"/>	<input type="checkbox"/>
Response to previous youth justice services.	<input type="checkbox"/>	<input type="checkbox"/>
Young offender has failed to comply with non-custodial sentences.	<input type="checkbox"/>	<input type="checkbox"/>

	Check ✓	✓ ONE most Important Factor
How offense has impacted the victim's life and any life sustaining injuries (physical or psychological).	<input type="checkbox"/>	<input type="checkbox"/>
How offense has impacted the victim's family.	<input type="checkbox"/>	<input type="checkbox"/>
Any reparation made by the young offender to the victim or the community.	<input type="checkbox"/>	<input type="checkbox"/>
Any time spent in custody on remand status.	<input type="checkbox"/>	<input type="checkbox"/>
Sentence suggested is not greater than what an adult offender would receive in similar circumstances.	<input type="checkbox"/>	<input type="checkbox"/>
Protection of society/community from young offender.	<input type="checkbox"/>	<input type="checkbox"/>
Deterring this young offender or other young persons from committing this type of offence.	<input type="checkbox"/>	<input type="checkbox"/>

Appendix C

Models of Youth Justice

Below are 5 distinct models of youth justice labeled from 1 to 5. Please CIRCLE ONE number that most closely represents your approach to the case study.

	1	2	3	4	5
General Features	Best interest & Informality Individualized Sentences Indeterminate Sentencing	Administrative decision making Diversion from youth court system & custody Alternatives to custody programs	Legal rights & Informality Sentence based on severity of offence, prior record & needs Determinate Sentences	Legal rights Least Restrictive Alternative Determinate Sentences	Legal rights/ discretion Punishment Determinate Sentences
Key Personnel	Social Worker, Rehabilitation Experts	Police & Probation Officers	Lawyers Probation Officer Social Worker Mental Health	Judge, Crown & Defense Lawyers	Police, Judge, Crown & Corrections
Key Agency	Social Work	Multidisciplinary Agency	Law & Multidisciplinary Agency	Law	Law
Justice System Goals	Diagnosis	Integrated Case Management Intervention	Diversion, Conferencing, Integrated Case Management, All sentence types & options	Proportionate sanctions & Punishment	Incarceration Punishment Incapacitation
Under-standing of Client Behaviour	Pathology is environmental & socially determined	Poor socialization Negative peers Poor family Impulsive/Risky	Diminished or full individual responsibility	Individual Responsibility	Responsibility Accountability
Purpose of Interventions	Provide Treatment	Retrain youth Employment Education	Sanction behaviour & provide treatment	Sanction behaviour	Public protection & deterrence
Objective	Rehabilitation	Implementation of policy & guidelines	Respect youth rights, respond to individual & "special" needs	Respect youth rights & hold accountable	Maintain public order & safety

Appendix D

Deterrence Questions for YPA Qualitative Interview

1. How much input did your province/territory have in crafting Bill C-10's YCJA amendments?
2. What do you think about the Bill C-10 amendments to include specific deterrence as a YCJA sentencing principle?
3. What would be your preference (select one):
 - (a) Maintain the Supreme Court of Canada's decision in *R. v. B.W.P.*; *R. v. B.V.N.* (2006) which definitively ruled deterrence was not an intended sentencing principle in the YCJA
 - (b) Endorse parliament's decision to add specific deterrence as a youth sentencing principle.
4. The YCJA amendment says the deterrence principle is subject to Section 38(2)(c) the principle of proportionality and the youth's degree of responsibility for the offence. How difficult do you think it will be for the judiciary to balance these principles?
5. By adding denunciation and deterrence as sentencing principles do you think this will exacerbate the problem in the YCJA of having too many principles for sentencing judges to take into account?
6. Overall, how do you think the deterrence principle will affect judicial sentencing?
7. Do you think there will be regional sentencing variation in your province and/or territory as an outcome of the deterrence principle? Explain
8. Overall what do you think the impact of the deterrence principle will be operationally in your province/territory?
9. Do you think custody counts will increase as a result of deterrence being added as a youth sentencing principle? If yes, by what percentage?
10. Do you think the principle of deterrence will effect aboriginal youth? Explain
11. Does the deterrence principle challenge or dispute what is set out in Section 38(2) (d) YCJA regarding aboriginal youth: 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 person's? Explain.
12. Do you think the deterrence principle will affect the sentencing of female youth? Explain
13. Do you think the deterrence principle will affect the sentencing of mental health youth? Explain
14. If a young person meets the criteria for custody as set out in Section 39(1) YCJA, how do you think the courts in your province/territory will decide between the deterrence principle and Section 39(2) alternatives to custody?