THE 1995 *YOUNG OFFENDERS ACT* AMENDMENTS: COMPROMISE OR CONFUSION?

*Nicholas Bala**

The Young Offenders Act *has been the subject of intense criticism, most obviously from members of the public demanding a "get tough" approach, but also from professionals who argue that not enough is being done to rehabilitate adolescent offenders. Growing fiscal pressures are also causing examination of increasing use of custody, especially in regards to youths who do not pose a risk to public safety. The 1995 amendments to the* Y.O.A. *are in response to these conflicting pressures, with a more retributive approach being taken to a small number of violent offenders, especially those charged with murder, and efforts to increase use of non-custodial dispositions for non-violent offenders. This article discusses the background for these amendments, and the likely interpretation that courts will give to some of the key provisions, as well as pointing out some of the limitations of these statutory reforms.*

La Loi sur les jeunes contrevenants *a été vivement critiquée, évidemment surtout par des citoyens et des citoyennes qui réclament une approche « ferme », mais aussi par des spécialistes qui soutiennent qu'on ne s'occupe pas assez de la réhabilitation des jeunes contrevenants et contrevenantes. Par ailleurs, en raison de contraintes fiscales grandissantes, on se penche sur l'utilisation de plus en plus fréquente du placement sous garde, particulièrement dans des affaires concernant des jeunes qui ne sont pas une menace pour la sécurité publique. Les modifications apportées à la* Loi sur les jeunes contrevenants *en 1995 visaient à répondre à ces pressions contradictoires grâce à l'adoption d'une approche plus rétributive envers un petit nombre de contrevenants violents, particulièrement envers ceux qui sont accusés de meurtre, et à des mesures incitant les tribunaux à rendre plus de décisions sans placement sous garde dans les affaires concernant des contrevenants non violents. Cet article discute de la genèse de ces modifications et de l'interprétation que les tribunaux donneront probablement à quelques-unes des dispositions fondamentales. En outre, l'article souligne les limitations de ces réformes législatives.*

* Associate Dean, Faculty of Law, Queen's University. This is a revised version of a paper presented at the Ontario Family Court Judges Educational Meeting, Ottawa, Sept. 30, 1994. Portions of this paper formed the basis of a Brief on Bill C-37 submitted to the House of Commons and Senate Committees on Justice and Legal Affairs.

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I. INTRODUCTION

Few, if any, pieces of Canadian legislation have been the subject of such sustained public criticism as the *Young Offenders Act* (*Y.O.A.*),[1] and the "reform" of the *Act* has been a major priority for the Liberal government. The *Y.O.A.* has been attacked by critics coming from very different perspectives, from the "law & order" right for not being "tough enough", and from the "therapeutic left" for failing to do enough to rehabilitate adolescent offenders. The Liberal government introduced Bill C-37,[2] amendments to the *Y.O.A.*, that are intended to offer a compromise[3] between these two critical perspectives, both of which have support within the Liberal caucus as well as in the broader community. While the dominant public message given by the government is that the *Act* is being "toughened", in particular as a response to violent youth, there are also elements in the Bill intended to strengthen the rehabilitative aspects of the youth justice system.

Merely enacting statutory reforms is unlikely to have a significant impact on levels of youth crime in Canada, at least in the absence of significant changes in the types of services which are actually provided to adolescents in the youth justice system. Even so, there is considerable merit to some of the fundamental objectives of Bill C-37