

AN EXPLORATORY STUDY OF THE IMPLEMENTATION
OF THE CUSTODY REVIEW PROVISIONS OF THE YOUNG OFFENDERS ACT
IN BRITISH COLUMBIA

by

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ABSTRACT

The replacement of the Juvenile Delinquents Act (JDA) by the Young Offenders Act (YOA) in 1984 marked the end of the system of individualized justice for juveniles that had existed in Canada since 1908. The enactment of the YOA signaled a shift in philosophy from a welfare to a justice model and a switch from a paternalistic and somewhat informal system to a legalistic system emphasizing accountability, due process and the protection of society. The study traces the historical development of both Acts, contrasts their underlying philosophies and outlines the major criticisms leveled at them.

In an attempt to explore the impact of the YOA on youth custody, the study focuses on the custody review provisions of the Act and their implementation in B.C. The YOA contains detailed provisions for such judicial reviews in sections 28 and 29. While possible under the JDA, there was no legal requirement for such custodial review and in practice this seldom occurred. While the intentions behind the review provisions of the YOA are not quite clear, it seems reasonable to assume that they were meant to ensure the systematic monitoring of custodial dispositions over time and to lessen the potentially negative effects of prolonged incarceration. In spite of this, the implementation of the YOA has been followed by a dramatic increase in the number and length of

custodial dispositions. This suggests that the review provisions of the YOA are not fully utilized. One likely reason for this could be the formal, intricate and somewhat confusing nature of the provisions. To test this hypothesis, an exploratory study was conducted. The study collected data from different sources (probation officers within the community and institutions, resource persons, youth court files, administrative statistics, etc.) using different methodologies (mail questionnaire, interviews, analysis of court files, etc.). Analysis of the data provides tentative support for the main hypothesis and suggests that reviews of custodial dispositions are not being utilized to their full potential. The analysis further reveals widespread confusion surrounding the provisions and vast discrepancies in their implementation.

On the basis of the findings a number of suggestions and recommendations for possible and desirable changes in policies, procedures, and in sections 28 and 29 of the YOA are offered.

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QUOTATION

"And let him who would lash the offender look unto the spirit of the offended.

And if any of you would punish in the name of righteousness and lay the ax unto the evil tree, let him see to its roots;

And verily he will find the roots of the good and the bad, the fruitful and the fruitless, all entwined together in the silent heart of the earth...

And you who would understand justice, how shall you unless you look upon all deeds in the fullness of light?"

Kahlil Gibran

The Prophet: On Crime and Punishment

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CHAPTER 1

INTRODUCTION

The replacement of the 1908 Juvenile Delinquents Act¹ (JDA) by the Young Offenders Act² (YOA) in 1984 marked the end of an era and a retreat from individualized justice (Wilson, 1982). The enactment of the YOA signaled a significant philosophical shift from the welfare model to the justice model. The new legislation was launched as a "progressive" reform, one that would vastly improve the perceived shortcomings of the JDA. Unlike the JDA, the YOA was not motivated by humanitarian reasons. Rather, the federal government, to a large extent, appeared to draft the legislation in order to appease the general public and various interest groups who, at one extreme, demanded that young offenders be afforded more legal safeguards and, at the other extreme, called for more punitive and tough measures. The drafters of the YOA promised that the rights of society and young offenders would be better protected. The euphemism "justice model" which came to describe the YOA's philosophy, implies a noble and fair process; one characterized by honesty and integrity. Indeed, the pursuit of "justice" was, in and

¹ S.C. 1908, c.40; S.C. 1929, c.46.

² S.C. 1980-81-82-83, c. 110; R.S.C. 1985, c. Y-1.

of itself, likely one goal of the legislation.

It appears that the implementation of the YOA, which has now been in operation for over six years, has created a difficult task for justice administrators who must maintain a delicate balance between the interests of society and the interests of young offenders. The decision-making points within the youth system best exemplify the difficulties inherent in applying the YOA's philosophy. Case law indicates that Canada's judiciary is having difficulty assessing the relative importance and weight of conflicting principles: the youth's accountability versus the community's responsibility for crime prevention, individual freedom versus the protection of society, and due process and legal safeguards versus liberal interpretation of the provisions of the YOA. Due to the philosophical confusion underlying the YOA, and the vagueness of terms such as "best interests", the resolution of these conflicts may be extremely difficult, if not impossible. It is important, therefore, to examine how the various provisions of the YOA have been implemented, in order to better understand the philosophy of the new Act, both theoretically and practically. An analysis of the custody review sections of the YOA provides an excellent opportunity to gauge the practical impact of the YOA's justice model philosophy.

The purpose of the study is to explore the implementation of the custody review provisions of the YOA in British

Columbia. This topic was chosen for a variety of reasons. First, the custody review provisions are a new reform brought about by the YOA. Although such reviews were possible under the JDA, they were not legally required and, in practice, rarely occurred. Second, these provisions of the YOA have not yet been studied. Thus, an exploratory study in this area is considered timely. Third, it is important to determine whether the goals or intentions of the custody review provisions have been achieved.

Concern has been expressed that the implementation of the YOA has brought about a significant increase in the number of youth in custody. As will be seen, this increase has been documented in British Columbia, as well as other provinces (Hackler, 1987; Corrado & Markwart, 1988). In this province, the increase in incarcerated youth is, in part, attributable to the rise in the maximum age of those under youth court jurisdiction from under 17 to under 18. Research to date, however, suggests that there may be other reasons for this increase. The formal tone of the YOA, and the intricate procedures it mandates, may have led to more punitive dispositions, involving a larger use of custody.

The notion of custody review and the YOA provisions regulating it suggest that they were intended to provide continual monitoring of, and attention to, custodial dispositions in order to ensure that young offenders are not kept in custody longer than they should. The large number of

youth in custody suggests that this is not occurring. It is thus imperative that the implementation of these provisions be studied in order to find out if this assumption is correct and, if so, why the practices of the custody review provisions have fallen short of expectations.

Chapter II sets the stage for the study. It details the historical development of both the JDA and the YOA. It describes the philosophy of both Acts, with particular emphasis on the change from the welfare model to the justice model. It also reviews the criticisms of the JDA which led to its eventual repeal, and summarizes the early concerns with the YOA. It outlines the sharp criticism addressed at the YOA in British Columbia where it was predicted that the legislation would result in more youth in custody and that its emphasis on accountability might be jeopardized by the legal safeguards it introduced to the juvenile court system. The chapter closes with a discussion of recent and proposed amendments to the new legislation. Most of the amendments are meant to strengthen the enforcement capabilities of the police and other practitioners, and to increase the dispositional powers of the court.

Chapter III commences with a discussion of the practices in British Columbia prior to the proclamation of the YOA. It shows that B.C. was a leader in the youth justice area, due to the foresight of provincial authorities and their having anticipated many of the directions the new Act would take.

The chapter reviews the legislation and policies the province enacted, inspired by the justice model, prior to the proclamation of the YOA. The chapter continues with an analysis of the impact of the YOA, in particular the substantial increase in youth incarceration rates that followed its implementation. Following this, an outline of the various dispositions available under both the JDA and the YOA is offered. Next, the section introduces the custody review provisions of the YOA outlining their history under both the JDA and the YOA. The chapter closes with a discussion of current practices of the custody review provisions in B.C.

Chapter IV focuses on the research topic. The rationale for studying the custody review provisions of the YOA is presented, followed by a brief explanation of the objectives and hypotheses of the study. The primary hypothesis is that the custody review provisions are under-utilized. The chapter also explains the sources of data and the methodology used to collect these data.

Chapter V is devoted to the presentation of the research findings related to the implementation of the custody review provisions in British Columbia. The results are presented according to the order in which the objectives of the research were enunciated in chapter IV.

The final chapter, chapter VI, addresses the question of whether the goals of the custody review provisions have been

achieved and,if not, why not. It draws on Cohen's (1985) theoretical model in its search for explaining the practical consequences the YOA has had. To conclude, the implications of the research findings are discussed and this is followed by a number of suggestions and recommendations that might ameliorate the present situation.

CHAPTER II

THE CHANGING PHILOSOPHY OF YOUTH JUSTICE IN CANADA: FROM PARENS PATRIAE TO ACCOUNTABILITY

Since the early nineteenth century, Canada has grappled with the issue of how best to deal with young people who violate the law. The evolution of youth justice in this country has been influenced by a variety of factors: increased knowledge within the social sciences, in particular, sociology, psychology and criminology; political ideologies; economic concerns; the media; international trends; moral and cultural attitudes; and the agendas of powerful interest groups. More recently, Canada's youth justice system has evidenced a struggle between two distinct, and opposing, philosophies. These two philosophies are known as the "welfare" and "justice" models. A description of these two models is provided by Corrado (1983). The welfare model, which has its roots in the positivist school of criminology, depicts juvenile delinquents as products of unsavoury backgrounds. Thus, they are not responsible for their actions. The juvenile court system responded to the delinquent by helping, treating or rehabilitating him or her. The focus was on what was best for the child, not the circumstances of the offence. The justice model, which

reflects classical thinking, views crime as the product of rational choice. Individuals, including youth, are therefore accountable for their behaviour. The system's response emphasizes deterrence and an adversarial process of meting out fair and just punishment. Everyone, young or old, is guaranteed the same due process rights. The distinction between the welfare and justice models could be easily understood and indeed well captured through an analysis of two federal statutes pertaining to young people and the law: The Juvenile Delinquents Act (JDA) and the Young Offenders Act (YOA). It is perhaps the relative popularity of one model over the other that has had the most significant impact upon juvenile justice policy and practice in Canada.

As will be shown, the JDA was enacted in 1908 and was largely inspired by the principles of the welfare model. The YOA, which became law in 1984 and replaced the JDA is, however, based on the justice model. Whereas the JDA embraced the philosophy of parens patriae, in that it placed the responsibility for the juvenile's welfare on the court, the YOA stresses that youth are accountable for their actions and that they be treated equally by the law.

This chapter will provide an historical analysis of the development of both the JDA and the YOA; a comparison between the two divergent philosophies of welfare and justice; and a critique of both Acts.

THE JUVENILE DELINQUENTS ACT

Development of the JDA

Early Reforms

The establishment of a separate criminal justice system for youth in Canada followed similar developments in many western countries. Indeed, the doctrine of parens patriae, a common law principle, can be traced back to fourteenth century England (Wilson, 1982). Young people considered "deviant" or "social misfits" have long been deemed in need of protection by the state who would thereby assume the duties and obligations usually belonging to parents.

Prior to the sixteenth century, however, few distinctions were made between youth and adults in terms of the law. A high infant mortality rate discouraged emotional investment in children and there was a tendency to either ignore or exploit them (Caputo, 1987). It was not until the early nineteenth century that the western world began to witness the emergence of increasingly influential reform movements dedicated to improving the criminal justice system in general and the legal and social conditions of children in particular (Leon, 1977; Wilson, 1982). Early reformers wanted to put an end to child labour and were concerned with medical and educational services, protection of abused and abandoned children, and criminal procedure changes.

Middle class families began to protect their children and

consider them to be "special" (Caputo, 1987: 126). This attitude was no doubt influenced by the fact that, as families became more prosperous, they no longer had to rely on children for contributions to the family income. At the same time, there developed a growing awareness that while children had some sense of right and wrong, they were not able, as adults were, to generalize that knowledge. Children were also held to be more susceptible to influences from their environment and from those around them. The juvenile court movement thus mirrored reforms dedicated to improving slum tenements, enacting and enforcing humane working condition laws, improving prison conditions and saving "future generations from misery, pauperism and crime" (Wilson, 1982: 3).

Late eighteenth century classical criminologists, who had a strong impact upon the criminal justice process at the time, helped influence the early juvenile law reforms by emphasizing the importance of rights, procedural regularity and responsibility (Archambault, 1983: 5).

The Positivist Influence

By the late nineteenth century, however, the positivist school of criminology suggested that criminal behaviour resulted from a combination of factors such as upbringing, economic structure, social status and, above all, biological abnormality. Two questions arose: given that internal and external forces determine behaviour, can a person,

particularly a child, be considered responsible for their illegal behaviour? Would not punishment then be unproductive and unjust?

Those from the positivist school also advocated an "activist doctrine" whereby potential criminals would be "diagnosed and treated" in order to "prevent" crime (Archambault, 1983: 6). Positivist theorists had a significant impact on the emerging juvenile justice system. They were largely responsible for the following features:

1. the view that crime and delinquency are diseases, susceptible to treatment;
2. the emphasis on treatment or rehabilitation rather than punishment;
3. the belief that children should be sheltered from adult criminals to prevent corruption;
4. troubled or neglected children were viewed as potential juvenile offenders thus justifying legal intervention;
5. acting "for the good of the child" justified awarding much discretion to social agencies and administrators of juvenile justice;
6. the juvenile court system was viewed as a social welfare institution. There was no need therefore for adult criminal procedures and due process (Archambault, 1983: 7).

Late 19th Century Legislation

This treatment ideology was put into practice when, in 1857, two Acts were passed in Canada: An Act for Establishing Prisons for Young Offenders³ and An Act for the More Speedy Trial and Punishment of Young Offenders⁴ (Leon, 1977). While such legislative efforts were important milestones in the history of juvenile law, these early Canadian statutes failed, in reality, to differentiate the treatment afforded to children from that of adults. Thus children were often subjected to punishments similar to those inflicted upon adults. Sometimes the punishment was even more severe (Archambault, 1983; Caputo, 1987). Lengthy incarceration of juveniles was considered justified as it was believed that "reformation could be effected for the benefit of the child and society" (Leon, 1977: 78). The new laws did not distinguish between children who were neglected or abused and those who committed criminal offences. In 1859, for example, abused or neglected children were often sentenced to Kingston Penitentiary (Burrows, Hudson & Hornick, 1988). This lack of distinction between those children who were from inadequate families and those who had committed crimes was also reflected in the 1874 Ontario legislation, An Act Respecting Industrial

³ An Act for Establishing Prisons for Young Offenders, for the Better Government of Public Asylums, Hospitals and Prisons, and for the Better Construction of Common Gaols, 1857, 20 Vict., c. 28 (Can.).

⁴ 1857, 20 Vict., c. 29 (Can.).

Schools⁵ (Leon, 1977). This legislation also provided for indeterminate sentences, which would eventually be included in the JDA.

During the late nineteenth century, ideological and political changes were taking place in Canada, most notably in Ontario, and further influenced the child saving movement. It appears that crusaders were dissatisfied with the legislation pertaining to juvenile offenders. It has been suggested that the state's concern for children was not genuinely humanistic in nature but was largely a reflection of "a change in the political economy from laissez-faire to monopoly capitalism and a concomitant change from repressive control to welfare state benevolence" (Platt, 1969 from Caputo, 1987:126). Regardless of the intentions, there is little doubt that Canada's juvenile justice system was starting to emerge within the broader political and social climate.

In contrast to earlier reformers and their emphasis on compulsory segregated training, discipline, and schooling, the new reformers looked upon the family as responsible for rehabilitation. If the family could not provide a "rehabilitative" environment, then the government should step in. "Bad homes" were viewed as the primary cause of juvenile crime. Children with behaviour problems which stemmed from

⁵ 1874, 37 Vict., c. 29 (Ont.).

"inadequate" parents began to be subsumed under the delinquent label and thus were not distinguished from criminals (Leon, 1977). The idea of the "foster family" evolved during that period, and was viewed by many as an appropriate alternative to institutionalization.

Some basic premises began to emerge during this reformist period which contributed to the foundation of the JDA. There was a growing recognition that children needed a separate status in law, distinct from adults. In addition, the relationship between an individual's age and their capacity to form the intent necessary for a criminal act, began to be questioned (Leon, 1977). In particular, children under the age of seven years were believed not to possess a "guilty mind", and those between ages seven and fourteen years were presumed to be lacking in such capacity (Archambault, 1983; Wilson, 1982), unless it was found that he/she possessed the "discretion" to distinguish between "good and evil" (Leon, 1977: 72).

Three phases occurred under late nineteenth laws which preceded the enactment of the JDA in 1908. Initially, juveniles were confined to lengthy stays in reformatories; subsequently, the notion of treatment-focused industrial schools became fashionable; thirdly, organized probation emerged as a new treatment strategy. This late nineteenth century period was characterized by reformist and rehabilitative efforts and beliefs, which collectively became

known as the welfare model. However, not all reformers were in agreement, and it has been suggested that disputes between "crime control" and "welfare" proponents were not uncommon even then (Burrows, Hudson & Hornick, 1988).

The Childrens Court Movement

Some reformers who advocated the creation of a separate court system and probation service for juveniles became prominent and influential members of the child saving movement within Canada (Leon, 1977). J.J. Kelso, a young Toronto journalist, and eventually Ontario's first Superintendent of Neglected and Dependent Children, is reported to have been particularly influential in the emergence of the childrens court movement in Eastern Canada which strived to form a juvenile justice system based on a family model (Burrows, Hudson & Hornick, 1988).

The goals of the Ontario childrens court movement were furthered by the enactment in 1890 of two statutes which provided for the expansion of the use of treatment-based industrial schools and limited the reliance on the more punitive reformatories: An Act Respecting the Custody of Juvenile Offenders⁶ and An Act Respecting the Commitment of Persons of Tender Years⁷ (Leon, 1977).

⁶ 1890, 53 Vict., c. 75 (Ont.).

⁷ 1890, 53 Vict., c. 76 (Ont.).

Kelso and other prominent reformers eventually enlisted the support of W.L. Scott, Local Master for the Supreme Court of Ontario and President of the Ottawa Children's Aid Society (Burrows, Hudson & Hornick, 1988). The federal JDA was eventually drafted by Scott and others (Burrows, Hudson & Hornick, 1988). The Bill was introduced to the Canadian government by Scott's father, who was a Senator.

It was evident, through the drafting of the JDA, that the primary focus was going to be on treatment, with little attention given to the accountability of juveniles or to the justification for state intervention (Archambault, 1983: 8). Through the doctrine of parens patriae, the juvenile court system was charged not only with "treating" or "rehabilitating" those found guilty of crimes but also protecting "socially and economically disadvantaged" youth (Caputo, 1987). The objectives of the 1908 JDA were to change delinquent behaviour through the imposition of a treatment-based disposition, and to adapt adult criminal procedures so that they became special rehabilitative tools of the juvenile court (Leon, 1977).

The passage of the JDA in 1908 was heralded as the crowning achievement of the childrens court movement (Currie, 1986). The JDA was rarely amended. The most significant change occurred in 1929, and was largely an amendment to streamline procedures (Leon, 1977). The underlying philosophy

of this treatment/welfare legislation remained virtually unchanged until the JDA was repealed in 1984. Since its inception, however, the JDA has been the subject of ongoing conflict between those seeking to protect and guide wayward children and those concerned with preserving civil liberties and rights. Attempts to reconcile these positions have been described as futile (Wilson, 1982).

Philosophy of the Juvenile Delinquents Act

The original JDA (1908) commenced with a preamble which outlined the philosophy of the legislation:

"Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts" (Juvenile Delinquents Act, 1908)

The preamble emphasized that youth should not be dealt with as criminals; indeed, they should be protected from this group of individuals who might have a bad influence on them. Section 31 of the 1908 Act stipulated that provisions of the Act should be "liberally construed" in order that the Act's purpose may be carried out, namely:

"That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child and one needing

aid, encouragement, help and assistance" (Juvenile Delinquents Act, 1908).

This philosophy, known as the doctrine of parens patriae, appeared to be the backbone of the JDA and the rationale for many a judicial decision. The doctrine required the court to act in a parental role; often intervening when other social agencies (i.e. family, school) had failed to raise a child in an "appropriate" manner. The JDA's image of children was that they were often "poor", "unfortunate", "misguided", "neglected" and in need of "care" and "nurturing". Such terms were used frequently throughout the Act and provided further evidence of its strong welfare focus.

The JDA had jurisdiction over children who were seven years of age or older, with the maximum age set at under 16 (or other maximum age as established by the provinces).⁸ Those adjudged delinquent were not considered "offenders" but were in a "condition of delinquency", and therefore required "help and guidance and proper supervision" (Juvenile Delinquents Act, 1929: Section 3(2)). In the 1929 revised Act, the preamble and section 31 of the 1908 Act were replaced by sections 3 and 38. These two sections, which set out the JDA's philosophy, reflected a "welfare model" view of juvenile delinquents. They were considered to be in need of

⁸ In British Columbia, the maximum age under the JDA was set at under 17.

"treatment"; they were not held accountable for their actions to the same degree as adults as they were thought not to be capable of the same criminal or "immoral" intent.

The JDA thus depicted the court as a "...wise and kind, though firm and stern, father. The question (was) not 'what has the child done?' but 'How can this child be saved?'" (Archambault, 1983: 8).

One of the presumed functions of the juvenile justice system was to identify the potential criminal at an early age. Through the early intervention of the juvenile court, it was hoped that "anti-social" behaviour would not develop into serious and persistent criminality.

Section 2 of the 1929 JDA defined a juvenile delinquent as any child who violated the Criminal Code or other federal statute, any provincial statute, by-law, or municipal ordinance. It also considered a child "delinquent" if found guilty of "sexual immorality or similar form of vice", or if they were liable by reason of any other Act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute. Thus, the JDA not only included violations of laws that applied to adults but also "status" offences for which an adult could not be legally prosecuted. This discrepancy was felt to be justified in view of the court's mandate to "prevent" children from becoming involved in delinquent or criminal behaviour.

Under the JDA, court hearings were usually informal since

judges were not bound by the same strict procedural rules as those governing adult court (Caputo, 1987: 128). Rather, judges had an "inquisitorial" role (Corrado, 1983: 5). The only guiding provision appeared to be to act "in the best interest of the child". The Act contained no provision giving a child the right to legal representation, or assistance from a parent or other adult. Written statements or admissions could be taken by police without any parent, lawyer, or other adult being present.

Probation officers had an integral and multi-functional role under the JDA, and were often the only adults present in court with the child. They were considered "officers of the court" and had "peace officer" status. They assisted the court by providing information and supervising and monitoring the orders of the court. At the same time, however, they often acted as advocates for juveniles and provided them with assistance and care. One of the first juvenile court judges, Judge Tothill, described probation officers as "the key innovative link between the court and the family" (Corrado, 1983: 4). Currie (1986) describes the dual role of quasi-legal counsel/social worker the probation officer had under the JDA as follows:

"the role played by lawyers in criminal courts was performed by probation officers or case workers in juvenile court and they were concerned with such things as 'truancy, school performance, attitude, and promiscuity during presentence investigation'" (Currie, 1986: 65).

As can be seen from the above, under the JDA, the juvenile justice system, and its players, represented a curious mixture of criminal law and social welfare philosophy. The legislation had wide jurisdiction over youth through its broad definition of delinquency. It compensated somewhat for its potential punitive impact by stressing that a finding of delinquency was not synonymous with a finding of criminality. Indeed, a trial was part of the "treatment" (Corrado, 1983). The JDA also directed that sentencing principles be guided by reform, rehabilitation and the child's welfare rather than deterrence. Most importantly, the Act provided for separation of child prosecutions and correctional processes from the adult criminal justice system (MacDonald, 1971).

Because the drafters of the JDA sought a non-legalistic framework within the confines of the federal criminal law, a conflict was bound to emerge between the philosophy of the Act and its implementation (Wilson, 1982).

Legal and Constitutional Changes in Canada and their Impact on the Juvenile Delinquents Act

The Constitution Act, 1867⁹ stipulated Canada's constitutional parameters and the jurisdictional division between Ottawa and the Provinces. The Act did not allow for the creation of welfare-based legislation by the federal

⁹ formerly known as the British North American Act, 1867 U.K.), 30 and 31, Vict., c. 3.

government (Wilson, 1982). The definition of "delinquency" was designed to incorporate both non-criminal and criminal conduct, thus enabling the federal government to enact legislation for juveniles which some suggested encroached upon provincial child welfare concerns and even contravened the exclusive power granted the provinces under the Constitution Act, 1867 (Leon, 1977; Wilson, 1982). Juvenile courts were set up to administer the JDA through provincial legislation (Corrado, 1983). Concern was eventually expressed that provincial legislation and corresponding services and facilities would differ greatly between the provinces, resulting in an unequal system of juvenile justice across the country.

Despite this seemingly inherent federal-provincial jurisdictional conflict, and the lack of uniformity between provinces' juvenile justice systems, the JDA remained unchallenged on constitutional grounds for several decades. The first court challenge based on the Act's constitutionality was in 1962, in the Ontario High Court of Justice. The decision in Re Dunne¹⁰, however, upheld the constitutionality of the JDA as the court declared that the federal Act did not encroach upon provincial jurisdiction in its procedures or the caring of neglected children (Wilson, 1982). Similarly, in

¹⁰ [1962] O.R. 595, 133 C.C.C. 64, 33 D.L.R. (2d) 190 (H.C.).

the decision in Re K.'s Certiorari Application¹¹, Justice MacLean of the B.C. Supreme Court, upheld the JDA's exclusive jurisdiction over provincial statutes. In 1966, the Supreme Court of Canada further upheld the validity of the JDA in the case of Attorney General of B.C. v. Smith¹². Although the Act had been criticized for its lack of clarity by B.C. Court of Appeal Justice Norris (dissenting) (Leon, 1977), the unanimous decision of seven Justices upheld the previous decision of the B.C. Court of Appeal. They held that the JDA was, in essence, criminal law and thus did not constitute an invasion of provincial jurisdiction. Wilson (1982: 15) suggests that this decision was a: "thinly veiled attempt to prevent a vacuum in the regime of law relating to juveniles in Canada". Due to the JDA's inconsistent application regarding the maximum age and the wide differences in provincial statutes and municipal by-laws, this decision and others similar to it were widely criticized for not acknowledging the JDA's unconstitutionality (Wilson, 1982). They did, however, spark controversy and discussion regarding the validity of many of the Act's provisions which eventually led to reforms.

An influential American court decision appeared to mark the beginning of the gradual weakening of the JDA,

¹¹ (1964), 43 C.R. 257, 47 W.W.R. 247, [1964] 3 C.C.C. 299 (B.C.S.C.).

¹² (1966) 53 W.W.R. 129, 53 D.L.R. (2d) 713, [1966] 2 C.C.C. 311.

particularly its cardinal parens patriae philosophy (West 1984). In 1967, the United States Supreme Court, in the Gault¹³ decision, declared that youth were entitled to the same due process safeguards as adults. It stated that, in the absence of due process, the juvenile court was nothing more than a "kangaroo court" (Corrado, 1983: 12). This decision guaranteed youth rights equal to those afforded to adults and brought the United States' juvenile court system closer to the adversarial adult system (West, 1984: xiv). This American decision became a significant precedent for Canadian reformers who were concerned with civil liberties during the 1960's. The JDA became increasingly criticized for its failure to provide children with the same protections as adults, particularly given that they could be prosecuted for status offences (Currie, 1986).

Under section 21 of the JDA, the provinces were authorized to enact enabling legislation in order to create programs for "juvenile delinquents". In an effort to modernize the practice of juvenile justice, particularly with regard to secure containment, B.C. enacted the Corrections Amendment Act¹⁴ in 1977. The implementation of this Act was risky, however, as under the doctrine of "paramountcy" any provincial legislation that provided for secure containment

¹³ 387 U.S. 1 (1967).

¹⁴ S.B.C. 1977, c. 69.

had to be consistent with the JDA. While the drafters of the Corrections Amendment Act acknowledged the constitutional problems, they felt there was general support from the federal Department of Justice and thus proceeded with the legislation (Ekstedt, 1983). Not surprisingly, a series of court challenges related to the constitutionality of the Corrections Amendment Act were heard, commencing in 1978. The first case, Regina v. A.¹⁵ was decided by the B.C. Provincial Court. Judge Barnett found that the Corrections Branch's containment program, authorized by the legislation, was an attempt to provide a new sentencing method for juveniles. This amounted, "in pith and substance", to criminal law and thus the Act was found ultra vires (Wilson, 1982). As a result of this court challenge, correctional programming was "modified" to continue the programs under a different status (Ekstedt, 1983). This decision was upheld by the B.C. Court of Appeal in 1979 in Regina v. P.D.P.¹⁶ Justice Lambert held that some portions of the Corrections Amendment Act were intra vires the Constitution Act, 1867 as they dealt with the administration and management of juvenile justice, including the containment criteria (Wilson, 1982). The legislation was held to be invalid, however, as its release provisions contravened

¹⁵ (1978), 40 C.C.C. (2d) 397, 6. B.C.L.R. 136, 3 R.F.L. (2d) 82 (Provincial Court).

¹⁶ [1979] 2 W.W.R. 333, 8 R.F.L. (2d) 149, 45 C.C.C. (2d) 271, 94 D.L.R.

section 20(3) of the JDA which only authorized the court to consider remission of punishment. As a result of these two court challenges, B.C. had to designate the containment centres as "industrial schools" as per the JDA and eliminate the provisions relating to release from containment (Wilson, 1982; Ekstedt, 1983).

A third court decision in 1980, Regina v. S.¹⁷ rejected part of the B.C. Court of Appeal's judgement and found that section 44 of the Corrections Amendment Act, relating to admission criteria, was ultra vires. Thus this section as well became inoperative (Wilson, 1982; Ekstedt, 1983).

Depite the court rulings in favour of the constitutionality of the JDA, the discussions surrounding these decisions in B.C. and other jurisdictions, served to undermine many practices associated with the JDA. When discussions on the implementation of the proposed Charter of Rights and Freedoms¹⁸ began, which would eventually outlaw discrimination based on age, the federal government was forced to consider youth legislation that would not contravene such provisions.

¹⁷ [1980] 6 W.W.R. 75, 53 C.C.C. (2d).

¹⁸ Part I of the Constitution Act, 1982, being schedule B of the Canada Act, 1982, (U.K.), 1982, c. 11.

Criticisms of the Juvenile Delinquents Act

The foregoing brief historical review shows that the JDA enjoyed wide support from the time of its passage in 1908 until the early 1960's. Considering that the Act remained essentially unchanged since 1929, it was not surprising that it eventually came under heavy criticism in the face of changing social values and attitudes, enhanced social science knowledge, and mounting information on the operations of juvenile courts.

In response to early criticism, those who still favoured the JDA argued that if the legislation was ineffective, this was only due to a lack of much needed resources (Wilson, 1982). Probation Officers in particular cherished the ability of the juvenile justice system to meet the specific needs of children through the flexible utilization of pre-sentence reports and other interventions (Wilson, 1982). They praised the informality and flexibility of the system which allowed the court to deal with youth creatively. They had to admit, however, there existed the potential for abuse inherent in the Act's informal approach and acknowledged that there was a need to safeguard the rights of juveniles who appeared before the court. However, as concern over civil and legal rights increased during the 1960's, the number of supporters of the JDA from inside the system began to dwindle (Wilson, 1982).

Initially, four major criticisms were made:

1. The JDA's parens patriae philosophy was ineffective

- in preventing delinquency or rehabilitating delinquents (Hackler, 1978; Corrado, 1983; Caputo, 1987);
2. The power and discretion afforded to juvenile justice administrators by the JDA were too extensive and fostered a climate whereby due process and legal safeguards could be ignored or even abused (Wilson, 1982; Corrado, 1983; Reid, 1986);
 3. The inability of the Act to distinguish between types of offences or conduct was discriminatory and the label "delinquent" had a negative connotation. Concern was expressed that such a negative label might produce criminality (MacDonald, 1971; Corrado, 1983; Currie, 1986; Reid, 1986);
 4. The JDA contained virtually no guidelines for interpretation and this had resulted in vast differences in practices across the country (Wilson, 1982; Corrado, 1983).

Philosophical Concerns

By the early 1960's, disillusionment with the doctrine of parens patriae led to "blistering criticism" (Corrado, 1983: 1, 8). At the same time, the principle of "rehabilitation" began to wane in popularity in both the United States and Canada and this further weakened the welfare model underpinning the JDA (Leschied & Gendreau, 1986).

Extensive reviews conducted on delinquency treatment programs indicated they had not achieved their goals of rehabilitation and crime prevention (Caputo, 1987, cites Trojanowicz, 1987, Empey 1982, and Lundmann, 1984). By the mid to late 1970's, the rehabilitative philosophy underlying the JDA appeared to have been virtually abandoned in favour of the sentencing principles of punishment and deterrence (Von Hirsch, 1976; Wilson, 1975, in Caputo, 1987). Indeed, it seemed that rehabilitative efforts had reached a state of "diminishing returns" (Hackler, 1978).

The JDA was also criticized for the unlimited discretion it gave the court for preventing juvenile delinquency. It was becoming evident that the philosophy of prevention adopted by the JDA is, in reality, a double-edged sword as procedural safeguards could be relaxed or sacrificed in the "best interests" of the juvenile under the guise of protecting or preventing him or her from further delinquent behaviour. Indeed, under the JDA it was not possible to overturn an adjudication of delinquency due to the informality or irregularity of proceedings (Wilson, 1982). Wilson refers to the words of Judge Fortas in the case of Kent v. United States¹⁹, as he feels they are applicable to Canada's JDA:

"While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable

¹⁹ 383 U.S. 541 (1966).

the immunity of the process from the reach of constitutional guarantees applicable to adults...There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children" (Wilson, 1982: 8).

Thus, it appears that more people started to question the validity of the JDA's well-intentioned philosophy. Many concluded that as laudable as the goals of child welfare and rehabilitation were, they did not justify the arbitrary means that were being used.

Discretion and Flexibility

A second major criticism of the JDA that was gaining ground related to a concern over the extensive discretionary power granted to the courts dealing with juveniles (Corrado, 1983). Justice practitioners continued to enjoy broad discretion at a time when there was growing evidence that few intervention programs worked (Reid, 1986, citing Wyman, 1977). Although it may have been true that in their daily operations, juvenile courts were conscious of the JDA's deficiencies, the potential for abuse or arbitrary decision-making still existed.

Underlying the enormous power of the juvenile court was a belief that a flexible and "liberal" application of court procedures would provide for a fair, individualized and creative process. As indicated, the JDA made no mention of

legal representation, due process, or other safeguards. This omission began to be questioned in view of the legal and constitutional developments described previously and as the shift away from the welfare model to the justice philosophy developed.

Concerns over discretion and the system's flexibility were particularly noteworthy with regard to two areas of practice under the JDA; indeterminate sentencing; and reviews of dispositions. Both of these practices could have detrimental consequences for juveniles.²⁰

Despite the broad discretion and relaxed atmosphere of the juvenile court, there were few checks and balances in existence. Since the Act paid little attention to legal rights or safeguards, justice practitioners were empowered to "treat" children and prevent them from developing into adult offenders, even at the expense of these rights. This situation was considered intolerable by the JDA's strongest critics (Reid, 1986).

The Delinquent Label

A third major criticism of the JDA during this period was the use of the all encompassing term "delinquency". While the intention of the drafters of the JDA was undoubtedly to avoid the application of the negative label "criminal" to

²⁰ Concerns over reviews of dispositions will be discussed in the next Chapter.

children, the substitute label of "delinquent" eventually developed its own negative connotation. Critics of the JDA pointed out that because the term "delinquency" failed to distinguish between criminal and non-criminal behaviour, this label could be even more damaging (Reid, 1986). It was also suggested that the "juvenile delinquent" label may even foster delinquent behaviour (Corrado, 1983). Decisions to charge a juvenile with being "delinquent" were often made by parents or social workers in the absence of any formal legal criteria, the only requirement being that a juvenile be "unmanageable" or "beyond parental control". The consequences of the application of the delinquent label were thus quite serious (Currie, 1986).

A related criticism directed towards the JDA was that the Act failed to provide for a screening process whereby juveniles could be diverted from a formal court proceeding, thus being spared unnecessary stigma. While some provinces implemented their own diversion programs, particularly in the 1970's, this practice was by no means standard across Canada. Extensive research was being conducted in Canada and other countries on the negative consequences of legal intervention and the findings supported diversion and other alternatives to juvenile courts. At one extreme, a study by the American President's Commission on Law Enforcement and the Administration of Justice (1967) recommended a pre-judicial screening whereby only the most serious cases of anti-social

behaviour would be dealt with by the juvenile court; the bulk of the cases were to be referred to various educational and counselling agencies (MacDonald, 1971). With regard to the JDA, there seemed to be a general agreement amongst professionals that the Act encompassed too wide a range of anti-social and deviant behaviour, with the result that too many children were subjected to prosecution in the juvenile courts, and, subsequently, being labelled as "juvenile delinquents" (MacDonald, 1971).

Lack of Guidelines

The fourth major criticism launched against the JDA was its lack of clear guidelines, criteria or policy statements for those charged with applying and interpreting the Act. This problem was thought to be particularly acute with regard to the practices of sentencing and review. As the legislation was largely silent on how judges should sentence juveniles and monitor/enforce their court orders, a juvenile's treatment was largely dependent on the individual judge and those assisting him/her.

This lack of guidelines was believed to contribute to the extreme variability of juvenile justice across the country, a matter considered by many to be confusing and unfair. Another problem with the Act which further exacerbated the differences between provinces was the variable maximum age whereby a juvenile in one province could be treated as an

adult in another. This lack of uniformity, in particular, was the subject of considerable criticism and calls for reform. While no one could agree on what the maximum age should be, there did exist agreement that the legislation should stipulate its jurisdictional parameters.

THE YOUNG OFFENDERS ACT

With the growing criticism of the JDA began a strong movement in Canada to replace the seemingly outdated legislation with a new Act more in line with the principles of justice: accountability, due process, protection of society and deterrence. The movement achieved its goal with the proclamation of the Young Offenders Act (YOA) in 1984. The next section will outline how this new legislation was developed, its philosophy compared to the JDA, some early criticisms of the Act, and its impact on Canadian youth justice to date.

Development of the Young Offenders Act

The replacement of the JDA with the YOA was the product of a very long and arduous process. The proclamation of the YOA was the culmination of almost twenty-five years of consultation, which included numerous conferences, committees, reports and six major legislative proposals (Reid, 1986).

Whereas the JDA was initiated by a unified group of social reformers and debated for only ten minutes in the House of Commons, the YOA was prepared and drafted exclusively by the federal government while inviting submissions from the provinces and interest groups (Reid, 1986).

The growing criticism of the JDA was coupled with an apparent dramatic increase in juvenile delinquency commencing during the 1950's. Alarm over this increase prompted the federal Progressive Conservative's Minister of Justice to form a special committee on juvenile delinquency in November 1961 (Cousineau & Veevers, 1972; Corrado, 1983; Caputo, 1987).²¹ While this increase in the crime rate may have been due to more effective policing and better counting procedures, it was nevertheless perceived to be a growing problem in need of a societal response.²² The establishment of the above mentioned Committee represented the first formal recognition by the Canadian government of the need to replace the JDA (Osborne, 1979). The Committee's report, entitled Juvenile Delinquency in Canada, was tabled in Parliament on February 6, 1966. The report contained over 100 specific recommendations and was put

²¹ Statistics offered by Caputo indicate that both juvenile and adult crime increased proportionately during the 1950's and 1960's.

²² Caputo in his 1987 article cites the Special Senate Committee on Youth (1986) and MacDonald (1969) to illustrate the conflicting opinions on whether such an increase in juvenile crime was a real increase or whether it was simply the result of differential reporting procedures.

to discussion through federal-provincial consultations. It was the subject of a federal-provincial conference held in Ottawa in January 1968. The Committee suggested that Parliament could facilitate the creation of a non-criminal, non-stigmatic status of delinquency by differentiating between criminal conduct under federal jurisdiction and non-criminal conduct under provincial jurisdiction (Wilson, 1982). The report also criticized the unfettered discretion allowed juvenile court judges and others and further suggested that the appeal process be widened. Above all, the Report strongly suggested that the number of juveniles formally sanctioned by the court be reduced, in favour of less formal alternatives (Gandy, 1971). These recommendations represented the first major directions for the contemplated new legislation. Because they were the first formal attacks on the JDA, however, the recommendations were not immediately adopted (Corrado, 1983). At the very least, the Report prompted public awareness of, and concern about, the nature of the juvenile justice system in Canada and the many problems it faced (Gandy, 1971).

During the 1960's and early 1970's, opposition leaders and the provincial governments continued to press the federal government for changes to the JDA. Impetus for change was further provided by the increased visibility and perceived "rebelliousness" of an emerging youth culture during this period. The re-birth of "law and order" campaigns in both the

United States and Canada helped popularize the "justice model" within youth justice circles. Certainly, the climate was ripe for this neo-classical philosophy, a climate created by several pressure groups calling for increased protection of society, stiffer penalties for criminals and, in some cases, a return to capital punishment (Fattah, 1982; Caputo, 1987). Despite strong pressure, the replacement of the JDA required four attempts on the part of the Canadian government (Corrado, 1983). Changes in government parties, provincial disagreement and opposition from the Bench all contributed to a lengthy process (Corrado, 1983).

Bill C-192

The first proposed legislation for replacing the JDA was known as Bill C-192 and called the Young Offenders Act. It was put in final form for first reading on November 16, 1970 (introduced by then Solicitor General of Canada, Honourable George J. McIlraith). The legislation was promoted as a "brave new direction" taken by the Canadian government. It incorporated many of the recommendations made by the Department of Justice Report. It was generally endorsed by the Canadian Bar Association (Cousineau & Veevers, 1972).

Criticisms of the Bill, however, were harsh. Then opposition justice critic, Conservative Eldon Wooliams, claimed the Bill was "the most punitive, enslaving, vicious and tyrannical piece of legislation that (had) ever come out

of the legislative grist mill" (Wilson, 1982: 6). New Democrat justice critic John Gilbert claimed there was no support from the Canadian public for Bill C-192. Critics both within and outside the House of Commons labelled the proposed legislation as a "seventeenth century approach to some very pressing twentieth century problems" (Wilson, 1982: 6). The Canadian Mental Health Association vehemently opposed the Bill's emphasis on legal rights over social and psychological needs (Cousineau & Veevers, 1972).

Groups were invited to submit briefs to the Justice Department Committee with regard to Bill C-192. The Canadian Corrections Association (as it was then known), for example, did so wherein it criticized the all-encompassing offence "delinquency". The Association indicated that there was still not enough of a distinction according to the severity of the behaviour (Goyer, 1971: 3).

Provincial government delegates also examined the proposed Bill in relation to their respective social legislation and administrative structures. For the provinces, one major problem was the lack of a uniform maximum age of jurisdiction; another was the kind of offences to be dealt with (Goyer, 1971: 3). The only agreement reached was that the YOA should not encompass offences under provincial or municipal jurisdiction. While the JDA had essentially remained unchanged since 1929, a number of varying provincial and municipal laws had evolved. Many aimed to achieve greater

precision and, in some cases, stiffer penalties (Goyer, 1971).

In view of such unexpected and extensive criticism, the Bill was eventually withdrawn and returned to the Solicitor General's Department for further review (Wilson, 1982). When it came for second reading, Bill C-192 contained the following changes:

- it limited the definition of offence to federal jurisdiction offences only;
- it redefined a "young person" as a child apparently or actually ten years or more and under 17 or 18;
- it removed the stigma of "juvenile delinquent" by making distinctions according to the seriousness of offences and by substituting a seemingly less negative label of "young offender";
- it encouraged the concept of "social rehabilitation" rather than relying exclusively on legal procedures for the treatment of young offenders (Goyer, 1971).

Then Solicitor General of Canada, the Honourable Jean Pierre Goyer, explained that:

"The terms of the disposition provided in the Bill aim(ed) at forging closer links between criminal justice properly so called and social laws protecting children and young people, as formulated and administered by the provinces" (Goyer, 1971: 17).

The debates surrounding the proposed Bill continued unabated. Some argued that the YOA's jurisdiction over youth should be more limited than that first introduced in Bill C-192. They suggested, for example, that instead of lowering the minimum age to 10, it be raised from 12 to 14 years. In addition, they called for more formalization of diversion or alternative measures (MacDonald, 1971: 3). Much discussion also occurred over federal-provincial cost-sharing for administering the YOA as the initial Bill C-192 did not make reference to this (MacDonald, 1971: 4).

Unfortunately, Bill C-192 was held back once again due to much disagreement between the provinces and the federal government and was allowed to die.

Young Persons in Conflict with the Law Act

Criticism of the ineffectiveness of the juvenile justice system continued, however, and this eventually led to more and stronger calls for reform. In 1973, federal and provincial corrections delegates met and struck a federal-provincial review group on the juvenile justice system. In addition, an interdepartmental committee on "young persons in conflict with the law" was also established by the Solicitor General. This Committee's report was submitted in 1975. Between 1975 and 1977, the consultation process began again as the federal government initiated further discussions, based on the Committee's recommendations, and aimed at developing the new

juvenile justice legislation (Corrado, 1983; Solicitor General, 1979; House of Commons, 1981). Interest groups were surveyed and attempts were made to arrive at "politically acceptable compromises by incorporating various elements of competing theoretical and philosophical positions into the new juvenile justice legislation" (Caputo, 1987: 130).

On July 31, 1975, then Deputy Solicitor General Roger Tasse, Q.C., submitted a report and new draft legislation entitled Young Persons in Conflict With the Law Act, to then Solicitor General Warren Allemand, on behalf of the interdepartmental committee. The new draft made a number of important and progressive recommendations and emphasized the need to return to the procedural safeguards of the adult criminal justice system, thus limiting the informal and individualized approach which characterized juvenile justice under the JDA. Although this draft law was put on hold pending the outcome of the consultations, this basic premise of the "justice" model was destined to remain through subsequent revisions and the ensuing legislation (Wilson, 1982).

Further Proposals and Discussions

By the late 1970's, the federal government appeared to clearly favour a justice orientation as the dominant philosophy of the new legislation for Canadian youth. The adoption of this philosophy was, to a certain extent, a

response to a public concerned with the apparent increase in crime. Many considered youth, dubbed by some as the "lost generation", responsible for this rise in the incidence of crime. This belief was reinforced by Canada's economic recession and high unemployment rate at the time.

In 1977, a document entitled Highlights of the Proposed New Legislation for Young Offenders was tabled by the Solicitor General's Department. After further discussion, another document, Legislative Proposals to Replace the Juvenile Delinquents Act was presented by the parliamentary secretary to the Solicitor General, in 1979. This proposal recommended that a maximum age of "under 16" be established. This was a necessary compromise as provinces were still unable to agree on this issue. The federal government indicated that it would accept "under 17 or 18" if the provinces could agree on a uniform age. A brief period of consultation between the federal and provincial governments followed in order to focus on matters relating to the proposed content of the legislation and the financial implications for the provinces.

The B.C. Attorney General's Department, at that time, appeared to support the shift from the traditional child welfare model towards a justice model. At the same time, however, the Corrections Branch opposed the proposed maximum age of under 16, feeling that too many youth would be unnecessarily dealt with within the adult system and that this would contravene the Act's philosophy of minimal intervention

and maximum community-based programming. Corrections officials also proposed that more restrictions be placed on the imposition of custody (Robinson, 1979).²³

The Young Offenders Act (Bill C-61)

On February 16, 1981, the first reading of what was by then known once again as the Young Offenders Act, confirmed that disagreement on the maximum age remained the major stumbling block to the enactment of the new legislation. The provision that provinces could opt out of the recommended maximum age caused much public and political opposition. Nevertheless, whereas early drafts of the YOA had sparked tough criticism by social welfare and justice associations alike, the new draft, known as Bill C-61, was introduced into the House of Commons in 1981, with a minimum of debate (Reid, 1986). The philosophy of the YOA was seemingly accepted at this point:

"The justice model allowed the Liberal government to co-opt the demands for individual accountability, protection for society, and tough deterrent measures against the new dangerous class voiced by the Opposition and the law and order lobby as its own" (Havemann, 1986:230).

²³ In B.C., provincial legislation known as the Correction Act already contained criteria for the imposition of custody or "containment" for juvenile offenders. In addition, the Corrections Branch had implemented policy statements which supported the notion of "minimal intervention".

While the proposed Act still contained a few provisions to mollify the child welfare supporters, the tenets of the justice model had obviously won out. The tension between these two competing ideologies, however, was evident throughout the development of the Act. British Columbia, for example, while in general agreement with the proposed legislation's philosophy, felt that the YOA should provide more of a balance between the needs of society and the individual needs of young offenders "to be assisted towards maturity by adults with an understanding of and compassion for the special problems of adolescence" (Vogel & Robinson, 1982: 3). In their submission to the Standing Senate Committee on Constitutional and Legal Affairs, then Attorney General of B.C. Richard Vogel and then Commissioner of Corrections Bernard Robinson stated:

"Although we have indicated a general support for the thrust of Bill C-61, as the full implications of the Bill have come to light through more detailed analysis and in-depth consideration of its many provisions by experts in the field, the Province of British Columbia is now of the view that the Bill will have a drastically negative, and unintended effect on the operation of the juvenile justice system...and it should therefore not be enacted until the appropriate changes to it are brought about" (1982: 3-4).

B.C. therefore made several recommendations to the federal government to offset the YOA's predicted impact. These included the following:

1. That the maximum age under the YOA not be under 18, as proposed by the Solicitor General of Canada, but

under 17, as was already the case in this province. An increase in the maximum age by one year would, according to provincial authorities, cost approximately 40 million dollars which would not be offset by a savings in the adult system (Vogel & Robinson, 1982: 6). In addition, concern was expressed over the mixing of younger and older, more sophisticated youth.

2. That the legislation be amended to deal with exceptional cases with regard to those children under age 12.
3. That the section on "Alternative Measures" be removed altogether due to constitutional grounds. B.C. felt that it encroached upon provincial jurisdiction, that it would create yet another level in the system due to its formalization, and that the use of these alternative measures be a bar to further proceedings.²⁴
4. That the combined effects of the "right to counsel" (section 11) with the evidentiary requirements under section 56 might "lead to the exploitation and abuse of the Act by sophisticated and street-wise young offenders, thereby undermining the fundamental

²⁴ As it was written, the section contravened B.C.'s policy with respect to diversion in that decisions by Crown Counsel in these situations were final and cases could not be resurrected (Vogel & Robinson, 1982: 10).

principle of...(accountability)" (Vogel & Robinson, 1982: 11).

5. That the disposition section (s. 23) provide for the court to consider the appropriateness of a placement or program, as determined by the operators.
6. That more stringent criteria for secure custody be included.²⁵ In addition, that the authority to transfer or place young offenders be left to custodial administrators and not the court. The justification for the court to review transfers from secure to open custody was viewed by B.C. as potentially burdensome, expensive and likely to lead to overcrowding in facilities.

None of the above recommendations by British Columbia was adopted by the federal government. On April 15, 1981, then Solicitor General Robert Kaplan, moved that Bill C-61 be given second reading and referred to the Standing Committee on Justice and Legal Affairs:

"The proposed legislation, which is aimed at providing an updated and comprehensive process to deal with juvenile crime which encourages both

²⁵ B.C. recommended that these criteria be such as were provided in the provincial Corrections Amendment Act, section 37, before this section was successfully challenged on constitutional grounds. Such criteria limited admission to "containment" to youth who had committed offences that were punishable by two years or more in jail as an adult, to youth who were at least 14 years of age, and who were unsuitable for community-based programs.

respect for the law and protects the well being of both the young offender and society, is long overdue" (House of Commons Debates, 1981: 9307).

Mr. Kaplan further indicated that the YOA would attempt to toughen the juvenile "kiddie" court image by making it a place "where a mature young person will be punished and held accountable to society for what he has done" (Corrado & Markwart, 1988: 115). This statement indeed represents a marked departure from the JDA's description of the juvenile court as a kind yet stern parental figure.

The second reading of the YOA still did not solve the ~~jurisdictional dispute over age~~: The minimum age was set at 12; the maximum under 18. However, provinces were still able to opt out of the upper age limit. This second draft of Bill C-61 included the controversial provisions for formalized diversion or "alternative measures" which pleased many who were so critical of the JDA's silence in this area (B.C. being one exception).

After second reading of the Bill, the uniform maximum age issue was finally resolved and set at "under 18". The YOA received Royal Assent July 7, 1982. It was proclaimed law April 2, 1984. Provinces were required to implement the maximum age provision by April 1, 1985.²⁶

At the time of its proclamation, the new YOA was

²⁶ B.C., therefore, had one year to increase the maximum age from "under 17" to "under 18" and thus redesign facilities and resources that would accommodate older, more sophisticated youth.

generally perceived to be a positive attempt at solving past and future constitutional problems by reducing the federal jurisdiction and creating a uniform age across all provinces (Wilson, 1982).

The Philosophy of the Young Offenders Act

The philosophy of the YOA, as already indicated, is one reflecting a justice ideology as opposed to one entrenched in child welfare principles. Yet the dividing line between these two models is not as distinct as one might assume. Because of this, it is not easy to describe the philosophy of the YOA. Indeed, the reason why the reform process took over two decades to reach a conclusion, is believed by some to be the conflict that existed over the supposed purposes of the juvenile justice system, and the different approaches to policy development articulated by individuals, bureaucrats, and politicians alike (Reid & Reitsma-Street, 1984; Caputo, 1987). Others feel that the YOA is the product of an attempt to reconcile competing philosophies. The positive features it supposedly has over its predecessor are summarized by Judge Omer Archambault:

"The YOA...is in response to this evolution of cultural values and attitudes towards the aim of justice. The legislation is based on a new set of fundamental assumptions reflecting this evolution and inspired...by extensive knowledge of human behaviour generally and the moral and psychological development of children in particular" (Archambault, 1983: 3).

Early YOA commentators suggested that a new era of juvenile justice had been reached with this legislation (House of Commons, 1982; Wilson, 1982; Archambault, 1983; Lilles, 1983). The YOA was seen by its supporters as more adaptable to societal change than the JDA, due to its incorporation of different models of youth justice. These different models, however, were thought to promote conflicting sets of values. Therefore, the debates prior to the implementation of the YOA often centered on such philosophical polarities as: "the best interests of the child" versus "the protection of society"; "punishment" versus "treatment"; "flexible adjudication" versus "procedural rights"; and "federal" versus "provincial" jurisdictions (Reid & Reitsma-Street, 1984).

The reason why the justice model ended up having the strongest influence on the drafting of the legislation is difficult to pinpoint. However, during the consultation period prior to the implementation of the YOA, there was a general shift in orientation from welfare to justice. This probably contributed to the debates about the legislation's purpose. As previously indicated, there was a gradual move towards conservatism within Canada, particularly during the late 1970's. This political climate fostered the principles inherent in the justice model, thus giving its proponents considerable opportunities for influencing social policies, including the YOA. Other legislation was also subject to amendments designed to "toughen up" the authority of the

statute. Bill C-18, for example, the Criminal Law Amendment Act, increased the penalties for impaired driving and enhanced the enforcement capability of the law relating to prostitution (House of Commons Debates, 1982). Several American jurisdictions also shifted from the parens patriae philosophy to the crime control philosophy (Corrado, 1983; Caputo, 1987). Over the past two decades, California, for example, moved from a primarily welfare-oriented system for young offenders to one premised on justice assumptions. Interestingly, both England and Scotland moved in the opposite direction from systems predominantly based on justice assumptions to those premised on welfare principles (Corrado, 1983). Thus, it appears that Canada is not alone in its effort to determine the best philosophy for dealing with young offenders.

The change in Canadian legislation from the JDA to the YOA clearly marked a new era in juvenile justice and reflects a shift in philosophy from a welfare orientation to concern over rising crime rates and the need to hold juveniles accountable for their actions. Hence, the preference for a responsibility model whereby reliance on social and community based solutions is conditional upon its consistency with public protection (Solicitor General, 1979). While the YOA intended to provide a more serious response to youth crime, it also strived to apply the principles of due process to young offenders and to allow them legal representation.

While the justice philosophy is clearly the dominant one,

dual concerns of justice and welfare models are evident in various provisions of the YOA (Caputo, 1987: 134), as will be seen in the following section.

The Declaration of Principle

Section 3 of the YOA is entitled "Declaration of Principle". The first part is comprised of 8 subsections which were intended as policy guidelines for Canada's juvenile justice system. Interestingly, the second part stipulates: "This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1)". A similar statement was contained in the original JDA's preamble, as previously mentioned. Unlike the JDA, however, the YOA sets out detailed principles, in order to provide some guidance to those applying the Act. The subsections which make up the "Declaration of Principle" are presented below:

Section 3. (1) "It is hereby recognized that

- (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
- (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;
- (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

- (d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;
- (e) young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;
- (f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;
- (g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and
- (h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate".

The above principles have been analyzed by various individuals in an attempt to articulate the new philosophy of youth justice in Canada. Politicians and others who were largely responsible for drafting the YOA have described the "Declaration of Principle" as a synthesis of competing models which, they believed, would provide clarity and flexibility. Judge Archambault, for example, has stated:

"The declaration of principles contained in the YOA,

in addition to serving as a guide to its interpretation and application, as well reflects Canadian society's attitudes toward and expectations of its youth justice system" (Archambault, 1983: 1).

Others have disagreed and suggested that the YOA's principles are not cohesive, but contain conflicting assumptions. Lilles (1983), for example, maintains that the principles reflect not only the justice model, but the welfare and crime control models as well.²⁷ Lilles' analysis reveals, however, that the philosophy favours punishment over treatment, considers the offence rather than the offender and places much less emphasis on judicial discretion than the JDA did. Reid & Reitsma-Street, in their detailed analysis of the assumptions underlying the YOA's statement of principle, point to an even more significant discrepancy. They conclude that the resolution of these "virtually dichotomous issues" requires "delicate balance" (1984: 10). Others feel that, in its effort to establish a compromise, the YOA has only succeeded in placating vocal interest groups without accomplishing any meaningful change:

The YOA is a..."masterful political document that accommodates and offers appeal to a divergent range of interest groups and philosophies...In effect, the Act attempts to be all things to all people" (Corrado & Markwart, 1988: 114).

²⁷ Lilles defines the crime control model as state responsibility for maintaining order whereas the justice model refers to due process. For a more elaborate discussion of these models, see Reid & Reitsma-Street (1984).

Others, however, have praised the YOA for providing a "coherent and balanced process", one that will "encourage respect for the law and promote the well-being of both the young offender and society" (Archambault, 1983: 20).

Indeed, the YOA makes a deliberate attempt to incorporate what criminologists and criminal justice researchers have proposed as a means of humanizing the juvenile justice system. The principle provided for in section 3(1)(d) which directs youth justice administrators to employ the least restrictive alternative consistent with public safety, is but one example. In addition, section 24(1) of the YOA outlines several conditions that must exist before sentencing a youth to custody. The Act clearly states that secure custody is only to be used when the young person poses a threat to society, "having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person".

Subsections (e) and (g) of the "Declaration of Principle" reflect the YOA's emphasis on extensive procedural safeguards and legal representation at every step of the process. Such provisions are considered by some to be a significant improvement over the JDA (Wilson, 1982; Archambault, 1983). Under the YOA, young offenders are entitled to all due process measures afforded to adults such as:

1. the right to counsel (s. 11);
2. the right to be heard and participate in proceedings

(s. 3(e));

3. the right to appeal (s. 27).
4. the right to be informed of rights and freedoms where these may be affected by the YOA (s. 3(g)).

In addition, youth are afforded "special guarantees" consistent with the assumption regarding age and reduced criminal responsibility (s. 3(e)). They are also granted the right to the "least possible interference with freedom" (s. 3(f)). The YOA thus recognizes the adolescent phase of development. Youth are capable of independent thought but not to the same extent as adults. They are expected to show responsibility to society, to their victims and in their own self-help/improvement. This responsibility, however, is tempered by the concept of mitigated accountability--not to the same extent as adults (Archambault, 1983: 13). Thus sentences should not be as severe as those for adults, as youth are seen to have "special needs".

As can be seen from the "Declaration of Principle", the doctrine of parens patriae has given way to a model based on the shared responsibility of parents, young persons and society to prevent and deal with crime (Archambault, 1983: 15). The philosophy of responsibility and accountability, however, is tempered with an attitude of help and support for young offenders. Thus, it appears that elements of the welfare model have been retained. This is exemplified in

various sections of the YOA. For example:

"An extensive review process is provided for to ensure continual monitoring of dispositions in order that they remain relevant and geared to the changing needs and circumstances of young persons. A review hearing will be available at the instance of young persons or their parents, as well as the crown" (Archambault, 1983: 14 -15).

Another departure from the JDA is the recognition of the value of social prevention. While society has been granted the right of protection from illegality, it also has some responsibility for crime prevention (Archambault, 1983: 17). Unlike the JDA, however, the YOA utilizes restraint in its preventive efforts, as exemplified by its intervention powers. For example:

1. the minimum age is raised from 7 to 12 and the maximum age to 17. The net result is a reduction in the size of the age group governed by the Act, particularly a reduction in the number of less mature youth being processed through the adult system;
2. the offence jurisdiction is limited to federal statutes/regulations only, thus eliminating criminalization of youth for violation of provincial offences, municipal bylaws or "status" offences;
3. the removal of status offences from the legislation corrects some of the previous discriminatory and discretionary practices of the JDA in this area;

4. the provision of a wide range of community-based dispositions.

The YOA's philosophy was thought by some to be an improvement over the JDA in that it would allow justice system administrators to respond more effectively to the dynamic needs of Canada's young offenders. This is perhaps best exemplified by an excerpt from then Solicitor General Robert Kaplan's 1982 submission to the Standing Committee on Justice and Legal Affairs:

"The new YOA will be more expensive...it will serve Canada more, because the opportunity of rehabilitating young offenders will be greater...also the opportunity of punishing young offenders...whatever philosophy...the new model which is before you provides more flexibility and gives the court more opportunity to deal with the problems before it than the present system does and that, in the long run, we can expect an improvement in the criminal justice system..." (House of Commons, March 23, 1982: 67:14).

Criticisms of the Young Offenders Act

Given the ethnic, cultural and political diversity of Canada, and in view of the large number of groups to be affected by the promised changes to the juvenile justice system, it was not surprising that the YOA came under criticism even before it was enacted. Early critics feared that the provinces would take over the youth justice arena as the federal government abdicated its constitutional

responsibilities. This, it was argued, might lead to just as much diversity between the provinces as existed under the JDA. Others felt that while some differences might exist, the uniformity possible under the YOA would be far better than that which was experienced under the JDA. Wilson (1982), for example, indicates that, given the political differences across Canada, some variance is natural and not that undesirable.

Nevertheless, after the initial report on juvenile delinquency in Canada was completed in 1966, the provinces took on the major initiative to develop the YOA (Osborne, 1979). In addition, the provinces implemented numerous reforms in anticipation of the repeal of the JDA in acknowledgement of their constitutional responsibilities to administer the juvenile justice system (Corrado, 1983).²⁸

The proclamation of the YOA in 1984 quickly sparked controversy and criticisms in anticipation of its impact. Two early criticisms are worth noting:

1. A confusion within the YOA's "Declaration of Principle", which appeared to be based on the competing philosophies of welfare and justice, and the concern that the justice model would emphasize a crime control orientation;
2. A concern that the YOA's emphasis on due process

²⁸ The initiatives of British Columbia will be detailed in the next Chapter.

might result in a system too formal and adversarial in nature, similiar to adult court. This, in turn, might have unintended consequences such as punishing more young offenders, ignoring treatment needs and widening the net of social control.

Philosophical Confusion

As mentioned previously, the drafters of the YOA took pride in developing legislation which provided a compromise between competing ideologies. While the justice model is the predominant theme, there are still provisions for the special needs, including treatment, of young offenders. Such provisions are evidence that the welfare model principles have not been completely abandoned. In their analysis of the assumptions underlying the YOA's "Declaration of Principle", Reid & Reitsma-Street (1984) suggest that they incorporate four theoretically distinct models of youth justice:

1. **The Crime Control model:** It is the responsibility of the state through the court system to maintain order for society;
2. **The Justice model:** The procedures for interference with freedom are specifically limited and based on consent as much as possible;
3. **The Welfare model:** It is society's responsibility to attend to the needs of the youth and the family;
4. **The Community Change model:** It is society's

responsibility to promote welfare and prevent youthful crime.

According to Reid & Reitsma-Street, these different models are problematic as they contribute to a lack of prioritized assumptions. They suggest that this leaves those responsible for the implementation of the YOA few points of reference and much room for discretion. Therefore, extraneous factors (i.e. access to funding and the ideologies of those responsible for enforcing the YOA) stand to influence the implementation of the YOA principles. The ambiguity of these principles is such that they may be used to provide a rationale for every possible decision.

Others have expressed concern over the confusing "Declaration of Principle" of the YOA. The Canadian Foundation for Children and the Law (1981) criticized the YOA's "Declaration of Principle" for providing little guidance and prioritization and suggested the Act was simply a "reenactment" of the JDA's "alliance of social welfare philosophy and criminal law" (Wilson, 1982: 261). More recently, similar criticism has been voiced by Corrado & Markwart, as may be seen from the following quotation:

"On the one hand, the principles have a clear conservative orientation that encourage reliance on the traditional adult sentencing principles of deterrence and incapacitation...On the other hand, these conservative propositions are tempered by other considerations which signal intended constraints on potentially punitive practices...in addition...the principles are replete with

qualifications that muddy the waters..." (Corrado & Markwart, 1989).

Reid (1986) describes an earlier study she conducted (Reid, 1985) in which she examined the attitudes and beliefs of 300 juvenile justice practitioners in Southern Ontario prior to the YOA's implementation. She detected the existence of a variety of ideological perspectives regarding the most effective method of treating or assisting young offenders. Relying on her previous work (Reid, 1964), as well as that of Hassenfeld and English (1974), Reid describes three levels of assumptions that guide social policy: (1) the stated philosophy, (2) the translation of the stated philosophy into program goals and objectives, and (3) the "ideological" orientation of the service providers (1986: 10). As the YOA was hoped to greatly reduce the wide use of discretion and administrative differences that existed under the JDA, such confusion within the Act's philosophy should indeed be cause for concern. In the absence of clear guidelines, it appeared doubtful that the justice administrators would commence a cohesive and uniform implementation of YOA principles. Unlike the JDA's "pure" parens patriae philosophy, the YOA, with its mixed philosophies, is bound to promote tensions and to allow for individual preferences to influence decision making.

Another criticism of the YOA's justice philosophy was that the Act may have gone too far in this direction within the welfare - justice continuum. Among the concerns that have

been raised is the "law and order" approach the Act appeared to take, an approach characteristic of times of economic restraint and conservatism (Hylton, 1982). This approach is reflected in the "crime control" provisions of young offender responsibility and the protection of society. Indeed these are the first two principles listed in the YOA's "Declaration". Reid (1986) suggests that "latent functions" may take precedence over "manifest functions".²⁹ She goes on to state that: "latent functions of the juvenile court are taking precedence and skewing the philosophy of the courts to match the bureaucratic interests at the local level" (Reid, 1986: 10). Thus, the principles inherent in the "justice" model may not, in practice, be realized.

For many, the YOA was not the "progressive legislation" it promised to be, but merely an amalgam of principles taken from many jurisdictions in the United States. Reid (1986) agrees with Lescheid & Gendreau (1986) when they point out how the principles of the YOA are similar to those espoused in the leading U.S. document on young offender policy, the Report of the Twentieth Century Task Force on Sentencing Policy Toward Young Offenders, released in 1978. They contend that both the U.S., judging by this report's conclusions, and

²⁹ Reid refers to Miller (1979) who defines "manifest functions" as basic philosophies of the system such as law and order, public safety, child welfare, whereas "latent functions" are more "mundane" concerns such as political patronage, contracts with vendors of services, arrangements between service delivery units, etc.

Canada have rejected "rehabilitation" as a primary goal in favour of the "justice" model. The doctrine of "nothing works" formulated by Martinson in 1974, they argue, has provided ammunition to the supporters of the justice model among politicians and many other groups. This abandonment of rehabilitation was apparently viewed as having dangerous repercussions. Yet, it appears that, despite the absence of **conclusive** data on the value of any one set of principles or on the effectiveness and efficiency of a given juvenile justice model, the Canadian government still proceeded to make changes in federal legislation and policies regarding juvenile law violators.

Thus, while the YOA was criticized for its confusing principles, it was also attacked for placing too much emphasis on "justice" issues at the expense of "welfare" concerns.

Due Process Concerns

A second major criticism launched against the YOA suggests that its emphasis on due process might result in the creation of a criminal code for children and thus an adversarial system that would duplicate the adult court process. While there is some evidence that the ordinary courts had been positively influenced by juvenile justice practice under the JDA, the trend for both the youth and adult systems was now towards the traditional tenets of the adult criminal justice system (Ekstedt & Griffiths, 1984). There

is little doubt that many of the changes introduced by the YOA move the juvenile justice system closer to the more formal and adversarial character of the adult system. The youth court under the new Act is: "first and foremost, a criminal court responsible for adjudicating the guilt or innocence of a young person" (Burrows, Hudson & Hornick, 1988: 1).

Those who subscribe to the "legal rights perspective" welcomed the increased emphasis on due process under the YOA (Cousineau & Veevers, 1972). For others, these new rights were bound to create a system that was too formal and adversarial (Caputo, 1987). In his never relenting praise of the YOA, Judge Omer Archambault (1983) responds to this criticism by pointing out that the youth court under the YOA does differ from the ordinary court in that it brings in the interests of the families. He equally points to another extremely important procedure peculiar to the YOA that distinguishes the juvenile from the adult court system, namely the extensive review process. This review permits the monitoring and modification of dispositions to adapt them to the changing needs and circumstances of young persons. Archambault further insists that the YOA continues to consider rehabilitation, which many say is now defunct in the adult justice arena.

Those who endorse the "help-oriented treatment perspective" have condemned the YOA for being too similar to the Criminal Code, something they feel is inappropriate for

the handling of young offenders (Cousineau & Veevers, 1972). For example, during the 1981 House of Commons Debates, New Democratic Party M.P. Svend Robinson, voiced his hope that youth would continue to be dealt with in a special manner different from that of adults and that the government would commit adequate resources to assist them. He stated:

"Indeed, the protection of society is and must be of great importance, but one must question whether by substituting a Criminal Code for children we in any way enhance the protection of society. I suggest the evidence is very much the contrary" (House of Commons Debates, 1981: 9316).

Some suggest the YOA will only guarantee the protection of society, not young offenders. Hackler (1987) postulates that attempts to make the YOA more like the adult criminal system may have resulted in an exaggerated emphasis on legalities. Such a system, thick with procedures, may be of little benefit to young offenders (Lescheid & Gendreau, 1986; Reid, 1986). While the JDA was being criticized for its flexibility and "free hand", many provincial jurisdictions were already introducing due process methods by the time the YOA was enacted. This situation, coupled with a growing public sentiment of conservatism and calls for punishment, may have diminished any commitment to rehabilitation and any concern with why youth commit crimes. Hackler (1987) points out that, while research on the impact of the YOA is limited, some general trends are emerging. These include rising institutional counts in Alberta and other provinces, an

increase in adjournment and court delays and decreasing resources for troubled youth and their families.

Increased involvement of lawyers has diminished previous practices of conflict resolution and involving youth in their court sentencing. Formal legalism, Hackler feels, can be a barrier to working out positive and creative solutions:

"The Youth Court is becoming a better place for lawyers but a poorer place for children in need of help. In court, the juvenile has more trouble telling his story. His disrespect grows with the delays and confusion. The system is an enemy, not a source of help. Government policies are putting more resources into the rituals of the court and less into providing judges with knowledge about their cases, more into custodial control and less into rehabilitative efforts, more into the monitoring of cases and less into providing flexibility and a wider choice of options for judges, probation officers, and social workers...the shift of public resources to those activities guaranteed to be ineffective may lead social historians to describe this period as one where designers of legislation meant well but ended up doing considerable damage" (Hackler, 1987: 209).

There is a further concern that more custodial dispositions will be imposed due to reduced flexibility and funding for alternative resources. This criticism has been supported through research by Hackler (1987). More recently, Corrado & Markwart (1989) have speculated that it is not the presence of legal counsel per se but a lack of quality amongst defence counsel which has contributed to increased custodial dispositions.

A somewhat related concern is that the YOA's increased formality may have unwittingly contributed to the widening of

the net of social control. While the YOA succeeded in establishing uniformity in terms of age across Canada, one of its unintended consequences might be a major increase in the number of youth handled by the youth justice system (Hackler, 1987). As pointed out by Corrado & Markwart (1988) there is some evidence that in B.C., 17 year olds are being dealt with much more harshly under the YOA than they would have been as first-time adult offenders prior to the YOA. Thus the raising of the maximum age in most provinces may result in a larger, more serious young offender population. Other critics have expressed concern that the Act's formalized diversion procedures may actually curtail the use of diversion because they make it too cumbersome (Caputo, 1987). Reduced discretionary power of the police, Crown Counsel and probation officers might also contribute to a widening of the control net. These criticisms are somewhat ironic given that the JDA was repeatedly attacked for its lack of uniformity in the maximum age and its silence on the issue of diversion.

Thus, as expected, the legalistic approach adopted by the YOA was criticized by some and praised by others. Obviously, the proliferation of due process safeguards could be seen as both an improvement and an impediment:

"More rights are granted but considerably more responsibilities are imposed. Without sufficient resources the punishment aspect may be resorted to by the courts by default of having few palatable alternatives" (Wardell, 1985: 338, in Caputo, 1987).

Amendments to the Young Offenders Act

Following the passage of the YOA, it did not take long before voices were heard calling for substantial amendments. Former Solicitor General of Canada Perrin Beatty is quoted as saying: "There was a wide consensus on the need for the Act and its basic philosophy when it was adopted unanimously by Parliament. But, (as) with any piece of legislation, its only test is its performance as law". (Reid, 1986: 8, quoting Beatty, 1986:7544). While acknowledging the need for change, Reid expressed the hope that:

"when the government amends the YOA, some priority and direction (will be) given to the stated philosophy in an attempt to at least provide leadership at the first level of the ideological continuum" (Reid, 1986: 10-11).

The recognized need to amend the YOA has been impeded by the continuing conflict over what should be its overriding philosophy. Renewing the Government commitment to the justice model, former Solicitor General Beatty declared:

"I will propose a number of important but more narrow and technical amendments. All of the changes will be consistent with the Act's aim of public protection while meeting the special needs of young offenders, and emphasizing their responsibilities" (Reid, 1986: 9).

The statement implied that the amendments will just provide procedural guidelines, whereas what is needed is a critical analysis of the underlying philosophies.³⁰

³⁰ See Lescheid & Gendreau (1986) for a more detailed discussion of the priorities for amending the YOA.

Among the sections of the Act that have continually been under attack and have generated persistent requests for reform, are the maximum three year custodial penalty, the prohibition on publishing the names of dangerous youth, and the problems posed by the destruction of records provisions. In response to these criticisms, welfare model advocates and children's rights activists who oppose the proposed amendments argue that the YOA already contains avenues to address these problems. For example, where the three year maximum penalty is not considered tough enough, the court can utilize the transfer to ordinary court provisions under section 16 of the Act. They also claim that since young offenders are not eligible for parole, mandatory supervision or remission, they are likely to do longer time than adults. They argue that it is "ludicrous" to take fingerprints and "mugshots" of "children", and that these practices may contravene the Canadian Charter of Rights and Freedoms (Caputo, 1987: 138).

With increasing pressure, however, the justice model advocates appear to have won out. Bill C-106, enacted in September, 1986, introduced some major amendments to the YOA. The principal changes contained in the Bill are as follows:

1. Enhancing the court's latitude to impose consecutive sentences for crimes committed prior to disposition or for subsequent offences;
2. Giving the police access to youth records for continuing investigations;

3. Allowing courts to grant permission to publish the name of dangerous youth "at large";
4. Enhancing police powers to detain suspects before trials;
5. Streamlining of procedures for transferring youth between custody types;
6. Enabling the police to arrest without warrant under section 26 of the YOA (breaches of court orders);
7. The amendment of the Criminal Code of Canada to prohibit the "counselling" of children to commit crimes.

As can be seen, the above changes are aimed at eliminating some of the administrative problems created by the YOA and enhancing the ability of the authorities to enforce the law (Caputo, 1987: 138).

Advocates of the justice model continue to criticize the Act for being too lenient still and this despite increased incarceration rates (Caputo, 1987). They argue that those under age 12 cannot be prosecuted, that 17 year olds are too sophisticated for the youth system, that housing younger and older youth together is inappropriate, and that there is a lack of facilities for dangerous youth. Some particularly vocal interest groups are actively lobbying the federal government for amendments to the YOA in order to correct these perceived shortcomings. Some groups are even advocating the

abolition of the YOA as it is too "permissive".³¹ It appears that such groups are garnering much support and that their campaigning has had a tremendous influence on provincial governments across Canada.

With respect to current proposals for amendments to the YOA, B.C. is actively attempting to amend the legislation to eliminate the court's authority to specify the custody type. Officials in this province believe that this decision should be made by correctional authorities who are, they feel, in a better position to evaluate the youth and decide on the appropriate facility and level of security he or she requires (Department of Justice, 1987). More recently, a "Consultation Document" put out by the Department of Justice in 1989 identifies five areas of the YOA that have been the subject of discussion by the provincial and federal governments for the purposes of legislative amendment or repeal. These areas are: the open/secure custody distinction and the custody review provisions, treatment and assessment of "special needs" youth, statements and evidence, children under age 12, and the

³¹ On a recent episode of the television program "W5" (aired June 17, 1990) outraged lobby groups were depicted as blaming the YOA for an apparent increase in violence (i.e. gang-related) and murder. Many of these groups are headed by parents of children who have been murdered by young offenders, most of whom received the three year maximum custodial penalty. In response to these groups, His Honour Lucien Beaulieu, a Toronto Senior Youth Court Judge, dismissed the criticisms as "illfounded and misdirected". He defended the YOA as an Act that emphasized accountability, and not necessarily punishment, and expressed concern that the youth court become a "dumping ground", particularly when other social agencies have failed to successfully intervene with youth.

maximum penalty under the Act combined with the provisions for transfer to adult court (Department of Justice, 1989). In response to public pressure on the federal government to address the issue of punishment for murder, proposed amendments to the YOA have been divided into two phases. Bill C-56, currently under discussion at the parliamentary level, proposes that a two year conditional release provision be added to the present three year maximum custody for murder. If reasonable grounds for "dangerousness" existed, Crown Counsel could make an application to extend the custodial term.

The second phase of amendment proposals, which deal mainly with the open/secure distinction and the custody review provisions, has been postponed pending the resolution of Bill C-56.

CHAPTER III

CUSTODY AND REVIEW UNDER THE JUVENILE DELINQUENTS ACT AND THE YOUNG OFFENDERS ACT

As can be seen from the discussions in the preceding chapter, Canada's juvenile justice history reflects a significant philosophical shift from the principles of treatment, care and informality espoused by the welfare model, to those of the justice model stressing accountability, deterrence, and procedural safeguards. In this chapter, attention will be focused on the impact these changes have had on custodial dispositions and review processes of the youth court under the YOA, as compared to the practices under the JDA. Of particular interest here is whether the YOA's custody review provisions are being utilized as intended. It is suggested that their inclusion in the YOA was to monitor the young offender's custodial term, to reduce the negative effects of long-term institutionalization, to provide youth with a parole-like system of gradual release to the community, and to encourage young offenders to avail themselves of opportunities for "rehabilitation". These suggestions will be further developed and tested in the next two chapters.

To facilitate the empirical analysis of custody reviews, this chapter will provide a preliminary description and discussion of the impact of the YOA through a comparison of

dispositions available and practised under the JDA and the YOA; as well as a description of the custody review provisions.

BRITISH COLUMBIA'S PRACTICES PRIOR TO THE YOUNG OFFENDERS ACT

Prior to the proclamation of the YOA, B.C. had already adopted many of the "justice-oriented" practices that the Act eventually introduced (Corrado, 1983; Corrado & Markwart, 1988). During the 1960's and 1970's, B.C.'s system of juvenile corrections and court services had seemingly entered a "justice" phase in their operations (Ekstedt, 1983). The province had implemented progressive legislation, programs and policy in an attempt to "modernize" the JDA (Vogel & Robinson, 1982) and in anticipation of the yet to be proclaimed Young Offenders Act. Ekstedt (1983) attributes B.C.'s "evolution" in the field of juvenile corrections to three emerging issues:

1. The increasing criticisms and disillusionment with the JDA's welfare model and efforts to repeal the Act;
2. The ongoing conflict between child welfare and correctional authorities within the (then) Ministries of Human Resources and Attorney-General over mandate, jurisdiction and responsibilities;
3. The changes within B.C.'s political climate during

the 1970's.

B.C.'s experimentation in the field of juvenile justice was not always in the "justice model" direction. In 1969, B.C. repealed the provincial Training Schools Act which authorized the establishment of industrial schools as per the JDA. Prior to 1969, B.C. had two such institutions, known as training schools, which were administered by the Ministry of Human Resources. The repeal of this legislation was the result of increasing criticism over the quality and conditions of these training schools by the late 1960's and chronic overcrowding due to the JDA's lack of criteria for admission or release (Ekstedt, 1983). Once the Training Schools Act was repealed, the juvenile court could not directly commit a juvenile to a secure institution post-sentence. The court was restricted to the use of less secure, community-based residential programs, which were operated by both corrections and child welfare authorities. These facilities had a decidedly treatment bent to them. While many applauded the closure of these facilities, correctional authorities were particularly concerned and frustrated with the resulting lack of control measures for highly delinquent juveniles. Conflict between social workers and probation officers at the line level increased. One of the unintended consequences of the government's decision to close the training schools was an increase in transfer applications to adult court (Ekstedt,

1983). By 1970, the province lowered the upper age limit from under 18 to under 17³². While the major reason was to reduce the number of juveniles being raised to adult court, it only resulted in younger juveniles being transferred (Ekstedt, 1983).

In the midst of the conflict between juvenile justice system administrators, the New Democratic Party defeated the strongly entrenched Social Credit Party in the 1972 provincial election. The new premier, Dave Barrett, was a former social worker with a substantially different political agenda from that of his predecessor. The new government was committed to community-based programs and resources and established tough screening measures in order to reduce the number of adult court applications for juveniles. In 1974, the New Democrats enacted the Administration of Justice Act. According to Ekstedt (1983), this Act had a major effect on juvenile justice policy in B.C. for several years. The province assumed responsibility for the administration of the juvenile courts, probation services and detention centres from the various municipalities. This gave the Ministry of Attorney General a heightened profile politically. At the same time, the highly respected Royal Commission on Family and Children's

³² Most provinces had retained an under 16 year limit (Corrado & Markwart, 1988).

Law³³ had recommended that, while community-based resources for juveniles should be utilized in the majority of cases, there still remained a need for secure facilities for those juveniles who were serious, "hard core" offenders. Despite this recommendation, and calls for similar reform by interest groups and professionals alike, the New Democratic Party resisted the reopening of such institutions (Ekstedt, 1983).

Near the end of 1975, the Social Credit Party defeated the New Democratic Party. Within three months, in response to media and public concern over serious juvenile offenders, secure containment for juveniles assumed significant importance at the Cabinet level. It became evident that the new government was taking a harder line with regard to juvenile offenders and was in favour of the justice model's principles of protection of society and punishment (Ekstedt, 1983). Senior government officials within the Attorney-General's Ministry were forced to quickly respond to the new political direction. The "difficult" negotiating process that followed, culminating in the new "Youth Containment Program" is described by John Ekstedt (former Commissioner of Corrections):

"...the primary policy development process that established the Youth Containment Program was not based on a clearly articulated philosophy related to juvenile justice; nor on any theory flowing from scholarly research; nor even on any reasonable grasp of the statistical information that might have been

³³ Known as the Berger Commission as it was headed by Mr. Justice Thomas Berger.

available...(it) was established as a result of a series of historical developments where many of the major decisions were taken in a "crisis" atmosphere and were "ground out" by negotiating compromises between varying points of view about the most effective means to resolve the associated political and administrative problems" (Ekstedt, 1983: 294).

The proposed Youth Containment Program required enabling legislation, which the re-elected Social Credit party quickly initiated in order to return to secure confinement in what were renamed as "containment centres" (Corrado, 1983). Despite constitutional concerns³⁴, the province enacted the Corrections Amendment Act in 1977. Once the legislation was in the drafting stage, and the policy direction of the government with regard to the juvenile justice system became clear, the B.C. Corrections Branch began developing many policies and procedures, particularly in respect to youth containment, which flowed from the justice model. It was evident, however, that much discrepancy still existed with regard to philosophical orientation; some viewed the welfare model as still appropriate, others favoured the justice model. The fact that the justice model had been initiated from "the top down", without proper consultation with less senior civil servants, increased the level of confusion and antagonism as to what the nature of youth containment programs should be (Ekstedt, 1983).

³⁴ These constitutional concerns are described in Chapter II.

The Youth Containment Program commenced operation in January 1978 (Ekstedt, 1983), but was short-lived, due to the court challenges to the Corrections Amendment Act between 1978 and 1980.³⁵ The legislation, and corresponding Corrections Branch policies, however, were instrumental in moving B.C. to the justice model. According to Corrado & Markwart (1988), children under twelve years were rarely prosecuted and if so, were never incarcerated. Laws pertaining to truancy and unmanageability had been repealed and prosecutions for sexual immorality were eliminated. Definite sentences were favoured and reviews or amendments to dispositions were heard more frequently in court. Custody sentences averaged four months with sentences longer than two years being the exception (Corrado & Markwart, 1988).

Corrado & Markwart (1988) further note that there were distinct government agencies of welfare and juvenile justice as well as a separation of philosophical practice and programs or services (particularly after the Training Schools Act was repealed). The provisions of the JDA wardship³⁶ were used

³⁵ See Chapter II.

³⁶ Section 20 (h) of the JDA allowed the court in rendering disposition to: "commit the child to the charge of any children's aid society, duly organized under an Act of the legislature of the province". In B.C., juveniles could be made "wards" of the Ministry of Human Resources (as it was previously known). While this disposition option was available, the preferred practice was a separate hearing under the provincial Family & Child Service Act which provided strict criteria for the removal of a child from their parental home, on a temporary or permanent basis.

infrequently. Further, custody was generally not used for rehabilitative purposes but was reserved for the more serious youth from whom society needed protection. Part IV of the Corrections Amendment Act authorized five different levels of correctional programs for juveniles: "restitution and compensation programs, community service programs, attendance programs, probation supervision programs, and containment programs" (Ekstedt, 1983: 287). The legislation provided admission criteria which emphasized that the lowest level of custody be utilized, that all community alternatives be first attempted, and that youth under age 14 generally not be contained. (Ekstedt, 1983; Corrado & Markwart, 1988). Community programs such as probation attendance and community service were thus widely utilized and had been developed considerably during the mid 1970's (Vogel & Robinson, 1982).

Additionally, Caputo (1987) points out that many young offenders who would be eligible for alternative measures under the YOA, were already being dealt with by diversion in many jurisdictions, including B.C., even though the JDA did not provide for such a practice. B.C. implemented specific policies in the mid-1970's whereby juveniles charged with provincial or municipal offences were not prosecuted in court but were diverted either by the police through the use of warnings and contact with parents, or by the probation

services for a pre-court enquiry ³⁷ (Osborne, 1979).

Throughout all these changes, it was becoming evident that the practices of juvenile justice in B.C., as well as in other provinces, were increasingly justice oriented and foreshadowed many of the reforms introduced by the Young Offenders Act. In 1981/82 a national study was conducted on juvenile court pre-dispositional detention and release practices in five Canadian cities, including Vancouver. The researchers, Moyer, Carrington and Kopelman were interested in finding out the degree to which the parens patriae philosophy was evident in these procedures. They found generally that these cities fell in the middle range of the "traditional - due process continuum" (Moyer et al, 1988: 474). They noted that decisions on release were based largely on legalistic factors whereas the decision to detain was influenced by extra-legal factors such as gender and age. Arrests made by police, then, were subsequently scrutinized by the courts which appeared, even prior to the YOA, to be concerned with due process and a justice model.

These initiatives by British Columbia appear to have stemmed from a recognition by policy makers that young

³⁷ The pre-court enquiry was the name of the investigation undertaken by a probation officer, at the request of Crown Counsel, to determine whether a juvenile should be diverted from the formal court process. Its authority was section 6 of the Corrections Amendment Act. Criteria for requesting pre-court enquiries and approving diversion plans were also driven by local Crown Counsel policies.

offender accountability and the protection of the public need to be emphasized over the welfare and treatment of juveniles (Vogel & Robinson, 1982). In order to limit the potential for abuse in the application of a more "punitive" philosophy, particularly within an informal court process, B.C. ensured that court cases were prosecuted by fully trained Crown Counsel and adjudged by legally trained judges (Vogel & Robinson, 1982; Corrado & Markwart, 1988). In addition, the role of probation officers and other key administrators was increasingly narrowed to a more "quasi-criminal" focus (Corrado, 1983: 25). The province was convinced that such measures would protect juveniles from unfair or discriminatory proceedings:

"Despite the greater informality of procedure provided by the Juvenile Delinquents Act, we are assured that there is a quality of due process in the juvenile courts of British Columbia today that is unequalled elsewhere in Canada, and perhaps North America" (Vogel & Robinson, 1982: 2).

IMPACT OF THE YOUNG OFFENDERS ACT

A variety of studies have been conducted since the proclamation of the YOA in 1984. While six years may be a relatively short period to determine the Act's long term effects, there appears to be mounting evidence which

substantiates many of the early criticisms of the Act³⁸. An analysis of research findings indicates that the YOA has given birth to a more punitive system than that which existed under the JDA. The justice model orientation of the legislation, coupled with an increase in procedural rules and formalities appear to have resulted in significantly higher incarceration rates for young offenders. While a decreased emphasis on treatment or rehabilitation of juveniles was expected, many had hoped that the introduction of due process, and therefore more checks and balances, would result in a less punitive system.

Increased Incarceration

It has been suggested that the YOA is incapable of addressing the "structural reality" of a young offender's societal experience (e.g. high unemployment; a lengthy period of dependency) (Caputo, 1987). If, indeed, the Act does not consider the needs of the offender, which often mitigate the circumstances of the offence, then more attention will likely be focused on legal factors at the pre-sentence stage. This focus may contribute to an increased reliance on incarceration as the most appropriate disposition (Hackler et. al., 1987).

Incarceration rates have risen dramatically in Alberta, Manitoba, Ontario and B.C. since the YOA was enacted (Hackler,

³⁸ These early criticisms of the YOA were outlined in chapter II.

1987; Caputo, 1987; Corrado & Markwart, 1988; Corrado & Markwart, 1989). It is difficult to speculate on the reasons for the increase in custodial dispositions as there is a "curious shortage" of official statistics or other data since the YOA's proclamation (Leschied & Jaffe, 1985), and a lack of reliable pre and post-YOA data in most provinces (Corrado & Markwart, 1989). More recently, however, statistics from the Canadian Centre for Justice Statistics and other sources have revealed significant increases in custodial dispositions and longer custodial sentences particularly in British Columbia, Manitoba and Ontario. These trends, however, have not been witnessed in all provinces. Nova Scotia and Quebec report a decrease of youth under age 16 in custody on an average daily basis (Corrado & Markwart, 1989). These differences in the use of custody are not surprising to some as the YOA's "Declaration of Principle" contains provisions which could both decrease and increase custody levels, depending on how they are applied by professionals (Hackler, 1987). In addition, the pre-YOA experience of the provinces was distinct and varied. Provinces that had undertaken de-institutionalization initiatives to lower custody levels prior to the YOA could show a greater increase in the use of custody following the Act's implementation (Corrado & Markwart, 1989).

As mentioned earlier, the increased legalism of the YOA can be a double-edged sword in that the more serious criminal behaviour is viewed by the court system, the more serious the

consequences may be. However, a change in legislative philosophy does not necessarily mean a corresponding change in the attitudes of those applying the legislation. Gabor, Greene & McCormick (1986) conducted interviews with youth and family Judges in Alberta after the first year of the YOA. They found that the majority of judges continued to be "welfare" oriented despite the change in legislation and were quite concerned about the decrease in the quality of services available to youth. They further felt that since the youths' rights had been well protected under the JDA, the positive impact of the YOA in this area was minimal. They noted a significant increase in legal representation and this, in their opinion, was more advantageous to lawyers than to young offenders. They also felt that unless the approach to the principles espoused by the YOA is balanced, some of the best features of the JDA may be lost without any gains under the YOA.

While it is difficult to measure changes in attitude, objective data clearly substantiate an increase in custodial dispositions ordered and, in some jurisdictions, lengthier terms of custody. Reports in the Ontario media, for example, suggest that custodial sentences have become significantly longer since the YOA was implemented. This is illustrated by Caputo (1987) who quotes an article from the Toronto Star:

"Average sentences for young lawbreakers in Ontario have more than doubled under Canada's YOA...In Ontario (according to provincial authorities), the average sentence for offenders aged 12 to 15 has

increased 135 percent for those being sent to training schools - called closed custody - and 210 per cent for those sentenced to group homes - open custody..." (Toronto Star, August 6, 1985, A9).

Reid (1986) reports that in 1986, young offenders were spending an average of 6 to 9 months in custody as opposed to 3 to 6 months under the JDA. These statistics are interesting as one of the criticisms of the JDA was its potential for abuse through lengthy indeterminate sentences.

Leschied and Jaffe (1985) conducted research on youth justice practices during the first eight months following the proclamation of the YOA. The study focused on nine counties of Southern Ontario. They found no reduction in the number of charges laid by police, despite a smaller eligible youth population (i.e. elimination of the under 12 group). They noted an increase in the length of pre-trial detention which was correlated with prolonged court time due to the introduction of many due process measures. The Leschied and Jaffe study also found that while the total number of dispositions remained constant, there was a dramatic increase in the number of custodial dispositions, as compared to under the JDA (from 5% to 11%). Of course the JDA did not distinguish between secure and open custody which might account for the increase.³⁹ However, open custody is still

³⁹ Of the 11% there were equal numbers of open and secure custodial dispositions. Refer to Leschied and Jaffe (1985).

"custody".⁴⁰

In her discussion of the YOA's impact, Reid (1986) cites a study conducted by Wardell in 1986 who examined the implementation of a variety of YOA procedures. Wardell concludes that there is still much discrepancy between the provinces and amongst members of the judiciary. Despite this situation, Wardell seems to still prefer the discretionary *parens patriae* principles over those of accountability, responsibility and due process (Reid, 1986).

Another study cited by Reid (1986) is one conducted by Weiler and Ward. This is a national study of community organizations and individuals working with the YOA across Canada. Data were collected during March 1985. Like the Wardell study, the authors found little evidence of general or consistent understanding of the Act. Both studies further observed a decrease in the number of psychiatric reports ordered and a reluctance to utilize the treatment disposition under section 20(1)(i) of the YOA (Reid, 1986). It is difficult to tell whether this is due to the lack of understanding of the provisions of the Act or to the shift in philosophy from welfare to justice.

⁴⁰ For instance, Robinson (1986) defines open custody as another segment on a continuum which extends from secure custody to one extreme through to open custody" (Reid, 1986: 7).

Research by Corrado and Markwart

The most revealing research on the impact of the YOA on the juvenile justice system in British Columbia was undertaken by Corrado and Markwart (1988; 1989). In their view, B.C. has "the most striking and unequivocal evidence of rising juvenile incarceration rates under the YOA" (Corrado & Markwart, 1989). They make it clear that the experience with the Act is bound to differ markedly by province. They refer to previous research under the JDA which showed substantial provincial differences in the way the Act was administered.

Corrado and Markwart (1988) report that, although one of the goals of the YOA was to achieve greater uniformity in juvenile justice across the country, large differences still exist. For example, the province of Quebec has apparently retained in practice a largely "welfare model" as opposed to B.C.'s "justice model" approach. However, the Act's overall impact as a "rights and responsibilities" legislative approach has been, according to Corrado and Markwart, both "profound and unfortunate" (Corrado & Markwart, 1988: 94).

The authors argue that because B.C. had adopted many of the policies, philosophies and practices espoused by the YOA, before it was proclaimed, the implementation of the Act did not give rise to significant changes in bureaucratic and organizational structures, or in the court system. The transition period was thus relatively smooth and efficient. Unlike other provinces, which, in some cases had to undertake

a complete overhaul of social service and justice agencies and systems, B.C.'s major challenge was the wording of the YOA itself (Corrado & Markwart, 1988: 97). The authors describe, nonetheless, five areas of the YOA which have influenced the administration of youth justice in B.C.

1. The incorporation of adult (Criminal Code) procedures pertaining to police processing and bail. Police officials responded critically to the YOA as they felt it eroded or diminished their authority, by the Act's inclusion of a variety of due process measures. Police were particularly concerned with their inability to charge or detain those under 12, the procedures surrounding the taking of statements and confessions, the constraints on record keeping and legal counsel provisions. On the other hand, the police welcomed the enhanced capacity to fingerprint and photograph youth and their increasing influence over the decision to process a charge to court.
2. Due process provisions, particularly the right to counsel and special procedural provisions.
3. The shift in philosophy of the Act itself toward responsibility, accountability and the protection of society.
4. Provisions for level of custody (open or secure) that are determined by the court as opposed to Corrections.

5. The increase in maximum age to under 18 from under 17.

The authors report statistics that reveal significant increases to B.C.'s youth institutional count. For example, from fiscal year (FY) 1983/84 to FY 1986/87, the number of admissions to bail supervision increased 23-fold whereas the total number of youth under "pre-dispositional surveillance" increased by 45%. There was, therefore, no tradeoff by way of decreased custodial remand admissions.

The authors further contend that the YOA has altered the nature of the court process by significantly increasing delays in proceedings and producing a huge case "back log" which has more than doubled in size. This, they state, is due to the increased presence of defence counsel⁴¹ and the due process provisions of the Act.⁴²

In FY 1983/84 the percentage of cases delayed by more than 90 days was only 2.5%, whereas in 1986/87 as many as 41% were. The resulting administrative costs must be significant. However, this issue aside, the authors believe that the effectiveness and efficiency of the youth court system must suffer as increased case delays are bound to lead to

⁴¹ Particularly in rural areas which could not utilize full-time duty counsel resources pre-YOA as the urban centres could.

⁴² For example, the custody review provisions require a minimum of two court appearances and as many as four (Corrado & Markwart, 1988).

difficulties in witness recall and availability. They are also likely to diminish confidence in the system for all concerned, including the youth who is likely to be even more anxious during the delay. Further, the impact of the sentence, be it punitive or helpful, is likely to be diminished due to a prolonged gap between the behaviour and its consequences.

These data have helped reinforce B.C.'s request for amendments to relax the right to counsel provisions under section 11 of the YOA. Corrado and Markwart postulate that increased court delays and the consequences of these delays, would be acceptable if they were offset by improvements to the system; for example, if fairer dispositions were to result from the YOA's emphasis on rights and responsibilities. While admitting that this possibility would be difficult to determine, they state:

"...the only way one could conclude that greater fairness in sentencing has been achieved under the YOA would be if one agreed greater fairness and the near doubling of the rate of incarceration of young offenders...are compatible propositions" (Corrado & Markwart, 1988: 108).

Custody in B.C.

Corrado and Markwart (1988) compared data from FY 1983/84 with data from FY 1986/87. They found the number of admissions to sentenced custody had increased by 85% (while

controlling for the increase in age).⁴³ The number of admissions to probation decreased by 12% during the same period. From these statistics, the authors conclude that B.C. courts under the YOA have favoured custodial dispositions. They do not view the more punitive orientation as solely a reflection of societal attitude since, during the same time frame, the number of adults sentenced to provincial custody (controlling for the age change) decreased by 12%. Further, they contend that 17 year olds, who would have been treated as first-time adult offenders, are being dealt with more harshly under the YOA (Corrado & Markwart, 1988: 109-110). The authors firmly believe that the provisions and philosophy of the YOA are responsible for the more punitive, custodial dispositions (Corrado & Markwart, 1989).

Corrado and Markwart (1988) speculate on a number of reasons that might explain why the YOA has resulted in more custodial sentences in B.C.:

1. The offence-oriented as opposed to offender-oriented nature of YOA may promote more emphasis on principles of general and specific deterrence (held in case law). ("Short sharp shock sentences", less than two months, comprised 46% of sentenced

⁴³ The authors later provided more recent data which indicated that in FY 1987/88, custodial admissions dropped by 6% from the previous year. The revised increase from FY 1983/84 to FY 1987/88 is 73% (Corrado & Markwart, 1989).

custodial admissions in 1986/87);

2. Offender concerns remain important. Treatment concerns may be the rationale for incarceration, particularly because of the difficulties inherent in ordering treatment without the consent of the youth⁴⁴;
3. The option of "open" custody, may give the court an avenue for compromise, leading to a widening of the custodial net. Although the inclusion of open custody was thought to satisfy welfare proponents, there is a great variability in what open custody is⁴⁵;
4. The elimination of the court's authority to order youth to the care of child welfare agencies may result in more youth sentenced to custody as social service agencies back away from their

⁴⁴ In 1986, due to chronic overcrowding in B.C.'s open custody centres, the Burnaby Youth Custody Centre (then known as the Burnaby Community Containment Centre) was opened on a temporary basis. It eventually became a permanent facility to house adolescent sex offenders who were also recommended by the court to attend psychiatric counselling at the nearby Juvenile Services to the Courts (a forensic facility). It has been suggested that many of these youth are being incarcerated for "treatment needs". For a more detailed and interesting analysis on the impact of the YOA on the operation of Burnaby Youth Custody Centre, see Shoom (1988).

⁴⁵ In B.C. open custody is either a camp setting or unit of proximity to a secure centre, staffed by correctional officers. In other provinces open custody is, what would be in B.C., a probation residential attendance program (Corrado & Markwart, 1989).

responsibilities⁴⁶;

5. The influx of 17 year olds may have fostered a more severe attitude among youth court judges generally, as they are now seeing a great many young offenders with longer, more serious offence histories.

The YOA contains measures to restrict the use of custody, and provisions to provide youth with due process safeguards, and access to legal representation or advice at every step of the process. These efforts, however, have been ineffective and unsuccessful in:

"...stemming the flood of increased committals to custody. Indeed, one could speculate that an enhanced degree of legal representation, insofar as it heightens the adversarial and criminal nature of the process, may inadvertently foster a climate that enhances the likelihood of incarceration" (Corrado & Markwart, 1988: 113).

After analyzing data from the Youth Court Survey, which collects dispositional statistics from all provinces (except Ontario) and the two territories, Corrado & Markwart conclude that:

"the YOA has proved to be more punitive than the JDA in most provinces or, at minimum, that as experience with the new Act has increased there has been an accompanying increased reliance on custody

⁴⁶ In B.C., the Social Credit government initiated an aggressive fiscal restraint program in 1983 that hit the Ministry of Social Services & Housing particularly hard. The YOA was enacted one year later.

in these provinces (Newfoundland, Nova Scotia, Manitoba, Alberta and B.C.)" (Corrado & Markwart, 1989: 15).

All in all, it is difficult to find any evidence to indicate that the YOA has had some positive impact. The calls for substantial amendments are, therefore, understandable. In assessing the impact of the YOA, Reid (1986) may be correct in her statement that the initial enthusiasm for the "revolutionary" new legislation is waning. She cites much criticism from provinces attempting to administer the "lofty goals envisioned by the drafters" (Reid, 1986: 1). She argues that despite honourable intentions, "bureaucratic interests and ideological orientations" have sabotaged the success of the YOA.

A COMPARISON OF DISPOSITIONS AVAILABLE UNDER THE JUVENILE DELINQUENTS ACT AND THE YOUNG OFFENDERS ACT

As evidenced by the preceding section on the YOA's impact to date, one of the most dramatic consequences has been the increase in the reliance on, and length of, custodial dispositions. This section will outline the various dispositions available to judges under both the JDA and the YOA and provide an analysis of the similarities and differences in the sentencing options.

Juvenile Court Dispositions under the Juvenile Delinquents Act

A comparison of the two Acts indicates that, overall, the JDA offered judges much wider discretion regarding disposition and a broader choice of alternatives to confinement than the YOA. These dispositions, including custody, were intended, under the welfare model, to be non-punitive and helpful in nature (Caputo & Bracken, 1988).

Section 20 of the Act listed at least nine different options available to a juvenile court judge after an adjudication of "delinquency" (see Appendix A). The provisions allowed judges much discretion and virtually unlimited creativity. The range of options under section 20 of the JDA allowed the juvenile court to do "almost nothing" (i.e. suspend final disposition) or do "almost anything" (i.e. impose such further conditions as deemed advisable) (Caputo & Bracken, 1988). In considering disposition, the social welfare of the child was the primary concern and the role of the probation officer was to provide "friendly" supervision. In B.C., the sentence management of juveniles was often the responsibility of both the Attorney-General's Corrections Branch and the Ministry of Human Resources. In practice, the existence of two government bureaucracies created the possibility of confusion and conflict. For instance, juveniles committed under section 20 (h) to "wardship" of the

Superintendent of Child Welfare, were often the subject of a probation order and thus under the supervision of a probation officer as well.

The JDA placed no limit on terms of incarceration (termed "industrial school") under section 29 (1)(i) as long as a juvenile was still under the jurisdiction of the Act. Indeed, indeterminate sentences were used frequently under the guise of the "welfare of the child" in order to "treat" him or her. This use of indefinite sentencing was dubbed by some as the "hallmark" of the JDA and appealed to those from the Positivist school of thought (Burrows, Hudson & Hornick, 1988).

The JDA also contained no criteria for imposing custody, except for a "suggestive" clause excluding those under age 12, as per section 25 of the Act (Caputo & Bracken, 1988). Provinces were left to develop their own policy in this area. As already described, B.C. implemented its own juvenile containment policy and enacted legislation to assist practitioners in decision-making.

Youth Court Dispositions under the Young Offenders Act

Like the JDA, the YOA provides for a wide and flexible range of sentencing dispositions. Unlike its predecessor, however, these dispositions are not only geared to meet the needs of young offenders, but also to protect society and to take into consideration, in appropriate cases, the rights of

the victims of crime. Of special note is that all of these dispositions are of a determinate nature. This represents a marked difference from the JDA which always allowed sentences of an indefinite term. In addition, a youth can no longer receive a disposition resulting in a punishment greater than the maximum applicable to adults. The maximum term of a disposition under the YOA is generally two years. If the offence is one where an adult could be liable to life imprisonment, the maximum length is three years.⁴⁷ Another difference is that the YOA provides youth courts with the authority to retain exclusive jurisdiction over their cases. It is no longer possible to transfer jurisdiction to provincial law (i.e. child welfare legislation) and provincial authorities, as was the case under the JDA (Solicitor General, 1979).

The term "disposition", euphemistically used in the JDA, is formally defined under the YOA and includes: (i) a youth court's order or "sentence" made under section 20 upon a finding of guilt; and (ii) an order made at a review hearing under ss. 28 to 32. Section 20 of the YOA outlines the dispositions that may be made (see Appendix B).

Although the number of options is even larger than those made available by the JDA, four of them (subsections c, d, e,

⁴⁷ Except in the case of consecutive dispositions for subsequent offences committed while already serving a sentence, which may result in a disposition in excess of 3 years (section 20 (4) YOA).

and f) deal with restitution and compensation and a fifth (h) with seizure and forfeiture. The remainder are: absolute discharge, fine, community service, custody or treatment. Judges must now provide reasons for their decisions as per section 20(6) of the Act, something that was not required by the JDA. Provisions of the YOA limit the discretion of youth court judges and custodial authorities, thus providing further evidence of the Act's "justice" orientation. For example, section 24 of the Act specifies the criteria for a committal to custody.⁴⁸ This section is somewhat ambiguous as the welfare philosophy is not totally ignored. There is little doubt, however, that several dispositions are now more victim-oriented such as community work service, restitution or compensation. Interestingly, section 22 of the YOA stipulates that the young person and his parents must consent to an order for treatment under s. 20(1)(i), unlike the JDA where treatment was decided upon exclusively by the court.

Probation Orders

Section 23 of the YOA outlines both mandatory and optional conditions for a probation order. The probation officer (termed "youth worker") remains an "officer of the

⁴⁸ A custodial disposition under section 24 of the YOA must be "necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person".

court" but his/her responsibilities are limited to supervisor/enforcer of the court order rather than the additional roles of "counsellor" or "friend" as was the case under the JDA.

Although probation conditions are now more formalized and administrative under the new Act, the court can still impose a variety of "social" conditions, such as employment, school attendance and the "catch-all" clause: "that the young person comply with such other reasonable conditions set out in the order as the court considers desirable, including conditions for securing the good conduct of the young person and for preventing the commission by the young person of other offences" (s. 23(2)(g) YOA). Similar conditions were also available to the court under the JDA. The conditions under the YOA, however, are less open to interpretation.

Open and Secure Custody

While the YOA's "Declaration of Principle" is a mixture of justice and welfare model concerns as stated previously, the custodial dispositions exhibit a stronger emphasis on the justice model (Caputo & Bracken, 1988). This is in direct opposition to custody under the JDA which was designed along welfare model principles. Unlike the JDA, which provided no distinction between levels of security for "industrial schools" and no description of their nature or purpose, the YOA provides for two custody types: "open custody" and

"secure custody". While the designation of custodial type is authorized by the Lieutenant Governor in each province, it is the youth court that has sole authority to specify whether custody will be served in an open or secure facility. This differs from the practice under the JDA where provincial authorities decided which facility a juvenile would be housed in.

Section 24.1 distinguishes between "open custody" and "secure custody". Open custody is described as "a community residential centre, group home, child care institution, or forest or wilderness camp, or any other like place or facility". Secure custody means "a place or facility...for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated".

Conditions for secure custody are set out in section 24.1(3) of the YOA. Young persons must be 14 or older at the time the offence was committed unless the offence is one for which an adult would be liable to imprisonment for five years or more; or the offence is one of breach of a disposition, prison breach, escape or unlawfully at large; or the offence is indictable and the youth was, within 12 months, previously found guilty of an offence for which an adult would be liable to at least five years imprisonment or was committed to secure custody with respect to a previous offence.

The YOA states unequivocally that young offenders shall

be held separately from adults. This is not unlike the JDA where children could not be held in the same detention areas as adults. While the Provincial Director may transfer young offenders back and forth between open custody facilities or between secure custody centres, he/she cannot transfer a youth from a secure custodial centre to an open custody facility except in accordance with the judicial review provisions. The Director cannot generally transfer a youth from open to secure custody except as a temporary measure and only up to 15 days (usually for escape or serious misconduct).

Transfers to Adult Court

Unlike the JDA, young offenders who turn 18 years old while serving a youth sentence can be transferred by a judge to an adult facility⁴⁹, in order to serve the remainder of their youth sentence. The request for such a transfer is made by the Provincial Director. In such cases, the youth's sentence continues to be under the jurisdiction of the YOA which means he or she would be ineligible for parole or remission. There is another type of transfer provided for by the YOA that also was not possible under the JDA. A youth who turns 18 while serving a young offender disposition, who is subsequently convicted of an adult offence (i.e. he/she escapes from youth custody and commits subsequent offences),

⁴⁹ by way of section 24.5 (1) of the YOA.

may have his/her remaining young offender disposition "converted" to an adult sentence, pursuant to section 741.1 of the Criminal Code of Canada. In this instance, the resulting sentence would come under the jurisdiction of the adult Criminal Code and adult correctional policies.

Both the JDA and YOA made provisions for the transfer of a case to adult or ordinary court. Section 9 of the JDA allowed the court to order a transfer to adult court in the case of a juvenile 14 years of age or older, charged with an indictable offence. The judge, in considering whether to transfer a juvenile to adult court, had to be satisfied that the interests of the child and society demanded it. The YOA provides for a transfer of a young offender to "ordinary" court under section 16. Again, the court is guided by the clause "in the interest of society, and having regard to the needs of the young person". There are considerably more criteria outlined in the YOA, however, upon which a judge must base the transfer decision than under the JDA, which provided virtually none.

THE CUSTODY REVIEW SYSTEM: A BRIEF HISTORY

The previous section described how much more formalized the dispositional provisions are under the YOA, as compared with those under the JDA. While both Acts contained a variety

of dispositional alternatives, the YOA emphasizes accountability on the part of young offenders, the protection of society, and is concerned with the victim. The JDA, on the other hand, emphasized the treatment of juveniles and often allowed for decisions that, although designed for the juvenile's "best interests", were sometimes arbitrary. The YOA's intent was to put an end to unfair dispositions by providing strict criteria, guidelines and legal safeguards. However, evidence supports what earlier critics of the YOA feared, namely that the YOA may have resulted in an increased reliance on custodial dispositions. If this is so, then it would seem important to examine one of the critical areas of the YOA: the sections pertaining to judicial review of custodial dispositions, contained in sections 28 through 29 of the Act.

These provisions, which did not exist under the JDA, provide the court with the authority to monitor and review custodial sentences on a regular basis. The purpose of these provisions is to prevent young offenders from continuing to serve time in custody when such a confinement is no longer necessary or appropriate. Regular use of these sections should, therefore, at least theoretically, help mitigate the negative impact the YOA has had on incarceration rates.

The next section will provide a discussion of the review provisions under the JDA and then describe the development of the intricate provisions for custody review now contained in

the YOA.

Reviews under the Juvenile Delinquents Act

Reviews under the JDA were possible under section 20(3), which endowed the court with the authority to cause a juvenile adjudged "delinquent" to be brought back before it at any time until the juvenile reached the age of 21. The court was then authorized to take any new measure provided for under the JDA, including a transfer to adult court, or such other sanction deemed appropriate. Early release from an industrial school was possible under this section but subject to a supportive recommendation from the school's Superintendent (Wilson, 1982; Caputo & Bracken, 1988).

The review provisions probably represent the most glaring example of the enormous power and discretion juvenile court judges enjoyed under the old Act. This section was, again, undoubtedly justified by the desire to assist the juvenile until the age of majority (formerly 21 in most jurisdictions), regardless of the maximum age in each province under the JDA. Though well-intentioned, this review section came under severe criticism for being inadequate, arbitrary, potentially punitive and for possibly exposing the youth to a form of double jeopardy (House of Commons, 1981).. Nevertheless, early release was possible through the utilization of provincial statutes; often child welfare legislation (Caputo & Bracken, 1988). Some argued that this practice, albeit discretionary,

was practical and adequate (Hudson, Hornick & Burrows, 1988). In B.C., for example, definite sentencing and judicial review of custodial dispositions for the purpose of early release had already been established by provincial policy under the JDA (Corrado & Markwart, 1989). Others suggest that the major reason why the JDA review provisions were inadequate was that they were left to provincial administrators to initiate (Department of Justice, 1989).

In reality, the review section was probably more utilized for enforcing conditions of probation than for reviewing dispositions, especially those that were not "indefinite" (Wilson, 1982). There were no other provisions for a breach of a court order under the JDA. Furthermore, corrections personnel (probation officers and custodial managers) were under no obligation (legislative or policy) to initiate court proceedings for the purpose of shortening custodial sentences. The high caseloads and other demands placed upon probation officers may also have limited the practice of bringing juveniles back to court for "good" reasons, besides varying an order for procedural purposes. In some cases, a judge initiated a review by ordering a date for the juvenile to be brought back to court when passing sentence on the original matter (Corrado et al, 1984(a)).

There were no elaborate provisions for notice, progress reports, leave, grounds, or the introduction of evidence under section 20 (3) of the JDA. The practice in Vancouver, B.C.,

for instance, consisted of a probation officer submitting a form entitled "Request for Process to Issue", wherein information about the juvenile's original sentence and a rationale for bringing him or her back to court were outlined. The request was witnessed and sworn in front of a Justice of the Peace who authorized court proceedings to be initiated. Juveniles could either be summoned to court or a warrant for their arrest could be issued. Parents could attend but their presence was not mandatory. Other parties could speak to the matter, but no legal representation was provided for under these proceedings. The probation officer usually presented the facts orally to the judge and was not subjected to a formal cross-examination. Hearsay evidence was allowed. Based on the exchange between the judge and the probation officer, a decision was made. Crown Counsel was usually present but played a minimal role in these proceedings. Everything was informal and usually concluded in one hearing.

Justice system players, particularly probation officers, generally liked section 20 (3) as it provided them with a quick, simple and powerful back up to their dealings with juveniles. They also enjoyed the flexibility it offered in modifying court orders as the juvenile's situation changed. While most would probably admit to the potential for abuse, they felt that the court provided a check on any system manipulation and that "in the interests of the child", the

advantages outweighed the disadvantages.⁵⁰

Section 20 (3) of the JDA could also be utilized in the case of a juvenile reappearing in court on a subsequent charge. The judge had the option here of either considering the new charge as a fresh delinquency, or treating the case as falling under section 20 (3) of the Act. In the latter case, the original sentence was revised in light of changed circumstances (Wilson, 1982).

If a judge ordered a juvenile transferred to adult court, pursuant to section 20 (3) of the JDA, the adult criminal court could impose its own sentence, for the same original infraction, in addition to the one previously imposed by the juvenile court. Thus a juvenile could serve two sentences for one offence. Exposing juveniles to double jeopardy was considered objectionable by some. In 1978, in the B.C. Provincial court case of Regina v. Chubak⁵¹, the court held that the review section was: "not only effective, it can be Draconian" (Wilson, 1982: 196).

⁵⁰ As a probation officer myself I can attest to sometimes feeling uncomfortable with the "power" this section afforded me in dealing with the "fate" of a juvenile and the sometimes unquestioning response by the court; on the other hand, when a juvenile had, for instance, run away from a group home and was living on "the street", I was grateful to have available the authority to quickly put in motion a process for apprehending him or her.

⁵¹ [1978], W.W.R. 119 (B.C. Prov. Ct.).

Historical Development of the Custody Review Provisions

There are no exactly equivalent provisions under the YOA to those found in section 20(3) of the JDA. However, an analysis of the developments preceding the proclamation of the YOA reveals that custody review sections were proposed from the very beginning, unlike many other provisions that were introduced at various stages. Federal law-makers recognized that the JDA had been severely lacking in this area and that something was required to address the monitoring of and variation in dispositions. Through its silence on the subject, the JDA allowed provincial authorities to assume control over early release from custody. Under the YOA, however, only the court can determine the level of custody and subsequently modify it. The issue of judicial versus provincial control at the sentencing and review stages was the subject of much debate during the development of the YOA.

The 1965 Department of Justice Report on Juvenile Delinquency in Canada recommended that provincial authorities retain the power to grant early release to youth from custody. The provinces supported this recommendation as they felt that the court was not the appropriate forum for deciding on the "treatment" of young offenders (Department of Justice, 1989: 53). This notion was generally supported by the federal government as the *parens patriae* philosophy of the JDA had not yet been abandoned (Department of Justice, 1989). The report did recommend that a mandatory review be instituted after one

year in custody.

Bill C-192

When the YOA was first introduced in 1970 as Bill C-192, the custody review provisions were made subject to the initiative of provincial authorities to review the status of detained youth. Indeed, if a young offender was not "rehabilitated", he or she could be further detained under provincial law as a "social welfare measure" (Goyer, 1971: 18). This proposal was, again, in keeping with the parens patriae philosophy (Department of Justice, 1989). It was soon pointed out, however, that such a practice would differ little from that which existed under the JDA, and that "including a provision for transfer to provincial authority constitutes an abdication of federal responsibility over criminal law" (Department of Justice, 1989: 53). Arguments were put forward which suggested that the replacement legislation should provide for regular judicial review of custodial sentences (MacDonald, 1971: 4). It is possible that the court review provisions were being pushed by a strong judicial lobby from Ontario, a lobby highly critical of the JDA, particularly the high number of juvenile wards committed to training schools in that province.⁵² Legal professionals and federal bureaucrats who were drafting the YOA further supported a

⁵² Interview with Alan Markwart, Youth Policy Analyst, B.C. Corrections Branch, April 30, 1990.

system of court review rather than an administrative release system, similar to adult parole, particularly since parole had fallen into disrepute. Thus, it was decided that the court, and not provincial authorities, as was the case under the JDA, should have the jurisdiction to review and alter dispositions. This decision was considered to be more in keeping with the philosophy of the YOA, particularly its emphasis on determinate sentencing and due process.⁵³

Young Persons in Conflict with the Law Act

This legislation, drafted in 1975, acknowledged that the practice of provincial control over custodial dispositions had to be discontinued in favour of the judiciary having sole authority to terminate or alter them. The Solicitor General's Department, which had assumed responsibility for the development of the YOA from the Department of Justice, also recommended that the court be limited to ordering determinate dispositions, and that judges be required to specify the level of custody (open or secure). The draft legislation also stipulated that a judge provide written reasons for ordering a custodial disposition. These reasons were meant to serve as a rationale for the decision and as a record for the purposes of custody review (Department of Justice, 1989).

This proposed legislation contained provision for

⁵³ Interview with Alan Markwart, Youth Policy Analyst, B.C. Corrections Branch, April 30, 1990.

mandatory and optional reviews to be heard in youth court.⁵⁴ The judge was granted the authority, under these proposed sections, to modify the disposition's duration or to replace it with another disposition. In addition, the draft provided for a separate administrative review agency to consider the care of a young offender under disposition of the youth court and to make recommendations to the court as to further disposition of the case on review.

Federal Working Group Proposals

Between 1977 and 1980, various federal working groups proposed further modifications to the sections related to custody review. The debate over whether authority for dispositional reviews should remain with the provinces or the judiciary was revived during this period. In 1979, a compromise was put forward. A federal working group proposal outlined an "Administrative Release from Custody", whereby the Provincial Director would be authorized to initiate the release of youth from custody, after a portion of the sentence was completed, when satisfied that the best interests of society and the young offender would be better served by placing the youth on probation. The Provincial Director would be required to serve a notice of intention in this regard to the Crown Counsel, the young person and his/her parents. Any

⁵⁴ Sections 30 through 31 of the draft Act.

of the parties could have the matter reviewed and decided by the youth court or a provincially appointed review board. Where no review was called for, the youth court judge could formalize the release by endorsing an appropriate probation order. This administrative release proposal was generally welcomed by the provincial authorities, including the B.C. Corrections Branch (Robinson, 1979).

In 1979, the federal Solicitor-General's Department also announced a separate "Review of Disposition" section intended to create a more extensive and accessible review process. Such provisions were designed to give all parties the opportunity not only to initiate a review, but to attend and be heard. The intent of the new legislation, according to then Solicitor-General Robert Kaplan, was to ensure that a youth's progress and welfare are continuously scrutinized while serving a custodial disposition. Therefore, a system of mandatory and periodic review was to be introduced whereby a review of a custodial disposition would be conducted by a youth court or, at the option of a province, a provincially appointed review board (all other types of disposition would be reviewed solely by a judge). In addition to the mandatory custody reviews, access to the court or board would be provided at the request of Crown Counsel, the Provincial Director, the youth or his parents.

The options available to the court or board would be to: confirm the original disposition; release the youth from

custody pursuant to terms or conditions of probation; or amend the terms or conditions of any other type of disposition. Under no circumstances would the court or board be able to make the disposition more onerous by increasing the length or adding conditions, except in the case of willful failure to comply with a disposition (Solicitor General, 1979:12-13).

In addition to the custody review proposals, the federal working groups recommended that provincial authorities be responsible for determining the level of custody young offenders should be committed to. In 1979, the Revised Federal Working Group provided further elaboration and detail with regard to procedures for reviews involving custody, proposed under section 31 of the Young Persons in Conflict with the Law Act (YPCL). Under the mandatory review section, responsibility to initiate the review was placed with the Provincial Director or delegate. The draft also stipulated that a youth could not be brought back to court for a review within 6 months of the disposition or last review date, except by "leave" of the Judge.

The grounds for review under this section were:

- (a) "that the young person has made progress which justifies a change in the disposition;
- (b) that the circumstances which led to the young person's committal to custody have changed materially;
- (c) that services are available which were not available at the time when the disposition was made or the case of the young person was last reviewed; and

- (d) such other grounds that the judge considers substantial or relevant" (Revised Federal Working Group, 1979: 24).

The Revised Working Group's proposals set out the requirement for a progress report prepared by the Provincial Director or delegate (in most cases this would be the Youth Worker/Probation Officer). In addition, section 31 of the YPCL, which set out the procedures for "administrative review" described earlier, was further refined and formalized. Section 31(9) of the YPCL was added and stipulated that:

"within 10 days of receipt of notification by the Provincial Director for an administrative release, the judge shall, upon application by the prosecutor, the young person or his parent, call for a review of a young person's case in the youth court and, after conducting a review, the judge may confirm, alter or deny the provincial director's proposal".

Section 31(10) was also added and set out that:

"if no review of the Provincial Director's intention is called for within ten days of receipt of the notice, the judge shall order the youth released from custody on probation upon such terms and conditions as he deems advisable, having regard to the recommendations of the provincial director and such probation order shall have the effect of a usual disposition".

The Federal Working Group also added section 31(11-15) which allowed a province or territory to appoint an independent review board to carry out the responsibility of reviewing custodial dispositions. Decisions of a provincial review board, however, were to be subject to further review by the Youth Court.

The 1979 Revised Federal Working Group draft deleted

subsections (9) and (12) of section 31 (whereby a judge on his own motion could call for a review) feeling that a review should be initiated by the parties and not the court who must maintain its impartial role as arbitrator. "Such is more consistent with the proper exercise of due process" (Revised Federal Working Group, 1979: 26). A briefing document prepared for the federal government in 1979 with respect to the proposed young offender legislation clearly articulated the jurisdictional issue:

"the youth court is to maintain exclusive jurisdiction over sentencing with no provision for transfer to provincial authorities which would be inconsistent with the criminal nature of the legislation. Once a judicial sentence is pronounced it is inconsistent that such sentence can be altered by provincial administrators. Judges are vested with the authority to decide the extent to which custodial or other measures should be utilized to ensure the safety of the public" (Department of Justice, 1989: 54).

Bill C-61

By 1981, the revised Young Offenders Act, known as Bill C-61, basically incorporated all of the custody review sections originally contained in the YPCL as subsequently modified by the Federal Working Groups. The Bill clearly spelled out review processes for both custody and non-custody cases. Mandatory reviews after one year of custody were clarified under a revised section 28 of the Bill, as were optional reviews and those within 6 months of a disposition.

Provinces were still left with the option of establishing review boards, which would be similar to adult parole boards.⁵⁵

During the 1981 Commons Debates, then Solicitor General Robert Kaplan advised the House that the review provisions would enable the court to continually monitor the progress and welfare of young offenders while ensuring that the public interest was safeguarded. Kaplan described the review process as "innovative and extensive" (House of Commons, 1981: 9309).

In 1982, during the Solicitor General's submission to the Standing Committee on Justice and Legal Affairs, section 28 was amended to allow for a further option of a transfer, upon judicial review, from secure to open custody. This provision followed from an amendment that, once again, stipulated that only the judiciary could specify the level of custody. The reintroduction of this section into the proposed legislation was based on the premise that the protection of society is a judicial responsibility (Department of Justice, 1989: 54). The suggestion that the court retain jurisdiction over sentencing and review procedures was also considered more

⁵⁵ In B.C., the issue was debated in terms of the amount of control the Corrections Branch should have over youth in custody (versus the judiciary). It was felt by some that this control should be left with the court as it would be more consistent with the intent of the YOA to do so. In addition, the Board would be more legalistic than a parole board as it would require counsel, its decisions would be subject to appeal, and it may have to legally record all proceedings (Markwart, 1981). Thus, a Review Board would entail an additional administrative burden for the province which was seen as undesirable.

in line with the legislation's increased emphasis on due process and legal rights in accordance with the Charter of Rights and Freedoms.

The final version of the YOA outlined the custody review provisions in sections 24, and 29 (administratively initiated releases or reviews) and section 28 (optional and mandatory reviews). As may be seen from the above discussion, the resulting sections were extremely detailed and formal in nature, particularly when compared with the JDA's very informal and loose system of disposition reviews.

Amendments to the Custody Review Provisions

Since the proclamation of the YOA in 1984, the custody review provisions have undergone a minor amendment to assist in streamlining the myriad of procedures and regulations surrounding the process of judicial review.

In September 1986, along with other amendments to the YOA, a portion of section 24 which outlined the administrative transfer from secure to open custody was eliminated and amalgamated with section 29 to decrease confusion in this area.

There are still many outstanding proposals for amending the review sections. In 1987, the Department of Justice in its "Inventory of Proposals and Suggestions for Legislative Review" outlined several areas regarding review of dispositions where amendments were desired. The majority of

these suggestions were made by various provinces, some of whom had experienced difficulty in implementing the review provisions.

Ontario, for example, suggested an amendment to section 24.2 (7) of the YOA which prohibits a temporary transfer from secure to open custody except through a judicial review. Ontario requested that the section be modified to allow a "test" of the young offender's appropriateness in an open setting. This, it is felt, would assist in determining whether an administrative recommendation for such a transfer under section 29 of the YOA is warranted.

In addition, the "Inventory" makes reference to the "notice" provisions under section 28 of the YOA. This procedure has been widely criticized by several provinces as too cumbersome, too costly and resulting in a delay of justice (Department of Justice, 1987). Provincial authorities claim that, on average, it takes six weeks to satisfy all the procedural requirements from the initiation of a review application under this section (Department of Justice, 1987). This delay, it is argued, results in few reviews, something that is contrary to the intent of the YOA. Substantial delays often mean that the review is heard close to the expiration of a sentence, thus making it of little utility. Additionally, section 28 has been criticized for the rigid application of its "annual review" requirement (Department of Justice, 1987). In cases where a series of short custodial dispositions total

more than one year (or a disposition is 13 months, for example) mandatory review hearings often appear meaningless to everyone concerned.

According to this 1987 "Inventory", British Columbia has recommended to the Department of Justice the following legislative amendments in relation to custody reviews contained in section 28 of the YOA:

1. That the "leave" requirement under section 28 (3) be determined upon written submission by the applicant (i.e. the provincial director) rather than the requirement of a court appearance;
2. That the completion of a Progress Report be triggered by a notice from the court that leave has been granted or that a "grounds hearing" and review are required, which would eliminate the practice of unnecessary reports being completed;
3. That the court be given complete discretion as to whether the Progress Report be in writing or verbal;
4. That express provisions be provided to allow for any judge to grant leave and hear grounds or a review, which would encourage centralized court hearings;
5. That leave under section 28 (3) of the YOA be granted to the applicant, not the Provincial Director;
6. That process to issue notice of a review be

initiated by the court registry, not the Provincial Director.

In addition, B.C. has requested some technical modifications to section 29. These proposals, and the ones described above, are presently under consideration by the Dispositional Policy Working Group.

The Department of Justice "Consultation Document" (1989) suggests that judicial reviews of custodial dispositions have come under "careful scrutiny" and that concerns with respect to the provisions have been voiced on philosophical, administrative and financial grounds (Department of Justice, 1989: 48). The "Consultation Document" goes on to state that the sections of the YOA pertaining to custody and review "impede effective placement and release" (Department of Justice, 1989: 50).

CURRENT CUSTODY REVIEW PROVISIONS UNDER THE YOUNG OFFENDERS ACT

Sections 28 and 29 of the YOA contain the provisions for judicial review of custodial dispositions. Unlike the JDA review section, the youth court no longer has the authority to recall a young offender and impose a greater sanction than the original disposition. Another difference is that the

youth cannot be transferred to adult court via a review hearing. Further, where a subsequent offence is committed, the court cannot circumvent the adjudication process, as was the case under the JDA. The new violation must be dealt with as a fresh offence. The new provisions of custody review represent a significant improvement over those of the JDA and their detailed procedures were meant to prevent the abuses of the past. Breaches of court orders or escapes from custody are clearly differentiated from reviews and dealt with under other sections of the Act. Reviews pertaining to non-custodial dispositions are found under section 32 of the YOA.

According to the Department of Justice (1989) the custody review provisions of the YOA were guided by the following principles:

- "to permit the courts to effectively exercise their jurisdiction over the duration of a disposition;
- to ensure that a disposition remains relevant to the ongoing and changing needs of the young person;
- to provide a means by which those at the service delivery level can contribute to the goal of ensuring that a disposition is relevant to the young person's needs;
- to provide a means by which juvenile justice can fulfill the principle of protecting the right of a young person to the least possible interference with freedom that is consistent with the protection of society;
- to provide a means of effectively and expediently dealing with situations where a young person is unable or fails to comply with the original disposition;
- to establish a parole mechanism especially designed for juvenile justice without requiring recourse to

the adult parole process;

- to provide an incentive for the young person to faithfully comply with the disposition leading to the potential of a favourable review by the provincial director or the courts;
- to foster the participation of the young person and his/her parents in the review process" (Department of Justice, 1989: 57).

Mandatory Reviews

Section 28 (1) and (2) of the YOA provide for an automatic review of a disposition involving custody after one year:

"section 28

- (1) Where a young person is committed to custody pursuant to a disposition made in respect of an offence for a period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the most recent disposition made in respect of the offence, and the youth court shall review the disposition".
- (2) Where a young person is committed to custody pursuant to dispositions made in respect of more than one offence for a total period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the earliest disposition made, and the youth court shall review the dispositions".

Optional Reviews

Section 28 (3) of the YOA contains the provision for optional review of a disposition involving custody:

- (3) "Where a young person is committed to custody pursuant to a disposition made in respect of an offence, the provincial director may, on his own initiative, and shall, on the request of the young person, his parent or the Attorney General or his agent, on any of the grounds set out in subsection (4), cause the young person to be brought before the youth court at any time after six months from the date of the most recent disposition made in respect of the offence or, with leave of a youth court judge, at any earlier time, and where the youth court is satisfied that there are grounds for the review under subsection (4), the court shall review the disposition"

Grounds for Review

Section 28 (4) outlines the grounds for a judicial review under subsection (3):

- (4) "A disposition made in respect of a young person may be reviewed under subsection (3)
- (a) on the ground that the young person has made sufficient progress to justify a change in disposition;
 - (b) on the ground that the circumstances that led to the committal to custody have changed materially;
 - (c) on the ground that new services or programs are available that were not available at the time of the disposition; or
 - (d) on such other grounds as the youth court considers appropriate".

Notice and Progress Reports

The Provincial Director's delegate is, in most cases, the youth worker/probation officer or institutional case-management coordinator. These members of the Corrections

Branch are charged with the responsibility to develop systems to initiate reviews both automatically and at the request of the youth, his parents or the Attorney-General (Crown Counsel). Section 28(6) stipulates that if the Provincial Director fails to cause a youth to be brought to court for a review as required, then the court can order the Provincial Director to do so.

Section 28(7) stipulates that the Provincial Director shall cause to be prepared a progress report on the progress of the youth since the original disposition took place; in addition the report might include personal and family history and present environment of the young person. The report is in writing, unless, with leave of the court, it is presented orally.

Under the mandatory review provisions, the Provincial Director is required to ensure that notices of the court appearance are received by the youth, his/her parents and Crown Counsel, at least five clear days before the court date. Under the optional review section, the person who requests such review shall "cause" notice to occur. Notices to parents must contain a statement informing them that the youth has the right to be represented by counsel. Notice may be served in person or by registered mail. It may be waived or dispensed with by the court if appropriate, or matters may be adjourned until proper notice is given.

Options available to court

Section 28(17) outlines the options available to the court after a review. The court:

"may, after affording the young person, his parent, the Attorney General or his agent and the provincial director an opportunity to be heard, having regards to the needs of the young person and the interests of society,

- (a) confirm the disposition;
- (b) where the young person is in secure custody, by order direct that the young person be placed in open custody; or
- (c) release the young person from custody and place him on probation in accordance with section 23 for a period not exceeding the remainder of the period for which he was committed to custody."

Section 29 Reviews

Under section 29, the Provincial Director can recommend that a youth be transferred to open custody or to probation:

- (1) "Where a young person is held in custody pursuant to a disposition, the provincial director may, if he is satisfied that the needs of the young person and the interests of society would be better served thereby, cause notice in writing to be given to the young person, his parent and the Attorney General or his agent that he recommends that the young person
 - (a) be transferred from a place or facility of secure custody to a place or facility of open custody, or
 - (b) be released from custody and placed on probation, and give a copy of the notice to the youth court.
- (1.1) *Contents of notice.*--The provincial director shall include in any notice given under subsection (1) the reasons for his recommendation and, in the case of a

recommendation that the young person be placed on probation, the conditions that he would recommend be attached to a probation order.

- (2) *Application to court for review of recommendation.*-
-Where notice of a recommendation is made under subsection (1) with respect to a disposition made in respect of a young person, the youth court shall, if an application for review is made by the young person, his parent or the Attorney General or his agent within ten days after service of the notice, forthwith review the disposition".

The same general rules regarding progress reports, notice, right to counsel and options available to the court apply to section 29. There are, however, no requirements for leave or grounds as set out in the optional review sections of s.28(3).

Section 29 (4) stipulates that where there is not an application for review under subsection (2), the court may order the youth transferred from secure to open custody, from custody to probation as the recommendation may be, or make no direction. A decision to make no direction must be communicated to the Provincial Director who may then request a review.

Review Board

A review board may be established by a province under section 30 of the Act and may carry out the duties of a youth court under sections 28 and 29, except for the release of a young person from custody to probation. Any decision of a

review board shall take effect in ten days. Where a review board decides a youth should be released from custody it shall make this recommendation to the court and, if no application for a review of the decision is made under section 31, the court shall forthwith on the expiration of the ten day period, release the youth.

When the review board conducts a review of a disposition the youth court shall, on the application of the youth, his parents, Crown Counsel, or the Provincial Director, review the board's decision, within ten days.

CUSTODY REVIEW PROCEDURES IN BRITISH COLUMBIA

In response to the custody review provisions of the YOA, B.C. had to develop many policies and procedures within the Ministry of Attorney General's Corrections Branch (now under the Ministry of Solicitor General) and Court Services Branch. Training for system personnel was required and additional positions were created within the custody centres to take on the additional "case management" responsibilities.

Review Boards

One of the first decisions B.C. had to make was whether or not to establish Review Boards as per section 30 of the YOA. As indicated previously, prior to the proclamation of

the YOA, B.C. opted not to establish such Boards as it was felt that this would amount to another administrative hurdle and would further delay the decision-making process. Given that the Board, in reality, would not be totally independent from the judiciary and would have limited authority, the establishment of a Review Board was deemed to be unnecessary (Markwart, 1989).

Central Review Courts

In 1985, the Corrections Branch began discussions with the provincial Judiciary, Court Services, and the Criminal Justice Branch in an attempt to centralize court reviews in locations adjacent to B.C.'s (then 10) youth custodial centres. The development of central review courts was prompted by an effort to streamline custody reviews, enhance expertise, and decrease costs associated with escorting the youth to and from a court location in outlying areas. There was some concern expressed at the time that the YOA might require the review to be heard by the original court of jurisdiction. In Regina v. Christine W. (Ontario Provincial Court, June 21, 1985) it was held that the wording of section 28(1) of the YOA, which calls for automatic annual review of any custodial disposition by "the youth court", did not allow for a change in venue. Judge James ruled that a review could be heard in a different jurisdiction for convenience sake, only if the inconvenience would result in a "denial of

justice" (Bala & Lilles, Y.O.S. 85-073). The same wording is also present in subsections 28 (2) and (3), and section 29 of the YOA. However, "the court" refers to the location of the original court and not necessarily the same judge. Regardless of this ruling, which was not binding on B.C., negotiations continued to centralize court reviews of custodial dispositions, and an agreement was eventually implemented on September 1, 1986.

The province thus established "review courts" in Burnaby, Chilliwack, Victoria and Campbell River for the purpose of hearing section 28 reviews only (mandatory and optional). Youth incarcerated within the Lower Mainland, however, were to return to the original court if the original disposition was made in a Lower Mainland court. Corrections Branch staff assumed responsibility for checking with the youth, his/her parents or guardian and Crown Counsel from the originating jurisdiction, to seek their approval for the review to be heard by the central court. The review court judge is responsible for contacting the original sentencing judges(s) for their approval. It was decided that section 29 review applications would continue to be heard in original court jurisdictions.

Corrections Branch Policies and Procedures for Custody Reviews

In order to assist corrections staff in the implementation of the custody review provisions of the YOA,

the B.C. Corrections Branch devised detailed and intricate policy which is outlined in the Branch's Manual of Operations, Youth Programs (Corrections Branch, 1985-1987). The policies and procedures total 47 pages. The breadth of these is somewhat overwhelming and this should give some idea of the complicated nature and often confusing applications of the YOA's review provisions. These policies and procedures are summarized in "Appendix C" of the thesis. In general, the policy dictates that corrections staff are to be proactive in initiating custody reviews and that, when in support of an early release, reviews should proceed under section 29 of the YOA, as this section is a legally simpler method than section 28.

In practice, different court locations and custody centres have distinct preferences for procedures to handle custody reviews. Some locations utilize section 28 reviews more frequently, others section 29 reviews (Markwart, 1989).⁵⁶ Some youth courts require young offenders to be present in court for a review hearing under section 29, even though his/her presence is not required under the YOA; other courts do not require the youth's presence.

⁵⁶ This difference in application was experienced by the writer when working at the Willingdon Youth Custody Centre from December, 1986 to April, 1988. Indeed, some courts had not implemented any procedures relating to custody reviews and were unsure how to proceed with them. Other courts (i.e. Burnaby, a designated "review court") had developed elaborate systems of processing review applications.

Leave by the Court under section 28(3)

The process for granting leave under section 28(3) for an optional review appears to be one area of confusion. Some courts decide "leave" at the first appearance. In some instances, the youth is present when leave is decided, in other cases the youth is not present when leave is discussed. Other courts, or individual judges, dispense with leave through an administrative "paper" process. It is reported that denial of leave rarely happens (Markwart, 1989). There has been some controversy over whether a progress report should be prepared prior to leave being decided, as opposed to after leave is approved. Corrections Branch policy stipulates that the progress report should be prepared in advance of a court hearing in order to decrease the number of court adjournments.

Officials within the Corrections Branch advise that, in practice, the majority of reviews are initiated by Branch staff, in consultation with young offenders, and not by the youth's parents or Crown Counsel (Markwart, 1989). Given the lengthy procedures required, applications for review with regard to youth sentenced to less than 90 days custody are extremely rare (Markwart, 1989). Corrections Branch personnel have expressed concern with regard to the review processes as exemplified by the following quotation by Alan Markwart, Youth Policy Analyst:

"The concern is the perceived inefficiency and lack of timeliness of the processes, given the procedural

complexities of the provisions and consequent delays in the process" (Markwart, 1989: 133).

Case Law - Custody Reviews

A number of court cases provide interpretation and, in some cases, precedent-setting decisions with regard to custody reviews under sections 28 and 29 of the YOA. Court cases chronicled by Bala & Lilles (Young Offender Service, 1984-1990) are summarized in "Appendix D". The appendix outlines some of the more significant court decisions in order to provide some insight as to how the custody review provisions are being interpreted.

The difficulties faced by the judiciary in the area of custody review applications is exemplified by a recent unpublished case presided over by Judge Auxier (R. v. Spencer W., Vancouver Provincial Court, Youth Division, February 1, 1990). The youth had been recommended by the Provincial Director for early release from open custody to probation, pursuant to section 29 of the YOA. Judge Auxier noted in her judgement that the YOA did not provide criteria for the court to consider with respect to a section 29 application, nor was there any case law to be found in the Young Offender Service which could guide her in making a decision. She notes:

"Many courts have grappled with the terms "needs of the young person" and "interests of society". What do the terms mean? How are they to be balanced? Should greater weight be given to one factor over the other?" (Auxier, 1990: 3-4).

Judge Auxier proceeded to examine case law that spoke to the

YOA's "Declaration of Principle" and resolved the case by granting the youth's application in an attempt to balance the conflicting interests of the youth and society.

An analysis of the case law contained in the Young Offenders Service reveals that many differences exist amongst the judiciary pertaining to the interpretation and application of the custody reviews sections. In general, however, it appears that review hearings are usually conducted formally and that all of the due process considerations normally followed at the dispositional hearing apply to review proceedings as well. Generally, the onus is put on the youth or applicant to convince the court that a change in disposition is justified. Plans for early release must be assessed and corroborated. Even section 29 reviews, which are supposed to be relatively simple procedures, appear to be formally considered and proceeded with. Judges appear to consider the potential for early release when sentencing adults, but in youth court, an early release may be considered the exception to the rule.⁵⁷

⁵⁷ Interview with Judge Auxier, Administrative Youth Court Judge, Vancouver, B.C., May 23, 1990.

CHAPTER IV

THE RESEARCH QUESTION, OBJECTIVES, HYPOTHESES AND METHODOLOGY

The preceding chapters provided an historical analysis of youth justice in Canada. We should now focus on the topic of the study: the implementation of the custody review provisions of the YOA. The rationale for conducting the study will be presented, as will the objectives and hypotheses of the research. The section will conclude with a description of the methodology used and the procedures for analyzing the data.

THE RESEARCH QUESTION

One of the rationales for conducting research on social or legal policy changes is to assess or evaluate whether the goals and objectives of a particular policy have been realized. There are often many obstacles which hamper the "successful" implementation of new legislation, especially one that entails significant changes from previous philosophy, policy and practices, as was the case with the YOA. The original intentions of a legal "reform", such as the YOA, may be achieved, or other unintended consequences might result. As pointed out by Fattah (1987) unanticipated consequences are

not necessarily negative. Legal reforms may also result in positive consequences which were not originally anticipated. Regardless, the gap between the "rhetoric" of intentions and the "reality" of their eventual consequences may, according to Cohen (1985), be due to a variety of factors. Cohen (1985) outlines five different models to explain the relationship between the intentions of a social control policy and its consequences. These he summarizes in a Table which is reproduced on the following page.

Cohen (1985) suggests that each model in the Table is characterized by "deposits of power" which drive each level and contribute to the next one. These deposits take the form of descriptions or "stories" and theories of causation. Cohen's five models are not mutually exclusive but most likely co-exist and complement one another:

- (1) the notion of progress is always present in the sense that things can obviously be better;
- (2) organizations which try to implement each new good idea start with (and then generate more of) their own demands;
- (3) whatever these demands, we will tell stories (ideologies) to justify and rationalize what we are doing;
- (4) these ideologies will justify action in such a way as to give a privileged position to their tellers and to safeguard their interests; and, finally,
- (5) these stories and interests exist and must be located in a particular social structure or political economy" (Cohen, 1985: 89).

Table I: Intentions and consequences: Five models

Model	Original Intentions	Status of Eventual Consequences
1. Progress	Benevolent - taken entirely at face value	More or less according to plan
2. Organizational convenience	Somewhat mixed but on the whole benevolent - things could have worked out	Things not quite working out; unmet promises, unintended consequences. Organizational convenience snarls up the original plan
3. Ideological contradiction	Contradictory and mixed and, for this reason, virtually impossible to realize	Because of contradictions, the emerging pattern bears little relationship to the plan. The policy area is a site in which contradictions are resolved
4. Professional interest	Some benevolence, but on the whole, intentions are highly suspect and eventually self-serving	Just what you would expect: the system is shaped by professional self-interest
5. Political economy	Intentions are more or less irrelevant or simply a mask for undeclared needs of the system	Just what you would expect: the system is shaped by the demands of the political economy

Cohen's typology will later be used in Chapter VI to analyze the consequences of the YOA in the area of judicial reviews of custody dispositions. Have there been unanticipated consequences of the legislation and particularly the sections pertaining to review? If so, how could the gap between the intentions of the legislation and the unintended results be explained? These were questions of importance to the writer in formulating the objectives and hypotheses of the thesis.

It is hypothesized that one "unintended consequence" of the YOA may have been the resulting confusion and misinterpretation of the Act's philosophy. This confusion is perhaps exemplified by the custody review provisions. While confusion may exist, the interpretation of the YOA has generally been more conservative than the rather "liberal" interpretation of the JDA. Given the differences in political agendas and political parties in power during the developmental years of the YOA, it is difficult to speculate on the specific intentions of juvenile justice reformers, as there were undoubtedly many divergent intentions. Regardless of the intentions of those who made the law, the implementation of the Act has resulted in an apparent increase in the use of custody as a dispositional option, an increase in the length of custodial sentences in many jurisdictions in Canada, and an increase in pre-trial detention. While evidence is still inconclusive, the data to date indicate a

general increase in custody rates (the average number of youth in custody on a day-to-day basis) since the proclamation of the YOA, which cannot be totally attributed to the increase in the upper age limit in some provinces.

Did the Canadian government intend the YOA to be more punitive and to result in more young offenders being incarcerated? If they did, it is doubtful that they would have articulated such an intention. As we have seen, the Act contains both "punitive" and "rehabilitative" principles. Indeed, the custody review provisions of the YOA reflect a concern over confinement and a desire to allow for early release. This view is supported by the following analysis of the Act prior to its proclamation:

"Section 28 of the Act (YOA) speaks to the issue of release from custody, requiring that there be an annual review of all sentences greater than one year in length and that there be legal machinery to provide for the possibility of custody review at any time. This section, and indeed the Act itself, reveals a general reluctance to incarcerate; incarceration is the alternative of last resort. It is in this context a progressive document, one that seeks to remove the extremes of coercion from our societal response to the youths that we label delinquent" (Boyd, 1983: 303).

Thus, it was considered by some that the intention of the YOA was not to incarcerate unduly. The review provisions were viewed as an indication of the intentions of Parliament in this regard. It can therefore be hypothesized that the resulting increase in custody rates has been an unintended consequence of the YOA. Depending on one's orientation and

ideology, such an unanticipated consequence may be viewed as either positive or negative in nature. Given the current political, cultural and economic climate, such an increase in the number of young offenders in custody might not have been unanimously regarded as a negative development and may in fact have been welcomed by many.

The question of interest here is: has the increase in custody rates been achieved, despite the provisions for custody review and early release, or are the numbers of such reviews and early releases so negligible that they have had a minimal impact on the length of custodial dispositions and thus the custody rates?

The main function of judicial reviews is to determine whether the original disposition is still appropriate, taking into consideration time elapsed and changes in circumstances (Bala & Lilles, 1982). This function fits in well with the philosophy of the YOA. Section 3(1)(f) of the Act's "Declaration of Principle" stipulates that young offenders have a guaranteed right to the least possible interference with their freedom, consistent with the protection of society; section 3(1)(c) provides that a young offender's sentence be modified to meet his/her changing needs.

In an attempt to implement these sections in the way intended by the YOA, the B.C. Corrections Branch developed policy which calls for a proactive style of initiating reviews on the part of Branch staff (B.C. Corrections Branch, 1985-

1987: Section L2). With regard to section 29 reviews, a system of "key dates" and regular case-conferences is mandated by policy for the purpose of maximizing a smooth transition from custody to the community. Ideally, young offenders in secure custody centres should be transferred to open custody centres after one-third of their sentence is served. Open custody residents in turn should be released on probation after two-thirds of their time is completed. Using these bench marks, which are similar to the adult conditional release procedures, young offenders on average should serve 67% of their custody sentences in jail. Estimates from Corrections Branch officials, however, indicate that youth serve on average 84% of their custodial sentences (Markwart, 1989). While it is not reasonable to expect that all youth will be released from custody after two-thirds of their sentence, one would have expected a lower average time in custody than 84%. At first glance, then, it appears that the custody review provisions of the YOA are not being utilized to their full potential as originally intended, and thus have not prevented nor alleviated the continuing increase in custody rates.

There are presently no province-wide statistics available concerning the frequency or outcome of custody reviews under sections 28 or 29 in B.C. (Markwart, 1989). And, it has been suggested that information on decision-making points within the youth justice system, including at the review stage, is

sorely needed (Hudson, Hornick & Burrows, 1988). The entire issue of early release for young offenders has received little attention at all levels. This is somewhat surprising as one of the most significant correlates of post-incarceration "success" is a good release plan and follow-up support in a community-based setting (Ross & Gendreau, 1980). For various reasons, however, there are no correctional programs in B.C. specifically aimed at post-release residence for young offenders coming out of custody (Markwart, 1989).

It is, therefore, the purpose of this study to address the issue of the custody review provisions of the YOA. The writer has chosen this area for study in order to provide a unique analysis of a singular "reform" within the youth justice system that was introduced by the YOA. Although early release and reviews of custodial dispositions were possible under the JDA, there was no legal requirement for them to occur. It will thus be of interest to determine whether the intentions of the new review provisions, namely to lessen the negative impact of custodial dispositions and provide some flexibility for monitoring sentences, have been achieved. Do the current review practices in B.C. conform to the letter and the spirit of the YOA? If there are gaps between the legislation's intent and the way in which these sections are implemented in practice, what are the reasons?

To address these important research questions, the writer decided to conduct an exploratory study. This type of

research, as opposed to an evaluative study, was chosen due to the paucity of prior research on the custody review provisions of the YOA. Due to its fact-finding nature, the research methodology is thus inquisitive and its hypotheses somewhat tentative.

RESEARCH OBJECTIVES AND HYPOTHESES

The objectives of the research are outlined in the next section. To achieve these objectives, several hypotheses to be tested have been formulated.

Who initiates custody reviews?

The first objective of the research is to examine and analyze the process and procedures of initiating custody reviews in British Columbia under sections 28 and 29 of the YOA. Of specific interest here is to determine how decisions are made to initiate reviews, what types of reviews are initiated for what purposes, and which party generally initiates the review (i.e. field probation officers or institutional case-management staff). This objective will be addressed through qualitative data obtained by means of open-ended questions to Corrections Branch staff who work under the YOA, both within custody centres and community probation offices. The data will be contrasted with information obtained from youth court files at Burnaby Provincial Court

with regard to the source of the review application.

It is hypothesized that the majority of review applications, including the optional reviews under section 28 (3) of the YOA, are initiated by the case-management staff of secure or open custody facilities, as opposed to field probation officers. This assumption is based on the writer's experience as a probation officer in both an institutional and a community setting. Despite Corrections Branch policy that case-management and release planning be the joint responsibility of institutional and community staff, many probation officers in the field place a relatively low priority on custody reviews. This may be because of other demands of their caseload and/or from the various youth courts. It also may be due to an attitude of "out of sight, out of mind". Field probation officers may give less attention to youth on their caseloads who are in custody as usually the "crisis" is over once the sentence has been pronounced. Particularly after recommending a custodial disposition in response to pressures from the community, the last thing a field probation officer wants to think about is release planning. On the other hand, case-management coordinators within custody centres generally operate from a different perspective and are subject to pressures from the administration to consider as many residents as possible for transfer or early release. In addition, custodial staff have more direct contact with the young offenders at this stage and

thus are in a better position to follow up on requests and to assist youth with the completion of the various required forms. It has been the writer's experience that Crown Counsel rarely, if ever, initiate a review application. This seems to make sense, as most often Crown Counsel advocate more severe sentences than are ultimately imposed. Thus it would be unlikely that they would subsequently instigate proceedings to lessen the length of the disposition.

The questionnaire was also designed to provide data on the type of review most frequently initiated (i.e. mandatory, optional or section 29 reviews). It was anticipated that the data obtained from youth court files at Burnaby Provincial Court would also show which party initiates the review, as well as the type of review proceeding.

How often are custody reviews initiated?

The second objective of the research is to provide an estimate of the number of section 28 and 29 review applications initiated by the Provincial Director (the B.C. Corrections Branch) or on behalf of young persons or their parents, since the YOA was implemented. Related to this objective, the study will attempt to provide an analysis of the outcome of sections 28 and 29 review applications that are submitted to youth court. Specifically, what proportion of review proceedings have resulted in a change from the original disposition?

As stated earlier, there are no data available within the court services, corrections, or provincial government information branches, on the number of custody reviews that have been initiated, processed or disposed of since the enactment of the YOA. As it is assumed that the Corrections Branch initiates almost all reviews, these data should be most easily obtainable from Corrections. The questionnaire asks staff to give their best estimate, based on their recollection, of reviews they have initiated or have instigated on behalf of young offenders, since the enactment of the YOA in 1984. Another question asks staff to estimate the percentage of custody reviews which they have supported that resulted in a change in disposition.

The results obtained from the questionnaire will obviously not provide an accurate estimate of custody reviews due to a variety of limitations with this method. First, not all corrections staff who have worked with young offenders or under the YOA since 1984 responded to the survey. Secondly, respondents were asked to rely on their memory in answering these questions. This was nevertheless considered to be a valid method of gathering information on the frequency and outcomes of custodial reviews. This assumption was based on a number of considerations. First, a short period of time has elapsed since the implementation of the YOA (relative to the length of time the JDA had been in force); second, the custody review provisions of the Act are new and require special

attention; third, the incidence of custody review applications are relatively infrequent. Thus, questionnaire participants should be able to recall the approximate number of custody review applications they have initiated. At the very least, the data will provide some indication of staff's perceptions with regard to the number of custody reviews they have processed. This discovery is, in itself, important within the context of the study.

Until August 31, 1990, the Corrections Branch collected workload statistics from all probation officers via monthly "Staff Planning Technique" inventories. There were sections of this report for counting the number of "review applications" and "progress reports" completed each month. Statistics were obtained from the Corrections Branch Resource Analysis Section for each month dating back to April, 1984 up to August, 1990 for the purpose of comparison with the responses from the questionnaire. It was originally hoped that these statistics would provide a better estimate of the frequency of custody reviews. Alas, it was later discovered that these statistics could not be utilized due to two problems. First, the category for counting "review applications" is also used to catalogue reviews of non-custodial dispositions under section 32 of the YOA as well as breaches of probation under section 26 of the Act. There is no way of determining the exact proportion of custody reviews initiated from these totals. Secondly, the category "progress

reports" is also used to count reports to the court with respect to non-custodial supervision of young offenders.

The Corrections Branch, over the past two years, has developed an automated computerized system (the Probation Records System) which has only in recent months been operating to full capacity. This new system totally replaced the manual Staff Planning Technique effective September 1, 1990. The automated system does differentiate between section 28 and section 29 custody review applications which result in progress reports completed by probation officers. It does not, however, differentiate between mandatory and optional reviews under section 28 of the YOA. Some preliminary statistics from the Probation Records System were analyzed in order to arrive at a closer approximation of the number of custody reviews initiated between April 1 to September 30, 1990. Neither the manual nor the automated systems, however, track custody reviews initiated from the custody centres. The institutions have their own automated computer system (Corrections Administration and Records Entry System). While the capacity for tracking custody reviews is there, the custody centres have generally not utilized the software. Automation of records has generally been reserved for identifying the movement of residents, calculating sentence lengths and discharge dates and keeping personal or vital information on inmates up to date.

The most reliable data on the frequency of review

hearings and the proportion of proceedings resulting in a change in disposition, were obtained from the youth court files at the Burnaby Provincial Court. The generalization of the findings to other courts in the province will of course depend on a number of variables which will be discussed later.

What criteria are used when custody reviews are initiated?

The third research objective is to determine and analyze the administrative criteria used by Corrections Branch staff when initiating custody reviews that support a change in disposition.

It is hypothesized that criteria differ substantially between youth custody centres and between geographical areas within the province. This assumption is based on the writer's experiential knowledge of the differences between the case-management practices within the different facilities and the probation office locales. Criteria are likely to be guided by local judicial preference as well. Data from the questionnaires, which identify the location of respondents, will be used to analyze these differences in support criteria for both mandatory and optional reviews. Data from the youth court files in Burnaby will also provide decision-making information, as indicated from progress reports and judicial comments.

How does the YOA fare in comparison to the JDA?

The fourth objective of the study is to find out to what extent a fundamental change in philosophy at the legislative level is understood and supported by the line staff whose task is to implement the new legislation. Of interest is to know how staff articulate the philosophical differences between the JDA and the YOA. How do they compare the YOA to the JDA? Do they consider the inclusion of the custody review sections to be one improvement the YOA has over the JDA? How do the attitudes and perceptions differ between staff who have worked under both statutes versus staff who have only worked under the YOA? What happens when the new legislation is at odds with long established philosophy and practices?

It is hypothesized that staff who have worked under the JDA and YOA will have less of an understanding of the review sections and will be less in favour of the review mechanisms, than those staff who have only worked under the YOA. This assumption is based on an impression that the writer has from working under both statutes and from having contact with probation officers from both groups. It is not unreasonable to surmise that those whose job performance underwent many changes with the implementation of the YOA, might be less supportive of the YOA in general and the custody review provisions in particular.

How well understood and accepted are the custody review provisions of the YOA?

Fifth, an objective of the research is to determine the level of understanding Corrections Branch staff surveyed have of the review provisions, of the distinction between the types of review, and of the required procedures. In addition, the study will determine what staff feel are the functions or advantages/disadvantages of the custody review sections, and explore whether they have experienced any difficulties or frustrations in their application.

As previously stated, it is hypothesized that the number of custody review applications is relatively small, due to their bureaucratic, confusing and time-consuming nature, and due to a philosophical resistance to early release on the part of some and ignorance of the sections on the part of others. In addition, since the average youth custody sentence in B.C. is less than three months in length, it is unlikely that youth are, in these cases, released early via custody review. It is far easier to release youth on a temporary absence (pass) close to the expiration of their sentence. This the Corrections Branch has the authority to do for a maximum of 15 days. It is a much simpler and preferable process, as opposed to initiating a custody review, particularly for youth sentenced to relatively short terms. Given these considerations, there are reasons to believe that custody reviews are infrequently initiated. This statement is

admittedly based on a subjective expectation of how frequently reviews should be initiated. The lack of data on the frequency of custody reviews under section 20(3) of the JDA means that there is no statistical base available, from which comparisons might be made with respect to the frequency of custody reviews under the YOA. The impression that custody reviews are few in number is derived from an assumption of the intent of the YOA, namely that reviews be an integral part of the dispositional process. Testing the validity of such an impression requires that the number of custody reviews be examined in relation to the number of custody dispositions (over ninety days in duration) ordered by the different courts of the province. Unfortunately, such data are not available.

How does B.C.'s experience with custody reviews compare with that of other provinces?

The sixth objective of the analysis was to compare British Columbia's experience implementing the custody review provisions with the practices of other provinces in Canada, in an attempt to find out the similarities and differences that currently exist. Requests were made of other provinces and territories to provide information on the numbers of custody reviews conducted in their jurisdictions, to describe their policies and procedures and to outline any problems or difficulties in implementing the review provisions. Based on the responses received, a number of general comparisons with

B.C. were meant to be discussed in order to provide an overall perspective of the custody review provisions across the country. However, because the type of information received from the other provinces was not detailed enough to allow for thorough comparisons with B.C., the results of this research are not presented with the major findings of the study. Instead, they are outlined in Appendix H.

The final objective of the study will be to discuss the social, economic and legal implications of the research. This will include suggestions and recommendations for any changes in policies, procedures, and in sections 28 and 29 of the YOA.

RESEARCH METHODOLOGY

As can be seen from the above, the present research uses various sources of information and a combination of methods to gather the information and data necessary to answer the research questions and to test the hypotheses of the study. Data on the current practices in B.C. relating to youth custody reviews were primarily gathered using two methods. The bulk of the information was collected from responses to a questionnaire sent to Corrections Branch personnel (see Appendix E). Additional data were obtained from court files

of the Burnaby Provincial Court (youth division). Research approval was granted by Simon Fraser University's Ethics Review Committee on December 18, 1989 (see Appendix F).

The Survey

A written questionnaire, delivered by mail, was the method chosen to survey corrections staff. This method was preferred to personal interviews, in view of the time and costs associated with travelling to the numerous locations throughout the province. Telephone interviews could have been conducted but it was felt that the quality of responses would be better if individuals were given time to consider the questions. Another advantage of a written questionnaire is that it reduces any differences in the way questions are asked and potential bias on the part of the researcher in recording answers. Originally, the intention was to send the questionnaire to all field probation officers in the province, all correctional case-management staff, and Crown Counsel. It was later decided to limit the questionnaire to the first two groups, thus excluding Crown Counsel. This decision was based on the writer's own experience working as both a field and institutional probation officer, during which time the number of applications for custody review submitted by Crown Counsel was nil.⁵⁸

⁵⁸ This opinion was also expressed in an interview with Mr. Alan Markwart on April 30, 1990.

The questionnaire is 10 pages in length and comprises 34 questions. The design of the questions allowed for a mixture of straightforward, objective responses, which would lend themselves easily to quantitative analysis, and more detailed, comment-type responses that would require more in-depth, qualitative analyses. The content of the questionnaire was designed to elicit some personal and biographic data of the respondents and also allow for some comparison between those who had worked under the JDA and YOA, and those who had only worked under the YOA. Respondents were asked to articulate the philosophies of the JDA and the YOA, as they perceived them, and were asked which Act they generally favoured and why. In terms of the custody review provisions, the questionnaire requested staff to describe how they process reviews, how many reviews they estimate they have initiated, what the outcomes of the review hearings have been, whether the subsequent dispositions have been "successful", and what criteria do they consider when recommending changes to original dispositions. The respondents were also asked what they thought of the review provisions, what they considered to be the advantages or disadvantages of the review sections, whether they had encountered any difficulties in processing the reviews and whether they have any recommendations for changes to the legislation or policy. Instructions for completing the questionnaire as well as its purpose were outlined at the beginning of the instrument.

Approval by the correctional authorities was required before the questionnaire could be distributed. As the writer is an employee of the Corrections Branch, approval was sought through the appropriate chain of command. The Assistant Deputy Minister of the Corrections Branch, Mr. Jim Graham, provided this approval on May 14, 1990 by way of a memorandum. He also indicated that he expected full cooperation from Branch staff in responding to the questionnaire (see Appendix F). This memorandum was attached to the front of the questionnaires. While it was hoped that a request from the Assistant Deputy Minister would encourage cooperation in responding to the questionnaire, it is possible that some staff might have reacted negatively to what they perceived as an implied direction to participate in a study that was in reality voluntary. Nevertheless, it was considered important to communicate to Corrections Branch staff that the study was sanctioned by the appropriate authority. To complete the package, a covering memorandum was composed by the writer (see Appendix E). This memo was addressed to Directors of Community Probation Offices and Youth Custody Centres. It outlined the purpose of the questionnaire, what the responses would be used for, and made it clear that participation was voluntary. It requested that managers cooperate by forwarding the questionnaire to appropriate staff, and by encouraging them to fill out and return completed questionnaires by June 22, 1990. Questionnaires were sent out by mail between May

26 - 28, 1990.

At least one questionnaire was mailed to every probation office that conducts youth probation services and to all youth custody centres in the province. A total of nine custody centres and 71 probation offices were mailed questionnaires for a total of 80 service delivery units throughout British Columbia. Each custody centre was sent one questionnaire with the exception of Willingdon Youth Custody Centre, which was sent two. This corresponds to the number of staff at each centre whose primary duties are release planning, and thus the processing of custody reviews. With regard to the 71 probation offices, the number of questionnaires sent was based on the estimated number of probation officers conducting youth work in that office. All youth probation officers have the authority to process custody reviews and complete progress reports for review hearings in Youth Court. Probation offices were mailed anywhere between one and six questionnaires, accordingly, in the hope that the maximum number of staff possible would participate. A total of 225 questionnaires were mailed to the 80 locations. This number represents a somewhat inflated approximation of the number of youth probation officers and youth case-management coordinators within the Corrections Branch. It was considered to be a better strategy to send more questionnaires out than the number of staff, again to maximize the number of responses. The number of staff that could have responded to the

questionnaire was probably closer to 200.

A total of 82 questionnaires were returned. Based on an estimate of 200 possible returns, the response rate was forty-one per cent. Questionnaires were returned from 46 different locations (two were received from unknown locations). Six institutions responded; forty probation offices. Three returned questionnaires were discarded from the analysis as they were largely incomplete. Thus the total number of questionnaires utilized for the analysis was 79. Several factors possibly limited the number of responses received. First, the distribution of the questionnaires coincided with the beginning of summer annual leave. Staff about to go on vacation may have had little motivation for completing the task, particularly given its voluntariness and perhaps low priority. Second, corrections staff have high caseloads and many demands on their time. Again, the completion of this questionnaire, which was fairly lengthy and required some concentrated effort, may have just been too difficult due to constraints on time and energy of staff surveyed. Third, there has been a large number of probation staff hired and trained within the preceding 18 months. New staff may have felt not knowledgeable enough to respond to the questionnaire. A fourth factor may have been a cynical reaction by some staff who have "been around for a while" and who may have been simply uninterested in academic endeavours such as this or who view them as a waste of time. A fifth factor may have related

to the operational style of the probation office. For instance, most offices are "generic" which means they perform a variety of tasks related to youth and adult probation, as well as family court counselling. Other offices specialize in one or two areas. Probation officers within an office further adopt specialist or generalist roles. Such differences may have affected the method of questionnaire distribution. For example, while six probation officers within an office may perform all three areas of the job (adult and youth probation and family court counselling), a Local Director may have decided to only distribute questionnaires to two of the staff who are the most experienced in the area. Whatever the reasons, and those listed above are mere speculations at best, the number of responses was considered adequate in view of the exploratory nature of the study.

A follow-up memorandum was mailed to all of the same locations on August 10, 1990 (see Appendix E). Those who responded to the questionnaire were thanked for their participation. In addition, staff were asked to forward any tardy questionnaires. No other responses were received as a result of the follow-up.

Court File Data

The second major source of data obtained was the court files of Burnaby Provincial Court (youth division). Ideally, all designated youth courts within B.C. should have been

included in the study. This was simply not possible, however, due to time and resource availability. The Burnaby Youth Court was chosen as one likely to be representative of other youth courts in the province. It is a designated central review court and therefore may receive section 28 applications from the following youth custody centres: Willingdon (secure), Holly (open, including Southview), Burnaby (open) and Boulder Bay (secure). In addition it may hear reviews under sections 28 and 29 as an original review court. It was thus assumed that the Burnaby Youth Court would contain a large sample of cases upon which to draw. There was also a practical consideration, the geographical proximity of Burnaby Court to the researcher.

Section 44.1 (k) of the YOA stipulates that a youth court judge may grant disclosure of youth court records if satisfied that such disclosure is in the public interest for research or statistical purposes. A request was thus made to the Administrative Judge for approval to examine youth court files at Burnaby. On April 25, 1990, approval was granted in writing to the researcher by Her Honour Judge Auxier (see Appendix F).

Data were gathered between May 11 and October 31, 1990. Due to the full-time employment of the researcher, data gathering was limited to the writer's days off from work or during short intervals between other work demands. It was necessary for the researcher to be as "unobtrusive" as

possible in order not to interfere with the operations of the court registry. Youth court files from April 1984 onward are kept together and filed according to numbers assigned by the registry. After some preliminary discussion with registry staff and file perusal, it was decided that the most efficient method of identifying files with custody review data, was to go through the daily court lists. Cases of custody review are identified on the left hand side of the court list by a "Z" after the file number. In addition, review hearings are easy to trace by the name of the statute "YOA" and section number "28 or 29" identified in the centre of the court list. The only shortcoming of this method is that applications for an optional review that were denied leave without a court appearance would not appear on the daily court list and thus would not be included in the sampled court files. In early 1987, however, the Burnaby Youth Court developed procedures whereby leave is dealt with at the first court appearance. This meant that this shortcoming was limited to 1984, 1985 and 1986.

Data collection began by going through each daily court list, which are filed by month, and writing down court file numbers of custody reviews that were listed. Repeated adjournments of particular cases were not written down, as details of each case would be contained in the court file. All court lists were studied from April, 1984 to March 1990. This period of time was selected for two reasons. First, it

coincides with the proclamation of the YOA and secondly, because it yields data from the past six fiscal years. Each fiscal year commences on April 1 and concludes on March 31 of the following year. Presentation of data by fiscal year is consistent with other research as well as statistics received from the Corrections Branch on daily institutional counts. A total of 127 custody reviews were disposed of⁵⁹ during this six year time period at the Burnaby Youth Court.

After obtaining all court file numbers, the researcher then pulled out the respective files and obtained data from them, utilizing a two page checklist (see Appendix G). The checklist provides categories for collecting information on the characteristics of young offenders appearing for review (i.e. age, gender), the type of review hearing, the number of court adjournments, those who were present at the hearing, the nature of the original charge(s) and original disposition, the youth court history, recommendations by corrections personnel and the final decision of the court. In general, as much information contained in the court file as possible was recorded. Not all court files studied yielded comprehensive data. In particular, files from 1984 and 1985 appeared to be missing important information. For this reason, not all categories of the checklist could be analyzed.

⁵⁹ "Disposed of" means that the cases reached a conclusion. For example, a new disposition was ordered, the original disposition was confirmed, the application was dismissed, leave was denied, etc.

Other Sources of Data

In addition to the above two sources of data, the researcher sent requests for information to other provinces and territories across Canada, and conducted two personal interviews.

With respect to the correspondence with the other jurisdictions, letters were first sent to all other 9 provinces, the Yukon and North-West Territories, on May 16, 1988 (see Appendix H). The letter explained the purposes of the research and enquired whether any statistics were available on reviews, whether Review Boards were utilized, whether general policies have been developed with regard to the implementation of the review provisions of the YOA and any legislative amendments proposed. Responses were received from New Brunswick, Ontario, Manitoba, Saskatchewan and Alberta.

A subsequent letter was forwarded August 13, 1990 (see Appendix H) to the same jurisdictions (with the exception of Quebec). The letter requested an update to original responses or responses from the other jurisdictions which had not answered. The same questions were asked. Six jurisdictions responded to this second request. Alberta, Manitoba and Ontario provided answers again. In addition, Nova Scotia, Prince Edward Island and the Yukon Territory responded. Thus, seven provinces and one territory in total responded in writing to the request for information on custody reviews.

In addition to the letters to the other jurisdictions, the writer conducted two personal interviews. Because of their expertise and positions, the two individuals selected were able to advise the writer on issues and directions the research might consider, clarify policy, procedure and the intent of the legislation with respect to custody reviews, and provide insights which could be utilized to complement the collected data.

Mr. Alan Markwart was interviewed on April 30, 1990 at his office in Victoria. He is the Youth Policy Analyst for the Corrections Branch and has completed significant research on the YOA, as described earlier. Mr. Markwart is considered by many, both inside and outside of Corrections, to be an authority on the YOA and on youth policy and practices within B.C. He was instrumental in developing policies and interpretations of the YOA and headed B.C.'s YOA Implementation Committee on behalf of the Corrections Branch.

The second personal interview was conducted with Judge Jane Auxier, of Vancouver Family Court, who is also the Administrative Judge for the Lower Mainland youth/family courts. Judge Auxier is well respected, knowledgeable and was actively involved in the development of the centralized review process at Burnaby Youth Court. The interview took place on May 23, 1990 at Vancouver Family Court.

ANALYSIS OF DATA

Due to the exploratory nature of the research data and sample limitations, detailed statistical analyses (such as analysis of variance) were not considered necessary nor appropriate. This was due to at least three reasons. First, data pre-YOA on custody reviews are non-existent. Therefore, the search for statistically significant differences was neither possible nor feasible. Second, the number of responses from the questionnaires (79) and the number of court files examined (127) were considered small enough to analyze without the need for statistical techniques such as multiple regression. Third, much of the data from the questionnaires were qualitative in nature requiring a qualitative not a quantitative analysis.

The researcher thus chose a variety of methods of analysis. With regard to the questionnaires, responses which could be easily codified were entered into a spreadsheet using the computer program "Lotus 1-2-3". For each of the 79 questionnaires, responses were entered on the spreadsheet for 26 questions (or parts of questions). Responses had to be assigned a number in order to be entered on the spreadsheet. Generally, responses of "a, b or c" would be coded as "1, 2 or 3", respectively. Some responses were assigned numerical values. For instance, the location of each respondent was identified by "1 to 5". Each of the five numbers represented

one of the five geographical regions which make up the Corrections Branch. Similarly, a respondent's "major area of study" (Question 5) was identified according to ten different responses, or a two-digit number which reflected a combination of major areas of study. Once as much objective data as possible were entered, the computer program "sorted" the data into "bins". Each bin identified the number of possible responses for each question, and tabulated the frequencies of each response.

The remaining "opinion" responses were subjected to a "qualitative analysis". Specifically, each questionnaire was again analyzed but responses were manually noted. Responses were divided by a total of 19 questions (or parts of questions). For every questionnaire, the responses were noted (either in their entirety or summarized) for each question. Responses which were the same or very similar from respondent to respondent were given a tick beside them in order to tabulate frequencies of particular responses. Responses of a distinctive nature were also noted. Once all the questionnaires had been vetted, both quantitatively and qualitatively, the quantitative data were tabulated.

Data obtained from the Burnaby Youth Court files were analyzed manually. Results were, in some cases, grouped by fiscal year. The data here were more objective and the checklist sheets lent themselves easily to manual computations.

It was originally anticipated that the court files would yield information on judicial criteria or provide reasons for decisions made by the court. In retrospect, however, this may have been a naive assumption. The best source for this information is the Court Recorder's tape or the court transcript. Obtaining access to court transcripts would have required a variety of procedural steps which, at a late point into the research, were neither practical nor feasible. Furthermore, listening to tapes and analyzing the information would have been a difficult and time-consuming undertaking that the researcher did not feel could be accomplished within the time constraints of the overall study. The most valuable information on criteria was contained in the progress reports, which are completed by field probation officers and are required in all custody review hearings. The report generally contains a recommendation section which gives reasons or outlines the criteria considered for recommendation with regard to a custody review. Progress reports were contained in the Burnaby Youth Court files in the majority of cases (86: 67.7%). In some instances, it appeared that the court had requested a progress report but it was not clear whether one has been completed, whether it has been delivered verbally, or whether a copy has not been left in the court file. In three cases, no progress reports were ordered. Instead, a psychiatric report pursuant to section 13 of the YOA was requested. The recommendations made by field probation

officers within the progress reports were difficult to catalogue as they were not always articulated. This style of writing is not surprising. Probation officers generally do not want to appear as giving directions to the court on what they think should occur. Rather, they prefer to outline options for the court to consider and describe the feasibility of each.

Information obtained through the two personal interviews described was recorded at the time into a stenographer's notebook.

CHAPTER V

THE PRACTICE WITH THE YOA'S CUSTODY REVIEW PROVISIONS IN B.C.

This chapter will be devoted entirely to the presentation of the study's findings pertaining to the practice with the YOA's custody review provisions in British Columbia. The findings will be presented in the same order used when the objectives of the study were outlined in the previous chapter. Following a brief description of the characteristics and background of survey respondents we will examine who initiates custody reviews, how often are the reviews initiated and the criteria used when a decision is made to initiate a review. To conclude this chapter we will see how the YOA fares in comparison to the JDA and how well understood and accepted are the review provisions.

PROFILE OF SURVEY RESPONDENTS

Field/Custody

Of the seventy-nine respondents who completed the questionnaire, the overwhelming majority (71: 89.9%) are field probation officers/youth workers and only eight (10.1%) work in custody centres. This slanted distribution means that the views expressed will reflect more the attitudes and practices

of those in the field than those in institutions for young offenders. This disproportional representation was not unexpected since the number of probation officers working in the field is much higher than that of those who work in a custodial setting.

Regional Representation

While the respondent group is not evenly divided between field and custody, it is fairly representative of the different regions of the province. All five regions are well represented. As the exact location of two of the returned questionnaires was unclear, it was only possible to determine the origin of the other 77. One quarter of these (24.7%) came from Vancouver Metro and another 12 (15.6%) originated in Vancouver Island. The interior region of the province ranks second with 18 (23.4%) completed questionnaires. Another 15 (19.5%) were returned from the Northern region while the remaining 13 (16.9%) were completed by those working in the Fraser region.

Length of Experience

The majority of respondents (56: 71%) have long experience in probation work having been in their present occupation for over ten years (33: 42%) or between five and ten years (23: 29%). The length of experience of the remaining 23 respondents is less than five years with 4 (5%)

of these having been in their position for less than one year. It is difficult to tell how representative the group is of the probation service in general with respect to experience. There are two possible reasons that may be responsible for the fact that the highest percentage of respondents are officers with more than ten years of service. It could be that custody reviews are usually entrusted to the more senior officers. Another possible explanation is that those with long experience are more likely to respond to surveys than others.

Educational Background

Almost all respondents (74: 93.7%) have at least an undergraduate university degree. Six of these hold a graduate degree: Masters (4), law degree (1) and Ph.D (1). Only one respondent completed only grade 12 while the remaining four completed one to two years of university or college.

Social sciences proved to be the most common educational background among the respondents (51: 64.6%). More than half of these respondents declare their primary area of study to be psychology (21: 26.6%), with the remaining having studied criminology (14: 17.7%), social work (9: 11%), and sociology/political science/economics (7: 9%). Seven respondents have a humanities background and another seven in education. The remaining three are divided between general arts (2) and chemistry (1). Five respondents did not provide their educational area.

Amount of Work with Young Offenders

Only 15 respondents (19%) work exclusively with young offenders or with the YOA in their current jobs. The remaining respondents (64: 81%) share their time to varying degrees between this and other areas: seventy-five per cent (8: 10%), fifty per cent (24: 30.4%), twenty-five percent (32: 40.5%). This is not unexpected as most probation officers in the community have generic caseloads, consisting of young offenders, adult criminals, and clients who are involved in civil matters pertaining to child custody and access or require mediation with respect to marital separation. All eight respondents from the custody centres indicate they work entirely with young offenders or with the YOA which is consistent with the nature of their jobs in youth custody centres.

Experience under the JDA

The majority of respondents (53: 67.1%) worked in the same field prior to the enactment of the YOA in 1984, and therefore have experience working under the JDA. The remaining respondents (24: 30.4%) have no experience in their present occupation under the JDA. Two did not indicate whether they had experience under the JDA.

From the data, a general profile of survey respondents emerges. Overall, the respondents are largely probation

officers working in the community and are representative of all five regions of the province. They have undergraduate degrees in the social sciences. Their jobs are comprised of other duties besides working with young offenders. They have lengthy experience in their current occupations and the majority have worked under both the JDA and the YOA.

INITIATING A CUSTODY REVIEW APPLICATION

The next section will examine the processes and procedures followed in initiating custody reviews, the types of reviews initiated and those who generally initiate the review.

Who Initiates Custody Reviews?

The survey data indicate that institutional probation officers more often initiate the custody review process than field probation officers. Most of the time the latter respond to the institution's lead by following through on arrangements and taking on an active role in court. This finding, which is consistent with the hypothesis stated in the preceding chapter, is based on the analysis of the respondent's descriptions of their major role in the preparation and/or processing of custody reviews.

The majority of field probation officers (42: 59.2%)

describe their major role in the custody review process as one of assessing the youth's plan for early release or transfer to open custody, determining his/her institutional behaviour or progress, and ascertaining the views of the community (e.g. family, police, social workers, etc.) with respect to the review application. In addition to this investigative role, the majority of field probation officers (46: 64.8%) state their major role is to prepare a progress report for the court prior to a custody review hearing. The progress report consists of a description and assessment of the investigation related to the above areas as well as a recommendation for or against the custody review and suggested conditions for early release where warranted.

Both institutional and field staff describe their major role in the processing of custody reviews as one of organization or coordination of all the necessary paperwork, and liaison with all concerned parties to "make the review happen" (52: 65.8%). Typical activities described are advising the court, Crown Counsel, the institution/field, defence counsel, youth, parents, Judiciary, Sheriff's Department, etc. on how and when the review will occur. Advising others is either done verbally or by written notification. One respondent described this role as "smoothing the glitches" of the process; another as being a "clerical gopher".

All eight institutional staff and approximately one-third

of community staff (26: 36.6%) indicate that another significant role they have pertaining to the initiation of custody reviews is "proactive case-management".⁶⁰ This includes ensuring the youth has an understanding of the provisions for review and drawing up and submitting the application on their own initiative, or on behalf of the youth.

The analysis of survey responses leads to the conclusion that field probation officers see their major role in the custody review process as "community-based". This means they are concerned with the potential impact a transfer to a less secure facility, or an early release, will have on the community. Field probation officers view their role as one of representing or protecting the "interests" of the community. This is accomplished in a general way, by assessing whether the intent of the original sentence has been satisfied, and in a specific way, by analyzing the potential consequences for those who will be in direct contact with the youth if the disposition is modified.

Institutional probation officers or case-management staff, on the other hand, describe their major role as evaluating the youth's progress in custody, completing

⁶⁰ This refers to the activity of regularly reviewing the status of all young offenders serving custodial sentences for the purposes of release planning and the preparation of custody review applications. This activity is dictated by Corrections Branch policy (Corrections Branch, 1985-1987: Section L2).

application forms and other necessary paperwork, and liaising with the field probation officer. Field probation officers are less involved with the "technical" aspects of the process. Their role here is generally limited to sending notifications of review hearings to the necessary parties with regard to section 29 applications. Institutional probation officers generally complete the application form and/or assist the young offenders in doing so. They also make application, usually on behalf of the youth, for "leave" of the court with respect to custody reviews under section 28(3) of the YOA. In addition, custody staff ensure that mandatory reviews of lengthy custodial sentences are initiated annually.

The Probation Officer's Role in Custody Reviews

The majority of survey respondents feel that most of the roles they are performing in the processing of custody reviews should be their responsibility (58: 73.4%). One in five respondents (16: 20.3%), all of whom are field probation officers, express the view that some of these duties should not be performed by them. Field probation officers generally feel that their roles pertaining to investigation and report-writing are appropriate as they are in the best position to understand the needs of both the youth in custody and the community. They see themselves as having a community perspective and are able, therefore, to assess the release plan and to comment on whether the intent of the original

sentence has been met. The major complaint voiced by field probation officers is that too much of their role consists of performing tasks which are generally associated with court registry functions (i.e. sending out court notifications). Most acknowledge, however, that their's is a pivotal role with respect to the implementation of the custody review provisions of the YOA. They equally believe that coordination of the process is best performed by them. Institutional staff are largely satisfied with their present role in the custody review process. Some indicate that they would appreciate more involvement from field probation officers in case-management and release planning.

Youth Court Files

The majority of youth court files studied contained information which showed who had initiated the custody review (103: 81.1%). In 58 of these cases (56.3%) the custody review was initiated by the young offender. All of these review applications were made under section 28(3) of the YOA. In some cases, the youth completed some or most of the application, with assistance from custody centre staff. In others, the form was solely completed by the institutional probation officer/case-management coordinator. In these cases, the youth signed the application and, in some instances, wrote a letter to the Judge outlining his/her reasons for the request. Of the remaining 55 cases, 28 were

initiated by institutional staff (27.2% overall), 26 were initiated by field probation officers (25.2% overall) and one custody review under section 28(3) was initiated by the youth's parent and processed by defence counsel. It was thus found that institutional personnel initiated custody reviews (either on their own or on behalf of a youth) in 83.5% of the cases. This finding provides further support for the hypothesis that institutional staff are the primary initiators of custody review applications.

Review Type

Survey Responses

Survey respondents ranked custody reviews they initiated according to each of the three types allowed by the YOA: mandatory (section 28(1-2)), optional (section 28(3)), and optional (section 29). Each type was ranked from 1 (most frequent) to 3 (least frequent). Tabulation of the responses produced results which are presented in Table 2.

Eleven respondents seem to have never initiated any custody reviews as they marked the "N/A" (not applicable) category in their response. Of those who answered in the affirmative, two-thirds (53: 67.1%) have initiated section 29 reviews at least once. A slightly smaller number of respondents (51: 64.6%) have also initiated optional reviews, pursuant to section 28 of the YOA, at least once. Mandatory reviews ranked third in frequency though they also have been

initiated at least once by over half of the respondents (45: 57%).

Table 2: Type and Frequency Ranking of Custody Reviews

Frequency Ranking	Mandatory s.28(1-2) YOA		Optional s.28(3) YOA		Optional s.29 YOA	
	no	%	no	%	no	%
1	12	15.2	26	32.9	27	34.2
2	10	12.7	20	25.4	13	16.5
3	23	29.1	5	6.3	13	16.4

Total	45	57.0	51	64.6	53	67.1
Unranked	23	29.1	17	21.5	15	19.0
N.A.	11	13.9	11	13.9	11	13.9
Grand Total	79	100.0	79	100.0	79	100.0

Of the fifty-three respondents who have initiated at least one section 29 review, one-half (27: 50.9%) ranked this type of review as the most frequently initiated. Similarly, of the fifty-one respondents who have initiated at least one optional review under section 28 approximately one-half (26: 51%) ranked this type of review as the most frequently initiated. Mandatory reviews were ranked as the most frequent by only twelve respondents (26.7%).

Table 3 provides additional information on the frequency

of each type of review using a scoring system based on survey respondents ranking of each type. Three points are allocated for each first ranking, two points for each second ranking, and one point for each third ranking. The picture that emerges from the scores contained in Table 3 is even more informative than the one provided by the previous Table. Mandatory reviews under section 28 (1-2) of the YOA are far less frequent than optional ones under section 28(3) and section 29.

Table 3: Type of Reviews by Frequency Order

Type of Review	Frequency Order	Total Points	Points (Rank)		
			1st	2nd	3rd
28(3)	1	123	78	40	5
29	2	120	81	26	13
28(1-2)	3	79	36	20	23

- Total number of respondents who did the ranking: $79 - 11 = 68$.
- Three points for each first ranking, two points for each second ranking and one point for each third ranking.
- Maximum possible points for any review type: $68 \times 3 = 204$.

The data suggest that the optional review provisions under both sections 28 and 29 of the YOA are initiated with similar frequency (although section 28(3) is slightly higher in frequency). The fact that mandatory reviews are initiated at a much lower frequency than the optional reviews is not

surprising since the vast majority of custodial dispositions in B.C. are under one year in duration. It is surprising, however, that section 28 optional reviews are initiated with the same or slightly higher frequency as section 29 reviews. Corrections Branch policy stipulates that section 29 is the preferred mechanism for the Provincial Director (corrections branch personnel) to utilize when supporting, and therefore initiating, an optional review application (Corrections Branch, 1985-1987: Section L1). Why then are these types of custody review initiated with the same frequency as those under section 29? As previously mentioned, institutional probation officers/case-management coordinators are the ones who most often initiate section 28 optional reviews on behalf of young offenders in custody. In such cases, while the idea for the review may not have originated from corrections staff, the process did. Respondents were required to include such cases in their ranking of review type. In retrospect, it might have been better to differentiate between these activities in order to obtain a clearer picture of the procedures used when the impetus for the review originates from the Provincial Director, as opposed to the young offender. In reality, however, the activities and decisions of custody staff and incarcerated youth are likely influenced by one another. Thus, it may have been difficult to isolate these factors.

Corrections Branch Statistics - Review Type

Data obtained from the Corrections Branch Probation Records System indicate that for the time period of April 1 to September 30, 1990, field probation officers presented a total of forty-five progress reports pertaining to custody review court hearings. Twenty-nine of these reports (64.4%) were completed under section 28 custody review provisions. The remaining sixteen (35.6%) belonged to hearings under section 29 of the YOA. These figures should be regarded with caution since the automated system has at least two limitations. First, the system does not differentiate between section 28 optional and section 28 mandatory reviews. Secondly, the new automated workload information system may not be totally accurate due to its recent implementation. These reservations aside, the statistics indicate that section 28 custody reviews during this six month period generated almost double the number of progress reports than did section 29 review hearings.

These data appear to contradict the information obtained from survey respondents, which suggests that section 28(3) custody reviews are only slightly more frequent than optional reviews under section 29, and that both types are initiated with more than twice the frequency of those in the mandatory review category. Even when section 28 optional and mandatory review categories are combined (38), they comprise only 58.5% of the #1 rank (excluding the "not applicable" category).

Section 29 was ranked as number one by 41.5%. This represents a difference of only 17%. Corrections Branch statistics, however, show that progress reports for section 29 reviews were much less frequent than section 28 reviews. The discrepancy between survey responses and Corrections Branch statistics may be due to the shortcomings of the questionnaire, inaccurate estimates of the respondents, or the shortcomings of the Probation Records System. It is also possible that the six-month time period serving as the basis for the automated statistics is not representative of the whole period since the implementation of the YOA.

Youth Court Files - Review Type

Data were also obtained from files at the Burnaby Youth Court on the type of custody review hearings over six fiscal years. The frequency of each type of review is outlined in Table 4. The figures in Table 4 refer to the number and type of custody review disposed of during each fiscal year. They indicate that optional reviews under section 28(3) of the YOA are significantly more frequent than mandatory reviews or section 29 reviews.

Table 4: Frequency and Type of Review
Burnaby Youth Court

FISCAL YEAR	YOA			TOTAL	% CHANGE
	28(1-2)	28(3)	29		
1984/85	1	8	0	11	
1985/86	1	13	1	15	+36.4%
1986/87	3	24	1	28	+86.7%
1987/88	13	16	8	37	+39.3%
1988/89	6	8	3	17	-54.1%
1989/90	2	16	1	19	+11.8%
TOTAL	26	85	14	127⁶¹	
%TOTAL	20.5%	67%	11%		

Of the total one-hundred and twenty-seven custody reviews disposed of from April 1984 to March 1990, eight-five (67%) are optional review hearings under section 28(3) of the YOA. Mandatory reviews pursuant to section 28(1-2) of the Act accounted for 20.5% and section 29 reviews for only 11%. During FY 1987/1988, the number of mandatory reviews is not very different from the number of optional ones (13 compared with 16). This, however, is not the normal pattern.

These results are somewhat surprising. The statistics generated from the Probation Records System also suggest that section 28 optional reviews are more frequent than section 29

⁶¹ There were two reviews conducted under section 20(3) of the JDA during FY 1984/1985. These are included in the total. Both were in regard to an early release from custody.

reviews (although the difference was not too large). The survey results, however, reveal that the Provincial Director initiates section 28(3) reviews with similar frequency as reviews under section 29. While it is possible that other parties might be initiating section 28 reviews, separately from the Provincial Director, the writer's first-hand knowledge of the custody review process indicates that this is not the case. Further, an analysis of court files reveals that custody reviews were, in all but one case, initiated by Corrections Branch staff. It may be that the judicial preference at Burnaby Youth Court is for custody reviews to proceed under section 28(3), rather than under section 29 of the YOA. Such a preference may not exist in other courts around the province. It is more likely, however, that Burnaby, which operates as a central review court, does hear a higher proportion of optional reviews under section 28(3), than courts which only hear reviews of custody dispositions they originally imposed. Joint corrections-court services policy dictates that section 29 reviews should occur in original courts as the process is simpler and there is a better chance the young offender will be released back to their original communities. In the writer's experience, however, this policy is not always adhered to in practice. Even if this were the case one would have expected a higher proportion of section 29 reviews than a mere 11%.

FREQUENCY AND OUTCOME OF CUSTODY REVIEWS

One of the original objectives of the study was to reach an estimate of the number of section 28 and 29 custody review applications initiated by the Provincial Director, or prepared by the Provincial Director on behalf of others, since the YOA was enacted in 1984. This objective proved difficult to achieve, due to the lack of statistics on custody reviews and to the shortcomings of the survey outlined in the preceding chapter. Similarly, it was difficult to determine the proportion of custody reviews that result in a modified disposition.

Frequency of Custody Reviews

Survey Responses

Respondents were asked to estimate the number of custody reviews they have initiated on their own or on behalf of a young offender since the enactment of the YOA in 1984, or since they commenced their present occupation. Thirty-five respondents (44.3%) estimate they have initiated "between one and five" custody reviews. Half that number (17: 21.5%) estimate they have initiated "between five and ten" custody reviews. Twenty-four respondents (30.4%) claim they have initiated more than ten reviews and four among them state they have initiated over thirty reviews each. Interestingly, fifteen respondents (19%) state they have never initiated a

custody review. All those who estimate they have initiated more than ten reviews are, with one exception, institutional staff.

The data provide additional support for the hypothesis that institutional probation officers/case-management coordinators initiate more custody review applications than field probation officers. The analysis of the survey responses also adds to the impression that the custody review provisions are under-utilized. Considering that almost three-quarters (71%) of the respondents have worked in their present occupation for five years or more (almost the length of time since the YOA was enacted), the number of reviews initiated may be regarded as relatively low.

Frequency according to Corrections Branch Statistics

As mentioned above, 45 progress reports were completed by probation officers in B.C. between April 1 and September 30, 1990, under sections 28 and 29 of the YOA. Based on this six-month period, it may be inferred that, as a group, field probation officers in B.C. complete 90 progress reports per year (in response to 90 custody review hearings). Such an estimate, however, does not take into consideration such factors as: under-reporting of workload, review applications which do not result in a court appearance⁶², review hearings

⁶² For example, leave is denied without a progress report being prepared, or the review is abandoned before a court appearance.

which proceed without a written progress report, changes in the number of young offenders sentenced to custody, institutional counts, increasing expertise and familiarity with the YOA with each passing year, judicial preferences, case law, staff reductions or shortages, and changes in overall workload. Nevertheless, ninety appears to be the best estimate possible of the number of custody review applications initiated or proceeded with annually. If this figure is accurate, it means that the average field probation officer completes very few progress reports with respect to custody reviews per year. Based on the figure of 105.2 full-time-equivalent staff⁶³, the average number of progress reports completed per year per probation officer is only 1.17.

To place these figures in some perspective, the average institutional count of young offenders since 1981 is given in Table 5. The figures represent the average number of youth held in custody centres within B.C., commencing with fiscal year (FY) 1981/1982 up to and including FY 1989/1990. The figures are based on the average daily count of both secure and open custody centres. The "daily count" refers to the "warm body" count as of midnight each night and includes both sentenced and in remand populations.⁶⁴ The Table shows a

⁶³ This is the number of full-time probation officers allocated by the B.C. Corrections Branch to perform youth probation duties. This number was obtained from the Branch's Resouce Analysis Section.

⁶⁴ Remanded residents are generally held in secure centres.

significant increase in the number of youth in daily custody following the raising of the maximum age from under 17 to under 18 in FY 1985/1986. Daily counts have remained at more than double of those prior to that point.

Table 5: Daily Institutional Counts in B.C.
Before and After the YOA

FISCAL YEAR	SECURE	OPEN	COMBINED	%CHANGE
1981/82	44.5	47.0	91.5	
1982/83	45.7	57.6	103.3	+12.9%
1983/84	62.5	59.3	121.8	+17.9%
POST-YOA:				
1984/85	46.99	59.74	106.73	-12.4%
1985/86	107.37	75.78	183.15	+71.6%
1986/87	155.64	135.08	290.72	+58.7%
1987/88	141.67	150.26	291.93	+ 0.4%
1988/89	136.23	140.94	277.17	- 5.0%
1989/90	122.86	122.79	245.65	-11.4%

Source: Ms. Helena Buchanan, Research Officer,
Management Information & Evaluation
Section, B.C. Ministry of Support
Services.

As mentioned in Chapter IV (p. 152), judging the frequency of custody reviews and whether they are under, adequately or over-utilized, requires statistics about the number of annual custody dispositions over ninety days. In

view of the absence of such data, it is impossible to pass a valid judgement on the appropriateness of the current frequency of custody reviews. Be this as it may, ninety custody review hearings per year do not seem that high when more than 200 young offenders are in custody on any given day in this province.

Frequency of Reviews - Burnaby Youth Court

The statistics from the Burnaby Youth Court, previously presented in Table 4 (p. 184), reveal that the court disposed of 127 custody reviews between April 1984 and March 1990. The number of custody reviews increased substantially from FY 1984/85 through to FY 1987/88. Similarly, the institutional count in B.C. increased from FY 1985/86 through to FY 1986/87. The institutional count peaked in FY 1987/88, followed by slight decreases in FY 1988/89 (-5%) and FY 1989/90 (-11.4%) (see Table 5). The number of custody reviews processed through Burnaby Youth Court sharply declined in FY 1988/89 (-54.1%), followed by a slight increase in FY 1989/90 (+11.8%) (see Table 4). The general decline in the number of custody reviews since FY 1987/88 may be attributed, in part, to the opening of the custody facility in Prince George in 1989. One might expect that the Prince George Youth Court would now be processing a greater number of custody reviews from the Northern institution, and that Burnaby would be hearing less reviews due to a decline in the youth institutional population

within the lower mainland.

Be this as it may, the total number of reviews seems to be low and lends support to the hypothesis formulated in the preceding chapter.

Outcome of Custody Review Applications

Survey Responses

Respondents to the questionnaire were asked to estimate the percentage of custody reviews they had initiated and supported. One might expect that the more a review application is supported by the Provincial Director, the more likely it will result in a change in disposition at court. The majority of respondents were supportive of review applications which they had initiated. Thirty-two respondents (40.5%) estimate they support their initiated reviews "75-100%" of the time. Eighteen respondents (22.8%) estimate they are supportive in "50-74%" of the cases. Thirteen (16.5%) back their reviews less than 50% of the time, while the remainder (20.3%) did not provide an estimate. Based on the above percentages, it is reasonable to expect that the majority of custody review applications would result in a change or modification to the original sentence.

Survey respondents were asked, therefore, to estimate the percentage of custody reviews they had supported which resulted in a change in disposition. The majority (51: 64.6%) estimate that over three-quarters of supported custody reviews

result in a modified sentence. In retrospect, the wording of that particular question may have been misleading. It might have been better to ask how many of the reviews they had been involved in or had experience with resulted in an altered disposition, rather than asking about the outcome of those they had initiated. Regardless, the data suggest that, in the opinion of Corrections Branch staff surveyed, custody dispositions are modified in response to a review application in three out of four cases.

Outcome of Burnaby Youth Court Custody Reviews

Data from the Burnaby Youth Court provide a clearer picture of the outcome of custody reviews. The possible outcomes include: transfer from secure to open custody; transfer from secure custody to probation supervision; transfer from open custody to probation supervision; confirmation of the original disposition or dismissal of the application; denial of "leave". The outcome of the 127 custody reviews is provided in Table 6.

The figures in Table 6 reveal that dispositions were modified in approximately one-half of the cases (62: 48.8%). Dispositions were confirmed or left unchanged in 48, or 37.8%

of the cases. Leave was denied in only four cases.⁶⁵ The five cases in the "other" category consist of two reviews which were abandoned by the young offender and three cases which were transferred to other court locations in the province.

Table 6: Outcome of Burnaby Youth Court Custody Review Applications

<u>OUTCOME OF REVIEWS</u>	<u>NUMBER</u>	<u>PERCENTAGE</u>
Transfer Secure - Open	13	10.2%
Release S.Custody - Probation	35	27.6%
Release O.Custody-Probation	14	11.0%
Dispositions Confirmed	48	37.8%
Leave Denied	4	3.1%
Other	5	3.9%
Unknown Outcome	8	6.3%
TOTAL	127	100.0%

The data suggest that a lower percentage of custody review applications than was estimated by survey respondents actually result in a modified disposition. Again, such a discrepancy may be due to factors unique to the Burnaby Youth

⁶⁵ The number of cases where leave under section 28(3) of the YOA was denied (4) may not truly reflect the number of applications denied leave. Periodically, leave may be decided prior to a court hearing (i.e. in the judge's chambers). Thus, such cases would not have been included in those studied.

Court, or to the way in which the questions were formulated. Alternatively, corrections staff may have over-estimated the percentage of custody review applications that result in a change in the original disposition.

Surprisingly, the number of early releases from secure custody to probation were two and one-half times those from open custody to probation. It is the policy of the Corrections Branch (1985-1987: Section L2) that young offenders be generally released early from open custody, rather than secure custody. This practice is consistent with the philosophy that a gradual lessening of security provides for a smooth transition from custody to the community. In reality, however, this may not always be feasible due to the intricacies involved in processing custody reviews. Most custodial dispositions do not allow enough time for two reviews to occur (one from secure to open custody; one from open custody to probation). The high proportion of early releases directly from secure custody could also be due to other factors. In B.C., there is little difference between open and secure custodial centres. Open custody facilities are more like their secure counterparts than the less formal structures favoured in some of the other provinces. Thus, a transfer from secure to open custody does not always achieve the goal of less security. In addition, populations within open and secure centres differ somewhat. In general, open custody centres contain less criminally sophisticated, younger

youth. It may be inappropriate to transfer older, more sophisticated youth held in secure custody to an open facility prior to an early release. Not only can the mixing of these two groups be problematic for the institution and the residents, but very often older youth wish to be separated from the less mature ones.

Success of Modified Dispositions

To what extent could custodial dispositions that were subsequently modified pursuant to a review hearing under section 28 or 29 of the YOA be described as successful? For the purpose of the study, the modified disposition could be termed a success when the young offender was not convicted of a subsequent criminal offence or did not violate (i.e. breach) the revised disposition during its course. Survey respondents were asked to estimate the percentage of "successful" modified custodial dispositions. Of the fifty-three respondents who answered this question, approximately one half (25: 47.2%) estimate that between "50 - 74%" succeed. Twenty respondents (37.7%) estimate between "75 -100%" modified dispositions are successful. In other words, the vast majority of those who answered believe that young offenders successfully complete revised dispositions at least fifty per cent of the time. It would have been interesting to verify this by following those whose dispositions were altered by the Burnaby Youth Court, in order to determine how "successful" they were. Time

constraints, however, precluded such an endeavour. It might be worth exploring in a future study.

CRITERIA FOR SUPPORTING REVIEW APPLICATIONS

Another objective of the study is to determine and analyze the administrative criteria used by Corrections Branch staff when deciding whether to support a review application.

Protection of the Community

Protection of the community seems to be the most important criterion considered by survey respondents in their decision to support a mandatory custody review application under section 28(1-2) of the YOA. Many (27: 34.2%) ranked this criterion as the most important and a smaller number (9: 11.4%) ranked it as the second most important.

For optional reviews under sections 28(3) and 29 of the YOA, the same criterion proved to be similarly important, although to a slightly lesser extent. One in four respondents (21: 26.6%) ranked protection of the community as the most important criterion they consider in relation to optional reviews and 11.4% ranked it as second most important.

One reason that protection of the community is slightly more important in the consideration of mandatory review applications, is that it may be related to the length of a custody term. Young offenders who receive custodial

dispositions which total more than one year (and thus are subject to the mandatory review provisions) are more likely to present a threat to the community. Presumably, the length of a custodial disposition is correlated to the severity of the offence(s).

Appropriateness of Release Plan/Open Custody Setting

The appropriateness of the release plan or the open custody setting, in the case of a transfer application, is another important criterion for survey respondents when deciding whether to support a custody review application.

With regard to mandatory reviews, this criterion was ranked as most important by 18 (22.8%) respondents. Twelve (15.2%) ranked it as the second most important criterion.

This criterion was thought to be the most important (25: 31.6%) in the decision to support an optional custody review application under sections 28(3) or 29 of the YOA. Another 11 respondents (13.9%) felt it to be the second most important. Interestingly, the majority (19: 76%) of the respondents who ranked this criterion as number one in importance, were from locations outside of Greater Vancouver and Victoria. This finding may be indicative of a more conservative philosophy amongst those from the more rural areas of the province. It may be that smaller communities have more influence on judicial decision-making or that there is less anonymity for young offenders upon release from

custody.

Almost one-half of the respondents specified that when considering whether to support either a mandatory or optional review application, they view the following to be important: the degree of support from community members (e.g. parents, social workers, the police, the victim), the availability of community resources, the suitability of the open custody facility, and whether the needs of the youth are better served in an open custody or community setting, as the case might be.

Intent of Sentence

Consideration of whether the intent of the original disposition has been fulfilled is another important criterion identified by respondents. For example, if one goal of the custodial sentence was for the youth to address a substance abuse problem, then it would be important to assess whether this goal had been achieved or whether it could be achieved in a different setting.

When deciding whether to support a mandatory review application, one out of five respondents (16: 20.3%) thought this criterion to be the most important and another fourteen (17.7%) rated it as the second most important criterion.

A similar pattern was observed with regard to optional reviews. Approximately one-fifth of respondents felt the intent of sentence to be the most important criterion in their decision to support the application (17: 21.5%). A smaller

number (9: 11.3%) ranked it as the second most important criterion.

Nature of Offence/Court History

While the "nature of offence" and "court history" were not ranked as high as the above criteria, approximately one-third of respondents stated that they consider factors related to these two criteria. For example, many respondents identified corrections/court history to be important. This includes a youth's past performance on supervision (i.e. probation, bail), offence history, seriousness of past and present offences, outstanding charges, prior custody reviews, and the likelihood of reoffending.

Attitude of Young Offender

Since custody review applications in the youth system may be seen as performing an equivalent function to that of adult parole, one would have expected rehabilitation to be a very significant criterion in initiating and/or supporting these applications. Contrary to expectations, very few respondents rated the criterion "rehabilitation" as important in the decision to support either a mandatory or an optional custody review. Approximately one-quarter of respondents, however, expressed concern with the attitude of the youth. They took into account whether the youth manifested a positive or mature attitude towards the custody review and the release plan or

transfer, towards the custodial disposition and/or the custodial centre, and whether he/she accepted responsibility for the original offence(s).

Criteria Used in Progress Reports

The second source of data, for determining administrative or other criteria utilized in the decision-making process with regard to custody reviews, were the progress reports contained in the youth court files at Burnaby. It was not always clear from the files examined, what criteria had been considered in arriving at a decision or recommendation. The analysis of the progress reports, nevertheless, did reveal some trends. When making a recommendation, probation officers wrote often about the youth's progress or behaviour in custody. They considered the proportion of the custodial disposition completed to be important and often assessed whether a youth had derived the maximum benefit from incarceration. A solid release plan appeared to be one of the primary considerations when recommending an early release from custody. A youth's maturity and attitude were other factors that were consistently mentioned in progress reports. In general, the criteria as expressed in progress reports, are similar to those ranked as important by survey respondents. The major difference is that "institutional progress" appeared less important a consideration amongst survey respondents than what was revealed by the progress reports.

ATTITUDE TOWARDS THE JDA AND THE YOA

Another objective of the study is to determine how corrections staff articulate the philosophies of the JDA and the YOA, how they compare the two Acts, which Act do they prefer and why, and how do they feel about the custody review provisions of the YOA. Due to the subjective, opinionated nature of responses, it was decided to present and summarize the findings in a conceptual manner. Thus, quantitative frequencies are not provided for most of this section.

Interpretation of Philosophy

Juvenile Delinquents Act

As previously mentioned, two-thirds of survey respondents have worked under both the JDA and the YOA. They were asked to describe what they felt was the philosophy of the JDA. The most common response was a reference to the doctrine of *parens patriae*. The court was viewed as performing a parental role, providing guidance and protection for juveniles. The second most common view was that juveniles were not considered criminals under the JDA, but misguided children. The third most frequent answer was that the JDA focused less on legal rights and more on what was best for the individual juvenile. The fourth response most commonly cited was that the Act emphasized treatment or rehabilitation.

Corrections staff surveyed were, in general, able to

correctly describe the major philosophy of the JDA. Minor discrepancies or deviations from the major orientation of the JDA did exist, but these were relatively few.

Young Offenders Act

With respect to the YOA, survey respondents overwhelmingly describe the philosophy of the YOA as one that holds young offenders responsible and/or accountable for their actions. To a lesser degree, they feel the Act's philosophy to be one of protecting the legal rights of young offenders and ensuring they receive the same due process as adults. Most respondents indicate that the YOA recognizes the "special needs" of youth and does not hold them as accountable as adults. Some respondents also made reference to the YOA's concern with the protection of society.

In general, the responses reveal that the vast majority of corrections staff surveyed are able to articulate the four major philosophical concerns that seem to have guided the YOA. Overall, the change in philosophy brought about by the YOA is well understood and articulated by this group of justice system administrators whose task it is to implement the YOA's provisions.

Comparisons between the JDA and the YOA

Respondents who have worked under both Acts described the advantages and disadvantages they feel the YOA has compared

to the JDA. Analysis of survey responses yielded over thirty advantages and thirty disadvantages. In many cases, specific practices of the YOA are described as both advantageous and disadvantageous by different individuals. While respondents are a homogenous group regarding their knowledge and ability to articulate the philosophical differences between the JDA and the YOA, they have divergent opinions as to what should be the philosophy of youth justice legislation.

Perceived Advantages of the YOA

The YOA was felt to have a variety of advantages in comparison to its predecessor.

Increased Formality and Clarity

Approximately two-thirds of survey respondents like the YOA's more formal nature. They feel that the Act is more clear, articulate and contributes to more consistent practices, than did the JDA. Many state that the formality of certain provisions of the YOA has led to improvements in their application (e.g. breach of probation, alternative measures, bail, reviews, dispositions). Many express satisfaction that the YOA has clarified the mandate of probation officers and that of the Corrections Branch.

Due Process

Approximately one-half of survey respondents applauded

the YOA's emphasis on due process, legal rights and safeguards, and the right to counsel. Some stated that the implementation of the Act has reduced the opportunity for system-manipulation and for abuse of authority. The elimination of indeterminate sentences and the review process under section 20(3) of the JDA were viewed by many as positive.

Increased Accountability and Responsibility

One in three respondents approve of the YOA's philosophy that young offenders be held accountable and responsible for their actions. Some view the Act's increased emphasis on reparation, compensation and concern for the victim as a distinct improvement over the JDA. A few praised the YOA for allowing more youth to be incarcerated for serious criminal behaviour.

Perceived Disadvantages of the YOA

Respondents also describe the major disadvantages the YOA has when compared to the JDA. Many of the same things viewed as advantages of the YOA by some were viewed as disadvantages by others.

Cumbersome Provisions

While many respondents welcomed the increased formality of the YOA and the resulting clarity and consistency, almost

as many (approximately seventy per cent) were critical of the complex and cumbersome nature of many of the Act's provisions. Many stated that the increased formality has created far too much paperwork and procedural requirements, which impede the administration of justice. Of particular concern is the delay in court proceedings, especially the length of time between the offence and the disposition, seemingly caused by the YOA.

Increased Presence of Defence Counsel

Fifty per cent of survey respondents do not like the increased presence of defence counsel that the YOA has brought about. Many express concern that lawyers do not always act in the best interests of the youth or take into consideration the dynamics of the youth's family. It is also feared that youth are learning how to manipulate the court system. This is viewed as contrary to the Act's emphasis on young offenders' accountability and responsibility. Also of concern is that the adversarial legal process is an inappropriate forum for resolving a youth's problems. Rather, conciliation and mediation are considered more effective.

The disillusionment with the increased role of the legal profession is coupled with a somewhat nostalgic feeling for the pre-YOA role of the probation officer. Much of the present role of defence counsel was, under the JDA, performed by probation officers. Many feel their role was important in the court process and that it contributed to dispositions which were flexible, meaningful and in the best interests of

the juvenile. On the other hand, just as many probation officers expressed relief that they no longer are expected to play a significant role during the pre-trial stage and act as both friend and enforcer while supervising a youth on probation.

YOA/JDA Preference

Survey respondents were asked which Act they preferred overall. Due to the straightforward nature of the question and answers, frequencies were quantified. Almost one-half of survey respondents prefer the YOA (35: 44.3%). One in five prefer the JDA (16: 20.3%) and approximately 3.8% indicate they like both Acts for different reasons. Approximately one-third did not answer this question (25: 31.6%). Originally, it was hoped that survey results would make it possible to differentiate between those who had worked under both Acts and those who had only worked under the YOA. Upon analyzing the questionnaire data, however, it became evident that most of those who worked exclusively under the YOA did not answer the questions pertaining to the philosophy of the JDA and the preference for either Act. Indeed, in one question, they were instructed not to. Obviously, respondents assumed that the same procedure would apply to some of the other questions, which is a valid assumption. It makes sense that those who had not experienced juvenile justice under the JDA would not be able to comment without relying on the opinions of others.

The data reveal that approximately 57% of the respondents who had worked under both Acts preferred the YOA overall. Only about 18% preferred the JDA. Many of those who prefer the YOA still feel the Act has many disadvantages and problems, however most view it as more contemporary than the JDA. Of those who prefer the JDA, many express extreme frustration with the cumbersome nature of the YOA. They feel their role has diminished and has been usurped by the legal profession. Others feel that, while the YOA's philosophy and goals are acceptable theoretically, the Act in practice emphasizes process at the expense of the welfare of young offenders.

Opinion of Custody Reviews

Approximately seventy-five per cent of survey respondents feel that the custody review provisions are one improvement the YOA has over the JDA. In order to test the hypothesis that those who have worked under both Acts will be less favourable to the custody review provisions, than those who have only worked under the YOA, responses of both groups were compared. The findings were inconclusive. This is because 14 out of 23 respondents who have only worked under the YOA answered "not sure" to the question asking them whether custody reviews constitute an improvement over the JDA. Presumably, they did not feel they could offer an opinion not having worked under the JDA.

The data do reveal that approximately sixty-seven per cent of respondents who have worked under both Acts consider the custody review provisions of the YOA to be an improvement over the JDA. A rough comparison with the group who only worked under the YOA (where approximately twenty-two per cent feel the review sections to be an improvement) seem to indicate that the opposite of the stated hypothesis is true. That is, those who have worked under both statutes consider the custody review sections more favourably than those who have only experience with the YOA. While such a comparison is problematic, for the reason outlined above, these results definitely do not support the stated hypothesis.

The overwhelming majority of respondents (13: 92.9%) who do not view the custody review provisions as an improvement are ones who have had experience under both statutes. In comparison, of those who have worked under the YOA only, one single respondent out of 23 (4.3%) feel this way. This finding may be seen as providing support for the hypothesis.

EXPERIENCE WITH THE CUSTODY REVIEW PROVISIONS OF THE YOUNG OFFENDERS ACT

This next section will examine the survey results to determine the level of understanding Corrections Branch staff display of the custody review provisions and whether they have

encountered any problems or difficulties in interpreting or applying these sections of the YOA.

Familiarity with the Custody Review Provisions

Less than half of respondents (48%) declare being very familiar with the custody review provisions of the YOA. Slightly less (44%) are somewhat familiar with them. Only eight per cent of questionnaire participants feel extremely familiar with the sections. No difference was detected between institutional and field probation officers in the degree of familiarity with custody reviews.

It was earlier hypothesized that those who have had experience under both Acts would be less familiar with the custody provisions than those who had only worked under the YOA. The findings reveal that of those who had experience under both statutes fifty per cent are very familiar with the review sections. To a lesser extent, they are somewhat familiar (22: 41%). One in ten in this group (5: 9.4%) is extremely familiar with the custody review provisions.

With regard to the group who have only experience under the YOA, fifty per cent are somewhat familiar with the custody review sections. With one exception, the remainder are very familiar (10: 41.7%). The data do not suggest any significant differences between the two groups. Thus there was no support found for the stated hypothesis. Indeed, those in the "YOA only" group indicate slightly less familiarity with the review

sections than those who have worked under both statutes.

Sections 28/29 Distinction

Approximately one-half of survey respondents (39: 49.4%) find the distinction between sections 28 and 29 custody reviews somewhat confusing. Almost one-third (23: 29.1%) find the distinction not confusing at all. Twelve respondents (15.2%) find the distinction very confusing and one found it extremely confusing. About thirty per cent of respondents commented that the distinction is difficult to make and the provisions are difficult to understand due to the intricate wording of the legislation. They note that the provisions require careful reading and that each time they become involved with a custody review application, they have to consult the legislation. Many note that Corrections Branch policy does not really clarify the legislation and that it sometimes makes the distinction between sections 28 and 29 even more confusing. It was further stated by many respondents that the distinction is misunderstood by judges, lawyers and court services personnel.

Of interest was that survey respondents, when asked to describe the major distinctions between sections 28 and 29 of the YOA, gave 41 different responses. Only six were able to give a complete and accurate description: section 29 reviews are initiated by the Provincial Director when in support of a custody review; section 28 is generally used for

unsupported, youth-initiated custody reviews and for mandatory, annual reviews; section 28 contains provisions for leave, grounds for granting the review application, and requires a formal court hearing. The majority of respondents gave correct, but incomplete answers. As many as twenty per cent of respondents, however, gave totally incorrect descriptions of sections 28 and 29. Some respondents indicated they had not had enough experience with custody review applications to be able to articulate the differences between sections 28 and 29. The responses appear, in the majority of cases, to correspond to how familiar respondents feel with the custody review provisions and how confusing they feel the distinction between sections 28 and 29 are. It was evident in a small number of cases, however, that respondents over-estimated their knowledge. Although some respondents stated they were **very** familiar with the custody review provisions, they did not correctly describe sections 28 and 29 of the YOA.

The group of survey respondents who have worked under both Acts seem to be more confused about sections 28/29 distinction than those who have only worked under the YOA. Approximately twenty-three per cent of the former group find the distinction **very** confusing, as opposed to zero per cent in the latter group. A slightly higher percentage of respondents in the "YOA-only" group (13: 54.2%) find the distinction only **somewhat** confusing, compared with the "both

JDA-YOA" group (25: 47.2%). Approximately thirty-eight per cent of the "YOA-only" group claim that the distinction between sections 28 and 29 is not confusing at all, whereas only twenty-six per cent of the "both JDA-YOA" group find it so. These results provide support for the hypothesis that those who have experience under both statutes find the review provisions more confusing than those who have experience under the YOA only.

Difficulties/Frustration with Custody Reviews

Over one-half of survey respondents (44: 55.7%) have encountered difficulties or frustration with the preparation and/or processing of custody reviews. The most common of these difficulties and frustrations are reviewed below:

Cumbersome Procedures

Because of the intricate and cumbersome nature of the review provisions, the procedures are considered tedious, time-consuming, and difficult to understand. Respondents state that quite often workers in the youth justice system (in particular Crown Counsel, court registry staff and some Judges) do not understand the process and thus are not always cooperative. This lack of understanding, according to survey respondents, creates much frustration for corrections staff and further impedes the use of the custody review provisions.

Infrequent Use

Another perception among respondents is that the procedures for processing custody reviews are misunderstood and confusing due to their infrequent use. A consistent theme throughout all responses was the insufficient experience respondents had with the custody review sections. Thus, a vicious circle exists: the less utilized are the provisions, the less understood they are, and the less understood they are, the less and less they are used.

Confusion Regarding Leave

The issue of "leave" under section 28(3) of the YOA seems to be problematic because it is dealt with differently by individual judges and courts. Generally, courts within the lower mainland, with some exceptions, deal with leave at the first scheduled court appearance. If leave is granted, then the review is adjourned for a formal review hearing. In Burnaby Youth Court, the study revealed that this procedure was followed in almost all of the hearings under section 28(3). More than two adjournments with respect to **any** custody reviews heard in Burnaby were rare. According to survey respondents, a variety of methods for deciding leave are occurring in courts from other areas of the province. In some cases, an efficient working relationship with the local judiciary and court has resulted in few problems with leave, or indeed with other review procedures. In other

jurisdictions, however, the issue of leave remains vague and uncertain.

Confusion Surrounding Section 29 Custody Reviews

Another major problem survey respondents identify pertains to custody reviews pursuant to section 29 of the YOA. It was intended that section 29 reviews be relatively simple procedures, due to the fact that they neither require judicial leave, the establishment of legal grounds, nor even a formal court hearing with the young offender. In reality, however, they appear to be even more complicated and misunderstood than custody reviews under section 28. Many staff express frustration that numerous judges and youth courts treat section 29 reviews as if they are proceedings under section 28(3). That is, they are conducted with the same formality, using the same criteria, and requiring the young offender's presence as do the latter ones.

There is also the issue of serving notice. As previously discussed, field probation officers strongly view the notice requirements under section 29 as a court registry responsibility. Section 29(1) stipulates that the provincial director may, when making a recommendation for a transfer to open custody or for early release "cause notice in writing to be given to the young person, his parent and the Attorney General or his agent". The word "may" undoubtedly refers to the Provincial Director's option to make a recommendation, not

to serve notice. There has been much discussion surrounding what "cause" means. Does this mean that probation officers write out the notifications or ensure that someone else does? Because this question remains unanswered, it appears that corrections staff are struggling with this requirement.

Disadvantages of the Custody Review Provisions

Survey respondents were asked what the disadvantages of the custody review provisions of the YOA are. Not surprisingly, the responses were quite similar to those difficulties and frustrations outlined above.

Cumbersome and Formal Procedures

Again, the cumbersome, time-consuming, and intricate nature of the provisions and the requirements were criticized by an overwhelming majority of respondents. Many pointed to the confusion over section 28(3)/29 distinction as a major hurdle. In addition, strict application of the mandatory review requirement was considered unnecessary by some. It was pointed out that making a young offender appear in court for a mandatory review when it is obvious to everyone concerned that no change in disposition will result, can make a mockery of the court process. Therefore, it was felt that the provisions should allow for some discretion on the part of provincial authorities.

Inconsistent Procedures

Many surveyed express concern that the custody review provisions of the YOA are not consistently applied around the province. While some declared that custody centres have different procedures with respect to reviews, the majority feel that the inconsistency lies with the judiciary and the different court registries. Because both institutional and field probation officers have to deal with many different courts in the province, this inconsistency seems to be a source of great frustration.

Custody Centre Interests

Approximately one-quarter of field probation officers surveyed are concerned that the custody review provisions promote attitudes and practices within institutions that are not necessarily in the best interests of the young offender or the community. For instance, an important concern to any custodial centre is maintaining the "count" at a certain level. Bed space is a practical concern. One way of reducing the count is to release young offenders early or transfer them to other facilities. Concern was expressed by some respondents that a centre's self-interest may intentionally or unintentionally lead to practices that are at odds with the protection of the community and/or the intent of the sentence.

In addition, some staff in the field feel that

institutional staff sometimes give youth the impression that early release is a "right", similar to mandatory or earned remission in the adult correctional system. Sometimes, a youth's high expectations pertaining to early release are not met. This can create management problems for both the institution and the field probation officer, and frustration for the young offender who is likely to feel that the system has let him/her down.

Judicial Authority

Approximately one in five survey respondents feel that the authority for reviewing a custodial disposition should lie with provincial corrections and not with the judiciary. Not surprisingly, many feel that the system of early release for young offenders should parallel the adult systems of parole and mandatory supervision. Some observed that provincial authorities should also be the ones who determine whether the youth goes to an open or secure facility, as was the case under the JDA. Initial and subsequent classification of inmates or residents has traditionally been the responsibility of the Corrections Branch. Obviously, many still hold the view that such decisions are best made by those entrusted with housing offenders and who are in close proximity to them.

Advantages of the Custody Review Provisions

Survey respondents were presented with six obvious

advantages the custody review provisions of the YOA have and were asked to rank them according to importance. Approximately one-third of respondents (25: 31.6%) ranked the following choice as the "best advantage" of the six:

- #1) To provide for a 'parole-like' system for youth (and thus, theoretically, a smoother transition back into the community).

The five remaining choices were ranked as the best advantage in the following order (from best to least advantage):

- #2) To assist in the case-management process of incarcerated youth (18: 22.5%);
- #3) To decrease the negative effects of institutionalization or warehousing (16: 20.3%);
- #4) To provide the courts with a method of monitoring custodial dispositions (12: 15.3%);
- #5) To provide a "reward" for good institutional behaviour (5: 6.3%);
- #6) To assist in decreasing the financial costs of administering custodial sentences (4: 5.1%).

In the open-ended part of the question, another advantage volunteered by approximately one in five respondents (17: 21.5%) is that the review provisions could incite the youth

to take responsibility for his/her own case-management and to plan for an early release to the community. It was suggested that the possibility of a custody review allows the young offender to link his/her behaviour in and out of custody.

Central versus Original Courts

Survey respondents were asked whether they favour custody reviews being heard in the original court where the custodial disposition was ordered, or in a centralized court of review. Over one-half (46: 58.2%) favour original courts. Only 22.8% favour central court reviews. A minority of respondents (11: 13.9%) indicate that, depending on the situation, both systems are appropriate.

Those who favour custody reviews being heard in original courts gave strong reasons for their preference. The overwhelming majority feel that the original sentencing judge (or at least the same court) should have sole jurisdiction over reviewing that sentence. This is because the judge has prior knowledge of the case and thus can make an informed decision. It was also felt that this ensures that the young offender is dealt with in a consistent manner, and it was judged to be more beneficial for the youth to return to the original court/judge. Many respondents stated that the centralized process defeats the real purpose of judicial review and is tantamount to an administrative decision. Respondents who favour original court reviews also indicate

that centralized reviews limit the community's involvement. Those working in rural areas in particular consider it important for the young offender to appear before the originating court because it is more attuned to the interests of the local community. Fewer respondents were in favour of processing custody reviews through original courts and felt that this would restrict the number of frivolous applications.

Respondents who favour centralized court reviews believe that this practice is generally the most inexpensive, efficient and convenient. One stated that the central courts are likely to be more objective than the original courts, hence preferred.

Respondents who did not indicate a preference generally feel that whatever is operationally feasible should dictate the court location. Some suggested that for "routine" cases, central courts are the most appropriate. If a case is "sensitive" or "contentious", however, the feeling was that it should be reviewed by the original court.

Of those respondents who have experience working under both the JDA and the YOA, over one-half (30: 56.6%) favour custody reviews being heard in original courts. One-quarter (14: 26.4%) favour central review courts, while the remainder (8: 15.1%) express no preference. A slightly higher percentage than 56.6 of the "YOA-only" group prefer original courts (15: 62.5%) and a much lower proportion (4: 16.7%)

favour central courts. The remainder of the "YOA-only" group (5: 20.8%) did not indicate a preference. Although the differences between groups are not that large, the findings suggest that those who have no experience under the JDA tend to favour custody review proceedings in original courts more than those with experience under both the JDA and the YOA.

CHAPTER VI

THE CUSTODY REVIEW PROVISIONS OF THE YOA:

A RETROSPECTIVE AND PROSPECTIVE LOOK

The preceding chapter presented the findings of the study pertaining to the custody review practices in British Columbia. This chapter uses the findings to examine the degree to which the manifest intentions of the YOA have been met, and the way the custody review provisions have been implemented. Explanations are offered for the gap separating intentions and consequences, with reference to Cohen's (1985) models, introduced in Chapter IV. To conclude, this chapter will discuss the implications of the findings and suggest or recommend changes to the custody review legislation, policy and practice.

INTENTIONS AND CONSEQUENCES OF THE CUSTODY REVIEW PROVISIONS

Based on the findings of the study, a number of questions may now be addressed. Have the custody review provisions of the YOA lived up to expectations? Have the goals envisioned by the drafters of these sections been achieved? Is there a gap between the legislation and the practices pertaining to

custody review? Have things changed for the better, for the worse, or very little, from the practices prior to the implementation of the YOA? In order to provide answers to these questions, it might be useful to analyze the implementation of the custody review provisions within the ideological context of the YOA.

This study commenced with an historical analysis of Canada's youth justice system, in an attempt to show the impact changing ideologies have had upon the evolution of both the JDA and the YOA. We saw how the JDA had been largely brought about by a movement concerned with saving children. What were substantial reforms at the time the legislation had been enacted (1908) and amended (1929) came under fire as a result of growing awareness of human rights during the 1960's. More recently, criminal justice has moved from the humanitarian rehabilitative ideals to a crime-control or "law and order" penal philosophy. It is this philosophy that has had the greatest influence on the YOA and its implementation. Of course, remnants of the *parens patriae* philosophy could still be detected in certain sections of the new legislation. This "ideological contradiction" is explained by Cohen (1985):

"ideas draw upon existing social, political and economic arrangements (as well as previous ideas) and then, in turn, leave behind their own deposits which are drawn up to shape later changes, reforms and policies" (Cohen, 1985: 100).

As mentioned earlier, this ideological confusion can be seen even in the Act's "Declaration of Principle". The

Declaration contains many contradictory statements, presumably designed to simultaneously satisfy the proponents of a crime-control orientation, as well as civil liberties advocates. To a lesser extent, the Act also acknowledges the concerns of those who remained faithful to the welfare model of juvenile justice. Because of the contradiction inherent in the YOA's "Declaration of Principle", it is not easy to determine the Act's true ideology, nor the real intentions of its drafters. While the Act could be generally interpreted as one based on the "justice model", this model itself may be nothing more than a compromise of the competing ideologies mentioned above (Havemann, 1986).

What were the intentions of the government with respect to the YOA? Certainly the federal government could not publicly state that the YOA was designed to be more punitive. Although many members of the general public would undoubtedly have welcomed such a direction, a declaration to this effect would surely have alienated the proponents of a more enlightened philosophy for juvenile justice. Perhaps for political expediency (a Liberal government declining in popularity), it was decided to promote the YOA as "progressive" legislation. Hence, it was hailed by Canadian politicians as contemporary, balanced and justice-oriented. Despite this political rhetoric, many believe that the real intentions behind the YOA were indeed punitive:

"the Young Offenders Act system, which is based upon individual accountability of youth, will be used to

legitimate an ideological shift to more coercive policies and more 'law and order' biased practices towards youth" (Havemann, 1986: 225).

To what extent did the views of the Canadian public, as articulated and expressed by several interest and pressure groups, influence the government in its attempt to replace the JDA by more contemporary youth legislation? It is no secret that the Canadian public tends to greatly overestimate the true incidence of crime (Doob & Roberts, 1982). But, unlike some jurisdictions in the United States, Canada did not experience "moral panic" in relation to youth crime during the late 1970's/early 1980's (Wilson, 1982). Certainly, there has been an increase in youth crime, however this increase was not disproportionate to increases in the youth population and increases in crime generally (Havemann, 1986). Furthermore, most youth crime tends to be "episodic, transitory and, in a majority of cases, subject to the inevitability of maturational reform" (Tanner, 1988: 355). It seems more likely, therefore, that Canadian politicians' promotion of a "law and order rhetoric", was meant to appease the fears of the public (Fattah, 1982). Such rhetoric performs a political function. Particularly in times of economic restraint, decreased tolerance and increased conservatism can be expressions of insecurity and discontent and can bring about demands for convenient scapegoats, such as young offenders. Many may "jump on the band wagon" of "sensational" incidents.

Has the second revolution of juvenile justice only served to "widen, strengthen and differentiate" (Austin & Krisberg, 1981) the control nets of society? In an effort to provide youth with the same rights as adults, have we merely shifted the emphasis from "child-saving" to "child-blaming"? (Havemann, 1986). Many suggest that "the system" has failed in its efforts to help or rehabilitate young offenders. Thus, perhaps all that it can hope to achieve is control and supervision.

If Parliament intended the YOA to be more punitive than the JDA, then it would appear that it has been successful. Evidence that the YOA has resulted in a substantial rise in the number of youth in custody seems to be undeniable. This increase has been the subject of considerable criticism (Hackler, 1987; Corrado & Markwart, 1988 and 1989). Yet, if this was the real intention of the YOA drafters, then such increase should not come as a surprise. If the idea is to hold youth more accountable for their actions, then the logical expectation is that they will be punished more harshly. Perhaps it was naively assumed that the due process rules and the newly created review mechanism would mitigate the anticipated punitive impact of the YOA. Or it may have been hoped that the punishment orientation of the legislation would be tempered by some of the provisions designed to promote the welfare of the individual young offender.

The custody review provisions of the YOA are those where

the due process and the welfare elements of the Act meet or coincide. Arguably, they are also in line with the accountability philosophy, since they require that the youth be returned to the court for a review, as opposed to making application to correctional authorities. Nevertheless, it is conceivable that the review sections were meant to minimize the potential punitiveness of lengthy periods of incarceration. They certainly were intended as a means for the court to continually monitor the appropriateness of continued custody. The effective utilization of the custody review provisions is one way of ensuring a young offender's "right to the least possible interference with freedom" (s. 3(1)(f) YOA).

The major finding of the study is that, in B.C., the practice with custody reviews under the YOA has been somewhat problematic. This conclusion is based, in part, on the statistics compiled by the Corrections Branch over a six month period, and on the small number of custody reviews processed through Burnaby Youth Court over six fiscal years. The results of the survey provide further support for this type of conclusion. At the very least, it is the perception of survey respondents that they have had minimal involvement in activities related to custody review. Based on these findings, it is fair to say that the provisions have not achieved their goal in this province. That is, custodial dispositions are not being closely monitored by the court to

ensure that no young offender is being kept in custody longer than necessary. Moreover, the current number of reviews could not have brought about a significant reduction in the number of confined youth.

The findings of the study suggest a number of reasons for the low number of custody reviews in B.C. Most significantly, it appears that the provisions themselves are misunderstood. This is probably due to their intricate, cumbersome nature. It does not appear that provincial policy has succeeded in making the provisions easier to understand. The main area of confusion seems to be the distinction between optional reviews under section 28(3) of the YOA and those pursuant to section 29. The confusing nature of the provisions also appears to result in different practices around the province, not only within corrections, but also amongst the various youth courts. These inconsistencies further exacerbate the confusion and frustration with the provisions. It is not unreasonable to suggest that this confusion also contributes to their infrequent use. Without enhanced experience and expertise, the sections will likely continue to be under-utilized.

Cohen's Model

Various other explanations can undoubtedly be advanced for the gap between the presumed intentions of the YOA and the reality of its application. In Chapter IV, Cohen's (1985) model was introduced as a possible vehicle for explaining such

a discrepancy. In Table I (page 137), Cohen's five different models of explanation were outlined. For the purpose of this discussion, two of these models are considered relevant.

Ideological Contradiction

In Cohen's model of "ideological contradiction", the original intentions of the "reform" (in this instance custody review provisions) are "contradictory and mixed and, for this reason, virtually impossible to realize" (Cohen, 1985: 88). As we have seen, the YOA's philosophy, from which the custody review sections stem, is characterized by ideological confusion. In addition, the study reveals that the provisions pertaining to custody review are, themselves, confusing. The sections attempt to encourage young offenders' accountability and responsibility by encouraging them to take part in their own case-management and release planning. At the same time, the provisions contain an expectation that a youth shows progress, positive change, maturation or signs of "rehabilitation" in order to be granted a modified disposition. Thus, there still exists an expectation that institutions will help as well as incarcerate. Even when the young offender can demonstrate improvement, the sections stipulate that any change in disposition must be compatible with society's need for protection. In addition to these three goals, the provisions strive to ensure that youth receive due process and legal representation. This

requirement is evident in the intricate wording of the sections and in the many procedural steps stipulated.

According to Cohen's model, the consequence of such contradiction is an "emerging pattern (which) bears little relationship to the plan. The policy area is a site in which contradictions are resolved" (Cohen, 1985: 88). Cohen suggests that those in charge of administering the policy (or legislation) develop their own language in order to make sense of the changes in policy. The study reveals that probation officers within the Corrections Branch have developed their own criteria for supporting or initiating custody review applications. They consider the protection of society, the interests of the community, the intent of the original sentence and the attitude of the young offender to be of paramount importance. Their reports to the court often speak to the youth's progress in custody or whether the youth has received the maximum benefit from incarceration. Such criteria, or phrases, are commonly used, with the unrealistic expectation that all those who work in the system know exactly what they mean. Yet, what do the "interests of the community" or "intent of sentence" really mean? According to Cohen:

"words neither 'come from the skies'...nor can they be taken as literal explanations of what is happening. Nonetheless, we must still listen to them very carefully. Words are real sources of power for guiding and justifying policy changes and for insulating the system from criticism...it is the rhetoric itself which becomes the problem" (Cohen, 1985: 115).

Upon closer analysis, the phrases commonly used suggest that YOA practitioners have adopted fairly conservative attitudes toward the implementation of the custody review provisions. Their interpretation of the sections is that the young offender is not entitled to early release from custody unless he/she has evidenced maturity and growth, has a structured release plan, and is no longer a threat to the community. This somewhat "crime-control" perspective embraced by many probation officers may explain, at least partially, why only a few reviews are being processed.

Professional Interest

A second model formulated by Cohen is "professional interest". This model suggests that while the original intentions are somewhat benevolent, they are "on the whole...highly suspect and eventually self-serving" (Cohen, 1985: 88). The intentions of the reform are pre-ordained by the system administrators. Using this model, we might speculate that, just as youth in custody were not brought forward for review under the JDA, this practice has continued under the YOA. Thus, things have not changed or have changed very little since the JDA days. This theory suggests that system professionals have a collective interest in maintaining control over those under their authority or "power".

Perhaps there is a reluctance to initiate custody reviews that is peculiar to B.C. Such reluctance would be in line

with the somewhat conservative philosophy prevailing in this province at the present time. This conservatism may be seen in a number of government statements. For instance, in 1988, the Corrections Branch was transferred from the Ministry of Attorney General to the Ministry of Solicitor General. The newly created Ministry, which comprises Corrections as well as Police Services and Motor Vehicle Branches, was established "in recognition of the government's commitment to public safety, to the protection of its citizens and to the regulation of various enterprises in our society" (Ministry of Solicitor General, 1988/89). The Corrections Branch may have had to adopt this "public safety" concern and to integrate it in its programs and services. Custody review might be a practice that does not fit well with the Ministry's stated mission and goal of public safety and protection of society.

The reluctance to embrace the custody review provisions would also be consistent with other justice trends in B.C., a province which has one of the highest young offender incarceration rates in Canada (Corrado & Markwart, 1989). In addition, the Corrections Branch has placed a high priority on constructing and/or expanding youth custody centres since the YOA took effect. It is difficult to determine whether more custody beds have been created to accommodate the decisions of youth courts who are sentencing more young offenders to custody, or whether the increased availability

of custody beds has resulted in more custodial dispositions. B.C. has tended to emphasize traditional institutional settings for both its secure and open centres (Caputo & Bracken, 1988), with the result that open custody structures look surprisingly similar to secure centres. Furthermore, the size and style of B.C.'s system of probation residential attendance programs are nearly equal to its open custody system (Corrado & Markwart, 1989). Thus, the Provincial Director has a significant span of control over young offenders.

Other trends in corrections illustrate B.C.'s more conservative, crime-control philosophy. Provincial parole is now considered a "privilege", as opposed to a "right". Supervision in the community is now "intensive", "specialized" or "electronic". Probation caseloads are becoming automated and classified. Initiatives by senior government or branch members undoubtedly influence the opinions and interests of those professionals at the "line" level. Those charged with the day-to-day application of the custody review provisions of the YOA may come to view the early release of young offenders, or their transfer between custody levels, as contrary to these control-oriented trends. Perhaps the custody review provisions are being considered by system professionals as too "soft", too ineffective, or somehow inconsistent with public safety or protection. Perhaps the perception that custody reviews are not a high priority has

resulted in the view that the provisions are too cumbersome and time-consuming. Certainly this was one of the biggest complaints voiced by the majority of survey respondents.

Vested professional interests in the status quo may also be hampering the effective implementation of the YOA's custody review provisions. Concern was recently expressed by the Corrections Branch's Youth Services Policy Advisory Group that young offenders are increasingly being incarcerated for "breach" of probation offences (s. 26 YOA). Branch officials note that "breaches" have accounted for 30% of custodial admissions during fiscal years 1988/89 and 1989/90, in contrast to 15% in FY 1983/84 (Corrections Branch, 1990). Assuming that recommendations by probation officers in cases of breaches of probation carry much weight with youth courts, it is not unreasonable to suggest that probation officers are increasingly demanding custodial sentences for probation violators. This hardening of attitude may be due to frustration with the young offender not complying with the conditions, but it could also be out of concern for public safety. In such cases, one would not expect probation officers to actively begin release planning via custody review once they have succeeded in placing the uncomplying youth in custody.

If we assume that professionals in the youth justice system have accepted the justice model, then it is not surprising that their primary goal will be to ensure the

accountability of young offenders and the protection of society. According to a theoretical model developed by Sarri (1983), the "organizational outcome" of a "justice" ideology would be "low rates of detention; dispositional equality; least intrinsic means of intervention" (Sarri, 1983: 320). On the other hand, if professional interests reflected a control ideology, with the primary goal of "crime reduction" and the "protection of others", then the results would be "high rates of detention and institutionalization" (Sarri, 1983: 320). In the case of the custody review provisions, it can be argued that, while the original intentions were based on the justice model (defined by Sarri as "equal justice; due process; procedural fairness" (1983: 320)), the implementation of the provisions has been co-opted by the control model (defined as "parens patriae" and "police power" (Sarri, 1983: 320)) adopted by system professionals.

IMPLICATIONS OF THE FINDINGS

The findings of the study have legal, social, economic and correctional implications. If the custody review sections continue to be under-utilized, institutional counts are likely to remain at their present high level or even increase. This would mean higher and additional costs for the Corrections Branch as it is much more expensive to supervise young

offenders in custody than in the community. As alluded to earlier, there may be a vested interest by the Corrections Branch to maintain the newly built or renovated facilities fully occupied. On the other hand, there may be a distinct advantage for correctional authorities to channel savings from reduced custody to community correctional activities, programs or services. While attention to the custody review provisions may not be timely within the current correctional and ministerial initiatives and goals, there is every likelihood that the political winds will shift in the future. Given B.C.'s history of leadership in Canada's youth justice system it may be beneficial for this province to investigate ways to increase the effectiveness and utilization of the custody review provisions.

Arguably, an increase in custody reviews will have economic and resource implications for youth courts. Additional review hearings would probably require provincial courts to allocate more court time to YOA matters. If so, then an increase in custody reviews may put further strain on already full court dockets. The cost of defence counsel provided to young offenders at the review hearing would also increase. As most lawyers for young offender matters are duty counsel or appointed by the court, this practice would place additional financial strain on the public purse. Yet, even with these additional economic costs there would probably still be savings overall when the decreased costs of

institutional care are factored in.

The seemingly conservative use of the custody review provisions of the YOA may have serious implications for the young offenders themselves. The longer the youth is kept in custody, the greater is the danger of deterioration, contamination and stigmatization. Besides incapacitation, what additional benefit is there in keeping young offenders in custody after they have achieved the maximum progress possible within the constraints of the facility? Victim-rights advocates and those who share their views might argue that lengthy incarceration is justified in order to achieve the goals of retribution and deterrence. Others might simply feel that early releases present a danger to society. Critics of this view might argue that society will not be better protected in the long run if youth are released without a period of transition or if they come out of custody "worse" than when they went in. The pros and cons of this argument have long been debated in respect to the adult systems of parole, mandatory supervision and remission. The recent federal government report on adult conditional release (Daubney, 1988) grapples with this same issue. It recommends that conditional release incorporate concern for the protection of society through the implementation of "risk assessment" criteria and the extension of eligibility dates for violent or dangerous offenders. Thus, in terms of costs, the goal of the custody review provisions of the YOA should

be to achieve a balance between the rights of young offenders and the rights of society, similar to its adult system counterpart. Presently, the practice of the custody review sections appears off-balance in that it tends to favour the immediate concerns and interests of society over those of individual young offenders.

If the custody review provisions are not being implemented as originally intended (and further research examining length of dispositions would have to be done), then there are implications for provincial authorities who have the responsibility for administering the YOA. While the apparent infrequent use may be blamed on the intricate, confusing nature of the provisions themselves, it may also be due to disorganized and inconsistent practices within the province, or to a lack of attention, or low priority being given, to the provisions. If the latter is true then provincial authorities may open themselves to criticism by federal officials.

RECOMMENDATIONS

If B.C. is willing to remedy the infrequent utilization of the custody review provisions, the following initiatives might be considered or undertaken:

1. The province could continue to put pressure on the federal government to amend the YOA with the objective of streamlining and clarifying the sections pertaining to custody review. In particular, the distinction between sections 28(3) and 29 needs to be better articulated in order to lessen the confusion. It is clear from the study that custody reviews supported by the Provincial Director are not always proceeded with under section 29, which is meant to be a simpler method than proceeding under section 28(3). Even if the process is initiated under section 29, it is not always understood or distinguished from section 28(3) by youth justice administrators within court services and Crown Counsel or by members of the judiciary. In addition, the requirements for notice under section 29, and leave of the court under section 28(3) are in need of legislative amendment in order to reduce the amount of paperwork and confusion in these areas.
2. B.C. could set up a task force or committee to study the custody review provisions and to come up with clear, consistent guidelines aimed at securing uniform practices among correctional centres, community probation services, court registries, Crown Counsel, and the judiciary. The committee or

working group needs to be representative of the various youth justice components and of the geographic regions of the province. Further study of the practices in other provinces, such as Alberta, Manitoba and Nova Scotia, which appear to have had more success implementing the provisions, would probably generate ideas and suggestions that may be incorporated within B.C.'s youth justice system. The overall goal of the committee would be to reduce the procedural and paperwork requirements of the custody review practices, reduce the confusion and misconceptions of the sections, and to provide leadership in order to encourage proactive reviews of custodial dispositions.

3. The province needs to continue its efforts to improve inter-ministerial cooperation at the senior and local levels with regard to services, programs and residential care/custody for youth. The study revealed that one of the most important criteria for the Provincial Director's decision to support a review application is an appropriate community plan. This finding suggests that young offenders may be denied an opportunity for early release if they have no place to go. Increased cooperation and coordination with other Ministries, particularly

Social Services and Housing, Health and Education, might result in more effective release planning and thus a higher utilization of the custody review provisions.

4. The Corrections Branch's Probation Records System needs to be revised in order that it may count custody review applications submitted by field probation officers, in addition to progress reports (the rationale being that not all reviews submitted result in a court hearing) and that the outcome of the reviews be recorded by the system. In addition, the automated system requires a slight adjustment to make it possible to distinguish between mandatory and optional reviews under section 28 of the YOA. It is also recommended that custody reviews submitted by institutional staff be entered into the Corrections Administration and Record Entry System. It is further recommended that youth courts continue their efforts to record the outcome of all youth matters, including custody review hearings. The increased recording would provide more accurate statistics on custody reviews in the future. It would also serve to determine whether the findings of the present study as to the frequency and outcome of custody reviews are accurate.

5. Further research on the implementation of the custody review provisions of the YOA is highly desirable in order to provide more information in this area and to validate the conclusions of the present study. It is hoped that this exploratory research will provide the impetus and a framework for future studies and analyses.

APPENDIX A
JUVENILE COURT DISPOSITIONS

APPENDIX A

Juvenile Court Dispositions

Section 20:(abbreviated)

- a) Suspend final sentence;
- (b) Adjourn hearing or disposition from time to time for any definite or indefinite period;
- (c) Impose a maximum fine of \$25. to be paid in periodical amounts or otherwise;
- (d) Commit a child to the care or custody of a probation officer or any other suitable person;
- (e) Allow the child to remain at home, subject to the visitation of a probation officer, such child to report to the court or to the probation officer as often as may be required;
- (f) Cause child to be placed in a suitable family home subject to the friendly supervision of a probation officer and the further order of the court;
- (g) Impose upon the delinquent such further or other conditions as may be deemed advisable;
- (h) Commit the child to the charge of any children's aid society, duly organized under an Act of the legislature of the province;
- (i) Commit the child to an industrial school duly appointed by the lieutenant governor in council.

APPENDIX B
YOUTH COURT DISPOSITIONS

APPENDIX B

Youth Court Dispositions under the Young Offenders Act

Section 20 (1)

Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any one of the following dispositions, or any number thereof that are not inconsistent with each other:

- (a) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;
- (b) impose on the young person a fine not exceeding one thousand dollars to be paid at such time and on such terms as the court may fix;
- (c) order the young person to pay to any other person at such time and on such terms as the court may fix an amount by way of compensation for loss of or damage to property, for loss of income or support or for special damages for personal injury arising from the commission of the offence where the value thereof is readily ascertainable, but no order shall be made for general damages;
- (d) order the young person to make restitution to any other person of any property obtained by the young person as a result of the commission of the offence within such time as the court may fix, if the property is owned by that other person or was, at the time of the offence, in his lawful possession;
- (e) if any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, where restitution of the property to its owner or any other person has been made or ordered, order the young person to pay the purchaser, at such time and on such terms as the court may fix, an amount not exceeding the amount paid by the purchaser for the property;
- (f) subject to section 21, order the young person to

compensate any person in kind or by way of personal services at such time and on such terms as the court may fix for any loss, damage or injury suffered by that person in respect of which an order may be made under paragraph (c) or (e);

- (g) subject to section 21, order the young person to perform a community service at such time and on such terms as the court may fix;
- (h) make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence;
- (i) subject to section 22, by order direct that the young person be detained for treatment, subject to such conditions as the court considers appropriate, in a hospital or other place where treatment is available, where a report has been made in respect of the young person pursuant to subsection 13(1) that recommends that the young person undergo treatment for a condition referred in paragraph 13(1)(e);
- (j) place the young person on probation in accordance with section 23 for a specified period not exceeding two years;
- (k) subject to sections 24 to 24.5 commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
 - (i) two years from the date of committal, or
 - (ii) where the young person is found guilty of an offence for which the punishment provided by the Criminal Code or any other Act of Parliament is imprisonment for life, three years from the date of committal; and
- (l) impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public"

APPENDIX C
B.C. CORRECTIONS BRANCH
POLICIES AND PROCEDURES
SECTIONS 28, 29 YOA

APPENDIX C

B.C. Corrections Branch Policy and Procedures with respect to sections 28 and 29 of the YOA (summarized)

1. Every young offender sentenced to custody has an absolute right to apply for a review under section 28 of the YOA, regardless of the merit of a change in disposition.
2. Where the Provincial Director is in support of a review, the application should be made under section 29 as it is a simpler and more expedient process than that required under section 28 (i.e. there are no requirements for "leave" or "grounds" to be satisfied).
3. Section 28 reviews should be processed in the designated central review court (locations as indicated previously, with the addition of Kamloops) according to the policy described above, by Corrections Branch staff (usually custody centre personnel).
4. It is the responsibility of the custody centre to initiate section 28 mandatory review applications. A system of identifying key dates and bringing forward cases at least one month prior to the annual review date shall be implemented at each centre.
5. Custody staff are required to assist a young offender's application for an optional review under section 28, regardless of the frivolousness of the application, and process the application to the appropriate court.
6. Review applications under section 28 must be filed in court within three working days of the application being completed (either by staff or the youth) by the custody centre staff. Centre staff must also advise the youth of his/her right to counsel, notify the court as to his/her intent in this regard, inform the youth of his/her legal right to mandatory or optional reviews, and advise the youth of review court dates.
7. Liaison between the institutional staff and the youth's field probation officer shall be ongoing

during the youth's custodial sentence. Custody staff are required to provide the probation officer with pertinent information for inclusion in the Progress Report. The field probation officer completes a written report for all review hearings under section 28.

8. The calculation of "leave" under section 28 (3) for optional reviews precedes the determination of legal grounds at the review hearing itself. The judicial leave requirement exists to screen out inappropriate applications. Leave is required when less than six months has passed since the most recent disposition. A previous review hearing counts as a "disposition" for this purpose.
9. Centre staff must liaise with the court to ensure that a court date is fixed, a "spring order" is prepared to release the young offender for transport purposes to the Sheriff's Department, and that notice to all necessary parties is arranged. The field probation officer may assist in this process.
10. Probation officers should prepare a Progress Report in anticipation of a review date to expedite matters (such procedures should be discussed locally between Corrections and the Judiciary).
11. Most early releases to probation from custody under section 29 should occur from open custody.
12. Section 29 should be utilized when Correction Branch staff are in support of the review application. The only criterion for recommending a change in disposition is for the Provincial Director to be "satisfied that the needs of the young person and the interests of society would be better served thereby" (section 29 (1) YOA).
13. Only those youth serving sentences greater than 90 days should generally be considered for a section 29 review.
14. The Provincial Director must prepare a formal written notice when recommending a review under section 29 which should include reasons for the review and conditions for release, as appropriate. These notices should be served to the youth, parents, and Crown Counsel, with a copy to the youth court.

15. Section 29 reviews should be an "integral" part of the case management process. Youth cases should be regularly reviewed by custodial centre staff for section 29 consideration "in order to minimize the level of intervention in their lives, to the extent it is consistent with the need to protect society". Initiating section 29 applications is the joint responsibility of correctional custody and community staff.
16. A transfer from secure to open custody should only be recommended when:
 - (a) "the youth does not pose a significant security risk;
 - (b) there is a likelihood the youth will reasonably comply with the rules of conduct of the open custody centre; and
 - (c) the special needs of the youth (i.e. medical/ psychiatric) are at least as likely to be satisfied in the open custody centre as they would be in the secure centre".
17. A release from custody to probation should only be considered when:
 - (a) "the release of the youth would not constitute an undue risk to the community;
 - (b) the intent of the original sentence has apparently been satisfied;
 - (c) the proposed community based plan is verified, would be as beneficial or more beneficial to the youth than what is available in the custody centre, and the youth is likely to comply with the proposed plan; and
 - (d) the behaviour and attitude displayed by the youth during the current sentence is good".
18. The probation officer is responsible for filing the section 29 review with the appropriate court registry and writing a progress report, which

includes a summary of the youth's institutional progress, an assessment of the community plan or open custody transfer, and recommendations for conditions of release/transfer.

APPENDIX D
CASE LAW
CUSTODY REVIEW PROVISIONS

APPENDIX D

Case Law Pertaining to Custody Reviews

Number of Mandatory Reviews

In Regina v. Donnie Lee P. ([1987] B.C.W.L.D. 1775, [1987] W.D.F.L. 1048, 2 W.C.B. (2d) 21, 414, B.C. Provincial Court) Judge Collings ruled that subsections 28(1) and (2) of the YOA require only one mandatory review. After that it is up to the appropriate parties to apply for a review under subsection 28(3) and establish grounds as per subsection 28(4) (Bala & Lilles, Y.O.S. 87-064).

Onus

Again, in R. v. Donnie Lee P., Judge Collings, in confirming the original 3 year custodial disposition for manslaughter for the second time, ruled that section 28(1) imparts an onus on a young offender to show cause for a change in disposition:

"With respect to the issue of onus on a subsection 28 (1) review of disposition, Collings Prov. J. referred to his own earlier decision in R. v. Darren M., Y.O.S. 86-082. He noted there that adult sentences are usually shortened automatically by virtue of earned remissions without recourse to court proceedings. In contrast, YOA provisions respecting secure custody dispositions allow for shorter durations but not automatic earned remission" (Bala & Lilles, Y.O.S. 87-064).

Judge Collings also denied the youth a transfer from secure to open custody stating that "the interests of society" argued

against such a transfer.

In a similar case, Judge Auxier considered the decision of R. v. Donnie Lee P. in the application of Re Bruce Patrick M ([1987] B.C.W.L.D. 2958, B.C. Provincial Court). Judge Auxier distinguished the circumstances of Bruce P. M. from Donnie L.P., noting that Bruce's performance in custody was "very good" and that the offence of manslaughter, while serious, was not the same "sadistic and horrible act" that formed the circumstances of R. v. Donnie Lee P. She accordingly granted the youth a transfer from secure to open custody under section 28(1) of the YOA. (Bala & Lilles, Y.O.S. 87-089)

In an earlier case, Re T.G. (Manitoba Provincial Court, February 5, 1986) it was ruled that grounds for an optional review do not automatically entitle the youth's application to be granted (Bala & Lilles, Y.O.S. 86-030). The onus is on the youth or applicant to "satisfy the court that the disposition made in respect of the offence, having regard to the needs of the young person and the interests of society be decided in one of the ways set out in section 28 (17)".

In R v. Kenneth R. (1987, 80 N.S.R. (2d) 61 (Yth. Ct.)) it was held that the applicant must provide provincial authorities with "concrete proposals for programs that have been sought out and confirmed by counsel" (Bala & Lilles, Y.O.S. 87-094).

Review Board

The only province that opted to establish a Review Board as per section 30 of the YOA was Newfoundland. The Board was created in 1987. The following year, a Newfoundland youth court judge ruled upon a youth's application for a review of a custodial disposition that both the Review Board and section 30 of the YOA were unconstitutional. The judge proceeded to conduct the review himself. The Attorney-General moved to quash the judge's decision. The motion was upheld in Re A.G. (Nfld.) and M.S. (1988, 75 Nfld. & P.E.I.R. 156, 223 A.P.R. 156 (Nfld. S.C., T.D.)). Justice Noel held that a youth court judge cannot entertain a review application unless the Provincial Director has caused the youth to be brought to court for that purpose (Bala & Lilles, Y.O.S. 88-106)..

Leave

In R. v. Michael Anthony V. (B.C. Prov. Ct., April 16, 1985), the issue of leave for an optional review under section 28 (3) of the YOA was addressed. Judge Davis held that the granting of leave required "special circumstances" (Bala & Lilles, Y.O.S. 85-085). This decision places the onus on the youth to provide the court with information or evidence which justifies a change in disposition.

The issue of leave was also addressed Re M.M. (N.S. Yth. Ct., April 25, 1985). Judge Comeau dismissed a youth's application for leave as he had no information on the

potential success of the review, in terms of establishing the grounds outlined in subsection 28 (4) (Bala & Lilles, Y.O.S. 85-078)..

In R. v. Anthony James S. ([1987] W.D.F.L. 2363 (Prov. Ct. (Yth. Div.)) it was decided that leave should be addressed in a separate hearing in which the youth or applicant is entitled to participate and that leave cannot be decided solely on administrative criteria (Bala & Lilles, Y.O.S. 88-034). This is a much different approach than that taken in R. v. Paul W (Ont. Prov. Ct. (Fam. Div.), August 7, 1989), wherein Judge Felstiner stated:

"I have never denied leave and I find it difficult to imagine a situation in which I would, unless a boy came back a week later, or something. I would at least hope that I would give a child a hearing" (Bala & Lilles, Y.O.S. 88-036).

Nature of Proceedings

The YOA's lack of direction for court procedures for hearing section 28 (3) optional review applications was criticized by Judge Kimelman in R. v. T.E.C. (Man. Prov. Ct. (Fam. Div.), February 11, 1985):

"In the move from child welfare principles under the Juvenile Delinquents Act, to due process under the Young Offenders Act, the drafters of the legislation have overlooked by design or by oversight the inclusion in the statute of directions for procedures that would have adequately had concern for the rights of the young person and made uniform and direct the court process. Such difficulties are inherent in s. 28 as will be outlined" (Bala & Lilles, Y.O.S. 85-037).

The court outlined guidelines for optional reviews which

stipulate that a review hearing should be a formal process where evidence is filed as documentation or sworn to under oath. The role of the court should not be to act as interrogator. The court also held that a probation officer should not represent the interests of the youth as he/she is an officer of the court. The court rejected the informal role the probation officer exhibited in this case and the hearsay evidence contained in the progress report.

The presence of Crown Counsel at an optional review hearing under section 28 of the YOA was felt to be of significance in Re T.G. (Bala & Lilles, Y.O.S. 86-030). This decision further emphasized the formalized nature of review hearings.

Progress Reports

The importance of the progress report to ascertaining the effectiveness of treatment programs within a custodial centre was emphasized in R. v. R.R. ((1987), 77 N.S.R. (2d) 400 (Yth. Ct.)). The court was particularly concerned with receiving evidence to determine the "optimum time" for release so as to further the progress of the youth in the community (Bala & Lilles, Y.O.S. 88-047).

Grounds for Review

In R. v. Amber P. (L.W. 827-022, Ont. Prov. Ct. (Fam. Div.), October 13, 1988) a youth was granted an optional

review application for early release on the grounds that new services were available to the youth (Bala & Lilles, Y.O.S. 88-186). Judge Fisher held that further "warehousing" of the youth in secure custody would not contribute to her welfare or the interests of society.

Section 29 Reviews

The previously cited case of R. v. Donnie Lee P., with regard to a later 1988 application for early release under section 29 of the YOA, speaks to procedures for these types of review hearings. It was held that the altering of the original disposition should be conducted in open court, and not privately in judicial chambers. The presence of the youth was not considered mandatory, but usually desirable. The court commented that section 29 applications could be regarded as "housekeeping matters" to facilitate release plans towards the expiration of the custodial sentence. This did not mean, however, that the court's role should be relegated to "rubber stamping" the application (Bala & Lilles, Y.O.S. 88-170).

APPENDIX E
SURVEY
CORRECTIONS BRANCH STAFF



To: Local Directors
Community Probation Offices
Youth Institutional Directors

Date: May 26, 1990

Re: Young Offender Research

I am a part-time graduate student at Simon Fraser University where I am in the process of completing my Master of Arts Degree in Criminology. My thesis is focusing on the custodial review provisions of the Young Offenders Act.

I am interested in collecting data on the field experience and opinions of professional staff working in the youth justice system and, to this end, have developed a questionnaire for youth workers/probation officers and institutional probation officers/case-management coordinators.

I would greatly appreciate your assistance in distributing the enclosed questionnaires to appropriate staff in your office or custodial centre and your help in encouraging as many staff as possible to complete and return the questionnaires to me.

Information collected will only be used for the purpose of completing the thesis. The identity of staff responding will not be revealed.

Completed questionnaires may be forwarded to me at my office address listed below. As I am facing a deadline, I would appreciate it if the questionnaires be returned as quickly as possible, and not later than **June 22, 1990**.

Thank you for your anticipated cooperation.

Dana Cosgrove
Local Director

Vancouver South Probation
3457 Kingsway
Vancouver, B.C.
V5R 5L5
(660-2370)

encl./

QUESTIONNAIRE INSTRUCTIONS

This questionnaire is being administered to three different groups of professionals within the youth justice system, therefore, some questions may not apply to you. If this is the case please respond "Not applicable". Otherwise, please attempt to answer all questions completely.

For the multiple choice questions, please circle the letter corresponding to your chosen answer.

Some questions are subjective but this is important for determining your opinions or attitudes. If it is not possible to answer some questions exactly, please give your best estimate.

I am available to answer any questions you may have pertaining to this questionnaire (office # 660-2370).

Good luck and thank you for taking the time to complete this questionnaire.

QUESTIONNAIRE

- 1) What is your current occupation?
- a. Probation Officer/Youth Worker (Field)
 - b. Institutional Probation Officer
 - c. Institutional Case Management Coordinator
 - d. Crown Counsel
 - e. Other. Please specify _____
- 2) Please indicate the full name and location where you are presently working.

- 3) How many years have you been working in your present occupation?
- a. Less than one year
 - b. One to two years
 - c. Two to five years
 - d. Five to ten years
 - e. Over ten years
- 4) What level of post-secondary education do you have?
- a. Grade 12
 - b. One to two years university or college
 - c. University Degree (undergraduate)
 - d. Masters Degree
 - e. Law Degree
 - f. Other. Please specify _____

5) What was your major or area of study?

6) To what extent are you currently working with young offenders or with the Young Offenders Act?

- a. 100%
- b. 75%
- c. 50%
- d. 25%
- e. Not at all

(If 'not at all', have you in the past? Yes _____ No _____
If 'Yes', to what extent? _____%)

7) Have you experience working in the same field prior to the Y.O.A. enactment in 1984?

- a. Yes
- b. No
- c. Not applicable

8) If you answered 'Yes' to the above, what do you feel are the advantages of the Y.O.A. compared to the Juvenile Delinquents Act (J.D.A.)?

9) What do you feel are the disadvantages of the Y.O.A. compared to the J.D.A.?

10) Overall, which Act do you prefer?

- a. Y.O.A.
- b. J.D.A.
- c. Not applicable

Please state the reasons for your preference:

11) What do you feel is the major philosophy of the Y.O.A.?

12) What do you feel was the major philosophy of the J.D.A. (if applicable)?

13) Are you familiar with the custodial review provisions of the Y.O.A. (sections 28 - 29)?

- a. Not at all familiar
- b. Somewhat familiar
- c. Very familiar
- d. Extremely familiar

14) In your opinion, do you feel the inclusion of the custodial review sections are one improvement the Y.O.A. has over the previous J.D.A.?

a. Yes

b. No

c. Not sure

Please explain: _____

15) Please describe briefly what you feel your major role is in the preparation and/or processing of custodial review cases:

16) Do you feel that this should be your role?

a. Yes

b. No

Please explain: _____

17) Have you encountered any difficulties or frustrations with the preparation and/or processing of custodial reviews?

a. Yes

b. No

Please explain: _____

18) Do you favour custodial reviews being heard in:

- a. Original courts
- b. Centralized courts (i.e. Burnaby)

Please explain: _____

19) Do you find the distinction between section 28 and 29 reviews are:

- a. Extremely confusing
- b. Very confusing
- c. Somewhat confusing
- d. Not confusing at all

Please explain: _____

20) Please describe what you feel is the major distinction between section 28 and 29 reviews:

21) In your experience, how are Judges granting "leave" under section 28?

- 22) Since the Y.O.A. was enacted in 1984, or since you commenced your present occupation, how many reviews of custodial dispositions have you initiated (or initiated on behalf of a young offender)? Please give your best estimate if you are not absolutely sure.
- a. None
 - b. Between one and five
 - c. Between five and ten
 - d. Between ten and twenty
 - e. Between twenty and thirty
 - f. More than thirty
 - g. Not applicable
- 23) Please rank the type of review initiated according to frequency (1 being most frequent; 3 being least frequent).
- a. Mandatory one year reviews [s. 28(1)]
 - b. Optional reviews [s. 28(2-3)]
 - c. Section 29 reviews
 - d. Not applicable
- 24) Of the custodial reviews you have initiated, what percentage of them have you been supportive of?
- a. 0 - 24%
 - b. 25 - 49%
 - c. 50 - 74%
 - d. 75 - 100%
 - e. Not applicable

25) Of the custodial reviews you have been supportive of, what percentage of them have resulted in a change of disposition?

- a. 0 - 24%
- b. 25 - 49%
- c. 50 - 74%
- d. 75 - 100%
- e. Not applicable

26) When considering whether to support a young offender's mandatory review application, which of the following criteria do you consider the most important? (Please rank your choices from 1 - most important to 8 - least important.)

- a. Institutional progress _____
- b. Intent of sentence _____
- c. Nature of offence _____
- d. Court history _____
- e. Rehabilitation _____
- f. Protection of the community _____
- g. Proportion of time served _____
- h. Appropriateness of community plan or open custody setting _____

27) Do you consider any other criteria? Yes ___ No ___

If 'Yes', please specify: _____

28) When considering whether to support a young offender's optional review application, which of the following criteria do you consider the most important? (Please rank your choices from 1 - most important to 8 - least important.)

- a. Institutional progress _____
- b. Intent of sentence _____
- c. Nature of offence _____
- d. Court history _____
- e. Rehabilitation _____
- f. Protection of the community _____
- g. Proportion of time served _____
- h. Appropriateness of community plan or open custody setting _____

29) Do you consider any other criteria? Yes ___ No ___

If 'Yes', please specify: _____

30) In your experience, what percentage of youths who are granted a change in disposition as the result of a custodial review, successfully complete the revised disposition? ('Success' is defined as absence of further criminal convictions or "breaches".)

- a. 0 - 24%
- b. 25 - 49%
- c. 50 - 74%
- d. 75 - 100%
- e. Not sure
- f. Not applicable

31) What do you feel are the major advantages of the custodial review sections of the Y.O.A.? (Please rank your choices from 1 - 6; 1 being the best advantage, 6 being the least advantage.)

- a. To assist in the case-management process of incarcerated youth _____
- b. To provide the courts with a method of monitoring custodial dispositions _____
- c. To decrease the negative effects of institutionalization or "warehousing" _____
- d. To provide for a "parole-like" system for youth (and thus, theoretically, a smoother transition back into the community) _____
- e. To assist in decreasing the financial costs of administering custodial sentences _____
- f. To provide a 'reward' for good institutional behaviour _____

31) Do you feel that there are any other benefits or advantages of the custodial review provisions?

- a. Yes
- b. No
- c. Not sure

Please explain: _____

32) What, if any, are the disadvantages of the Y.O.A. custodial review provisions? _____

33) Do you think the provisions could be improved, either procedurally or legislatively?

- a. Yes
- b. No
- c. Not sure

Please explain: _____

34) Would you like to add any other information that might not have been covered by the above questions?

Thank you for taking time away from your busy schedule to complete this rather lengthy questionnaire. I feel it is important when doing research that as much practical information as possible be included in order to ensure reliability and validity. Your cooperation is greatly appreciated.



Province of
British Columbia

MEMORANDUM

To:
Local Directors,
Youth Probation Officers
Corrections Branch

Date:
August 10, 1990

RE: QUESTIONNAIRES ON CUSTODIAL REVIEWS

I am writing to express my thanks and appreciation to all the Local Directors and probation officers who returned questionnaires to me in regards to custodial reviews as per the Young Offenders Act. I received almost 90 responses from all over the province which will help to enhance the quality of the research results.

If there are any questionnaires still "floating" out there, please do not hesitate to pass them along!

Thanks again,

Dana Cosgrove
A/Local Director
Vancouver South Probation

3457 Kingsway
Vancouver, B.C.
V5R 5L5
(660-2370)

APPENDIX F

APPROVALS

SIMON FRASER UNIVERSITY

VICE PRESIDENT
RESEARCH AND INFORMATION SYSTEMS



BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6
Telephone: (604) 291-4152
FAX: (604) 291-4860

December 18, 1989

Ms. Dana Cosgrove
304 - 5051 Lougheed Highway
Burnaby, B.C.
V5B 4T5

Dear Ms. Cosgrove

**Re: An analysis of judicial reviews of youth custodial dispositions
in B.C.: Policies, procedures, statistics and outcomes**

This is to advise that the above referenced application has been approved on behalf of the University Ethics Review Committee subject to approval of the Administrative Judge of Provincial Court for Youth Matters and to the approval of the Ministry of the Solicitor General, Corrections Branch. Once you have received these approvals in writing, please forward a copy of each to this office

Sincerely,

Thomas W. Calvert, Chair
University Ethics Review
Committee

cc: Dr. E. Fattah
Dr. S. Verdun-Jones

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HER HONOUR JANE AUXIER
ADMINISTRATIVE JUDGE

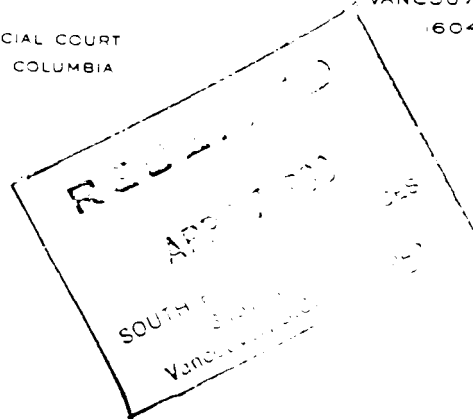


THE PROVINCIAL COURT
OF BRITISH COLUMBIA

VANCOUVER FAMILY COURT
2625 YALE STREET
VANCOUVER B.C. V6K 1G2
604-660-9138

April 25th, 1990

Ms. Dana Cosgrove
Acting Local Director
South Probation Office
3457 Kingsway
Vancouver, B.C.
V5R 5L5



Dear Ms. Cosgrove:

I received a copy of the letter which you forwarded to Judge Pendleton requesting access to youth court files for the purpose of completing your Master's thesis.

Under Section 44.1(k) of the Young Offenders Act, a youth court judge may grant disclosure of youth court records to a person deemed to have a valid interest in the record if satisfied that the disclosure is desirable in the public interest for research or statistical purposes. Your thesis would certainly seem to come within that category and I am happy to grant you the approval for access to the youth court files at the Burnaby Provincial Court.

Yours truly,

for Jane Auxier
Administrative Judge
JA/mjk



Province of
British Columbia

CORRECTIONS BRANCH

Ministry of
Solicitor General

MEMORANDUM

May 14, 1990

Corrections Branch Staff

Re: Young Offender Research

Please be advised that the research being conducted by Ms. Dana Cosgrove respecting judicial reviews of young offender custodial dispositions enjoys my full support.

The research will provide valuable information regarding present practices and outcomes and will be helpful in adjusting present policy or legislation. I expect that Corrections Branch staff will provide Ms. Cosgrove full cooperation with the research.

Thank you for your anticipated cooperation.

J. B. Graham
Assistant Deputy Minister



To:

Date:

Authorization to Access Young Offender Records

Pursuant to Article (c) of Order in Council 2162/86, made pursuant to Section 44.1(1) Young Offenders Act, Ms. Dana Cosgrove is hereby authorized access to young offender correctional, and other youth justice system, records for the purpose of carrying out a program of research relating to judicial reviews of young offender custodial dispositions. This authorization shall remain in effect until December 31, 1990. The identities of young offenders shall not be disclosed in the published results of the research.

Jim B. Graham
Provincial Director
May 14, 1990

APPENDIX G
COURT FILE CHECKLIST
BURNABY YOUTH COURT

BURNABY YOUTH COURT

CHARACTERISTICS OF YOUNG OFFENDERS : CUSTODY REVIEWS

Court File # _____ Date (first appear) _____
Judge(s) _____ Type of Review _____

Age _____ Gender _____

of adjournments _____ Reasons for adjournment(s):

Date (final dispo) _____

Lawyer present: Yes _____
No _____

Type of legal representation:
Duty Counsel _____
Lawyer Appointed _____
Private Lawyer _____
Other _____

Others present:

Youth _____	Parents _____
Guardian _____	Social Worker _____
Youth Worker _____	Other worker _____
Crown Counsel _____	Police _____
Victim _____	Other _____

Original Charges: _____

Youth Court History _____

Originating Court _____ Judge: _____

Original Disposition _____

Disposition Requested _____

Reasons for Request _____

Leave granted? _____

Progress Report Completed? _____

Recommendation by field P.O.: _____

Recommendation by Institutional P.O. or C.M.C.: _____

Recommendation by Crown: _____

Recommendation by Defence: _____

Other comments or recommendations: _____

Criteria for change in disposition: _____

Judge's decision: _____

Reasons for decision: _____

APPENDIX H
CUSTODY REVIEWS IN OTHER PROVINCES

Dear Sir:

I am a graduate student from the School of Criminology, Simon Fraser University, Burnaby, British Columbia. I am in the process of collecting data for my thesis research which is a study of the review provisions of the Young Offenders Act (Y.O.A.). While the focus of my research will be British Columbia's response, I am interested in the general policies, practices, and procedures in your province regarding sections 28 and 29 of the Y.O.A. and any statistics that you may have compiled to date, as I understand that your province has made great strides in implementing the Y.O.A. I am hoping you can offer me all and any information available in regards to the following:

- (1) Statistics on the frequency of optional and/or mandatory reviews of custodial dispositions since the Y.O.A.
- (2) The outcome of optional and/or mandatory reviews of custodial dispositions.
- (3) Whether reviews are heard by a youth court or a provincial review board, and in the latter case, the composition of this review board and the procedures it follows.
- (4) Are reviews held in original jurisdictions or are they centralized? Have there been any practical problems resulting from this practice?
- (5) Who generally initiates custodial review applications (i.e. the youth, the institution, the youth worker, Crown Counsel)? Are there any criteria or guidelines governing the initiation of review? What are the percentages of applications made by Crown Counsel and by others?
- (6) Any case law regarding leave or legal grounds.

- (7) What administrative criteria have developed for supporting a change in custodial dispositions?
- (8) Any legislative amendments proposed (or in the process of being proposed) by your province regarding the Y.O.A.'s custodial review provisions.

I realize that a detailed response to any of the above might be time-consuming, but I would greatly appreciate all the assistance you could offer me. I would be happy to send you a copy of my thesis when it is completed. I believe that it is crucial to undertake research in the area of youth justice, particularly since the proclamation of the Young Offenders Act, in order to evaluate and develop appropriate procedures, laws, and policies.

Please address all correspondence to:

Vancouver Regional Office
#401 - 815 Hornby Street
Vancouver, B. C.
V6Z 2E6

I look forward to hearing from you at your earliest convenience. Thank you.

Dana Gergely,
Regional Staff Development Officer,
Vancouver Metro Region

August 13, 1990

Dear Sir/Madame:

I am a graduate student from the School of Criminology, Simon Fraser University, British Columbia. I am in the process of completing my M.A. thesis, which concerns the custodial review provisions of the Young Offenders Act. While the focus of my research has been within B.C., I am interested in some broad comparisons with other provinces. I wrote to you approximately two years ago, requesting statistics on the frequency of reviews within your respective youth justice system, as well as your general policies with respect to this area of the legislation. I would like to thank those provinces which did respond.

As the thesis will be completed in October, 1990, I am interested in updating my research results. Due to working full time in the B.C. Corrections Branch, as well as recent personal commitments, I have been unable to finish the thesis until now.

I would appreciate any assistance your province could give in providing me any information available with respect to the following:

- (1) Statistics on the frequency of optional and/or mandatory reviews of custodial dispositions since the YOA.
- (2) The outcome of optional and/or mandatory reviews of custodial dispositions.
- (3) Whether reviews are heard by a youth court or a provincial review board and, in the latter case, the composition of the review board and the procedures it follows. Why did your province opt for one over the other?
- (4) Are reviews held in original jurisdictions or are they centralized? Have there been any practical problems resulting from this practice?

- (5) Who generally initiates custodial review applications (i.e. the youth, the institution, the youth worker, crown counsel, etc)? Are there any criteria or guidelines governing the initiation of reviews? What are the percentages of applications made by crown counsel and by others?
- (6) Any case law regarding leave or legal grounds.
- (7) What administrative criteria have developed for supporting a change in custodial disposition?
- (8) Any legislative amendments proposed by your province regarding the YOA's custodial review provisions.

I would appreciate any response in relation to the above questions. If interested, I would be happy to send you a copy of the completed thesis at your request.

I look forward to hearing from your province. A response no later than September 30, 1990 would be most desirable.

Sincerely,

Dana J. Cosgrove (formerly Gergely)
Local Director
Vancouver South Probation Services

HOW DOES B.C.'S EXPERIENCE WITH CUSTODY REVIEWS COMPARE WITH THAT OF OTHER PROVINCES?

Who Initiates Custody Reviews?

The study found that the majority of custody reviews in B.C. are initiated by institutional probation officers and/or case-management coordinators within youth custody centres. Judging by the information received the practices seem to differ somewhat from province to province. It does appear, however, that delegates of the various Provincial Directors are the primary initiators of reviews. No jurisdiction reported reviews being initiated by the Attorney General's agent (Crown Counsel).

B.C.'s practices are somewhat similar to those of Alberta where almost all custody reviews are initiated by staff within the facility where the youth is held. The staff member may be a director of a small facility or a "caseworker" within a larger centre. Review applications from open custody residents are generally processed by field probation officers. Seldom are custody reviews initiated by other parties, or even the youth him/herself. In Saskatchewan, most reviews are brought forward through a joint effort of community and custody staff, either on their own initiative or on behalf of young offenders. Like B.C., the Saskatchewan Social Services Department adheres to the principle that the first day of custody is the first day of release planning. Both provinces

expect their community and custody staff to give regular and early attention to case-management and discharge plans. Things are substantially different in Manitoba, however, where mandatory and section 29 reviews are always initiated by the field probation officer. Reviews under section 28(3) are initiated by the youth and his/her lawyer. New Brunswick reports that all custody reviews are initiated by the young offender. Upon his/her request, the review documentation is then prepared by the institutional social worker or youth worker. In Prince Edward Island (PEI), who initiates custody reviews depends on the type of review. Probation officers initiate all mandatory reviews, whereas defence counsel, on behalf of young offenders, generally initiate optional reviews under section 28(3). The Provincial Director or "authorized delegate" initiates reviews under section 29 of the YOA. Custody reviews in the Yukon are initiated by young offenders and processed by youth workers (field probation officers).

Type of Custody Review Initiated

The study's findings generally suggest that in B.C., optional custody reviews are initiated with greater frequency than mandatory reviews. And while survey respondents indicate that they initiate reviews under sections 28(3) and 29 with similar frequency, the data obtained from the Burnaby Youth Court show that section 29 reviews account for only 11% of custody review hearings over a six year period. Approximately

two-thirds of the custody reviews heard in Burnaby Youth Court were optional reviews under section 28(3) of the YOA.

This practice is almost the exact opposite of that of Manitoba where reviews pursuant to section 29 are the preferred mechanism. Statistics gathered by Manitoba, from October 1986 to September 1990, indicate that over half the custody reviews initiated (216: 57.1%) were under section 29 of the YOA. Mandatory reviews were the second most frequent (114: 30.2%) whereas optional reviews under section 28(3) made up only 13% of the total number of reviews. Manitoba reports that they have streamlined the section 29 review process and are experiencing considerable success with it. Both Crown Counsel and the youth courts seem to have been very receptive to applications under section 29 and they are dealt with very quickly. Manitoba is considering utilizing section 28(3) of the YOA in cases where the Provincial Director wishes to release a youth on a temporary absence, as opposed to an early release. They have not tested this practice yet, however.

The experience in Nova Scotia with respect to custody review type is largely similar to that of British Columbia. Statistics obtained from Nova Scotia's Department of Solicitor General indicate that, from April 1987 to March 1990, the vast majority of custody reviews were initiated under section 28(3) (144: 77.4%). Mandatory reviews occurred much less frequently (37: 19.9%) whereas reviews under section 29 of the YOA were very rarely initiated (5: 2.7%).

Statistics on review type were not received from the other provinces. Two jurisdictions, however, provided general information. The Yukon Territory's Department of Health and Human Resources indicates that optional reviews far out-weigh mandatory reviews (they have had only two mandatory reviews since 1984). Alberta's Solicitor General Department advises that, two years ago, custody staff were encouraged to process optional reviews under section 28(3) of the YOA. Due to problems experienced with the "leave" requirement of this section, reviews were subsequently applied for under section 29, which is the current practice.

Frequency of Custody Reviews

The study had difficulty determining the frequency of custody reviews in B.C. due to the lack of statistics. The majority of survey respondents recalled having initiated less than ten custody reviews. One in five respondents had never done so. Only 127 custody review hearings occurred in Burnaby Youth Court over six years. The best estimate is that approximately 90 custody reviews occur annually in B.C. When contrasted to the number of young offenders incarcerated in B.C., the number of custody reviews was considered low. For instance, during fiscal years 1985/86, 1986/87 and 1987/88 the number of admissions to secure and open custody centres in B.C. were 515, 655 and 614, respectively (Corrado & Markwart, 1989).

The number of custody reviews in Alberta appears to be significantly higher. Without knowing the number of youth incarcerated, however, comparisons with B.C. are hazardous. Like B.C., Alberta has experienced an increase in the proportion of young offenders committed to secure and open custody since the implementation of the YOA. The Canadian Centre for Justice Statistics reports that the number of custodial dispositions in British Columbia increased by 81% from FY 1984/85 to FY 1986/87. During the same time period, Alberta experienced an increase of 88% (Corrado & Markwart, 1989). Alberta's Young Offender Placement Authority provided statistics on the number of optional custody reviews submitted between April 1986 and December 1989. Mandatory reviews were not included. A total of 1,055 custody reviews were initiated in that three and a half year period. This figure is more than three times the estimated number in B.C. for the same period.

There were 378 custody reviews initiated in Manitoba from October 1986 to September 1990. While this number is closer to the estimated number in B.C. over the same time period, there are probably less youth in custody, due to Manitoba's smaller population. Nevertheless, Manitoba, like B.C., has experienced a significant increase (80%) in its proportion of youth custodial dispositions since the YOA was implemented (Corrado & Markwart, 1989).

Nova Scotia advises that they initiated 186 custody

reviews between April 1987 and March 1990. This province is one of the few that has not experienced a dramatic increase in custodial dispositions since the YOA. While its proportion of youth committed to custody has risen from FY 1984/85 to FY 1986/87 by 28%, the number of young offenders (under age 16) held in custody has actually decreased since the YOA came into force (Corrado & Markwart, 1989). Thus, the number of custody reviews, while seemingly lower than the estimate for B.C., may represent a larger proportion of the young offender custodial population in Nova Scotia.

Outcome of Custody Reviews

In B.C., it was the perception of survey respondents that custody review applications result in a change in disposition in three-quarters of the cases. Data from Burnaby Youth Court indicate that dispositions were modified in just over one-half of the review hearings. Reports from four other provinces: Alberta, Manitoba, Nova Scotia and PEI, suggest that their approval rate may be somewhat higher.

In Alberta, optional custody reviews were approved in approximately three-quarters of the cases (766: 72.6%) between April 1986 and December 1989. The majority of approved cases (483: 63.1%) authorized an early release from custody to probation while the remainder (283: 36.9%) approved a transfer from secure to open custody. A similar pattern was observed at B.C.'s Burnaby Youth Court in that twenty per cent of

modified dispositions were transfers from secure to open custody and approximately eighty per cent were early releases from custody to probation supervision.

In Manitoba, the approval rate of custody reviews between October 1986 and September 1990 was 69%. With regard to applications under section 29, the approval rate was even higher (85.2%), corroborating Manitoba's contention that section 29 reviews are working well.

Statistics from Nova Scotia indicate that, between April 1987 and March 1988, the vast majority of custody review applications resulted in a modified disposition (44: 84.6%). All but two of these cases were early releases from custody.

Authorities in PEI estimate that approximately eighty per cent of all custody reviews result in a change of status for the young offender.

Criteria for Supporting Custody Review Applications

In B.C., the study found that the most important criteria utilized by survey respondents in their decision to support a custody review are: protection of the community; the appropriateness of the community plan or open custody setting; the intent of the sentence, corrections/court history; and the attitude of the young offender. Progress reports completed by field probation officers were concerned with the youth's progress or behaviour in custody and the proportion of time served. While some jurisdictions provided written policies

outlining administrative criteria for initiating reviews, it was not considered appropriate to compare these criteria with the findings of the present study as provincial policy may not be what is practised.

Central versus Original Court Reviews

Like B.C., all responding jurisdictions indicate that custody reviews are heard in youth courts and not by provincial review boards as allowed by the YOA. Practices do differ, however, with respect to custody reviews being heard by original or central review courts.

In B.C. over one-half of survey respondents prefer that custody reviews be heard in original courts, preferably by the original sentencing judge. This preference is not in line with provincial policy which supports the use of central court reviews for the majority of optional applications under section 28(3) of the YOA.

In Alberta and Manitoba the practice is somewhat similar to B.C.'s central review court system. In Alberta, most reviews are heard in the youth court servicing the area where the young offender is incarcerated. Exceptions to this practice occur when the original sentencing judge insists on hearing the review. In these cases, the judge's request is always honoured. In Manitoba, the most conveniently located youth court hears the review.

In Saskatchewan, Ontario, New Brunswick and PEI, the

preference is for the original judge to hear the review. In Saskatchewan, judges apparently support this practice in order not to, or appear not to, "second opinion" original dispositions. Exceptions to this practice do occur for geographic convenience. In rural areas of these four provinces, transportation and appropriate holding facilities can sometimes present problems. In Saskatchewan, reviews may be heard locally when the potential outcome of the review will "only" be a transfer from secure to open custody. In Ontario, original and local judges must both agree to the review being heard in a "local" youth court.

The practice in the Yukon varies depending on the situation. All custodial reviews are heard in Whitehorse where all the custodial facilities are located. Some young offenders from the Yukon are incarcerated in British Columbia. Yukon officials prefer that these youth be reviewed in Whitehorse rather than in the central review court in Burnaby, B.C., so that they may have more input at the review hearing.

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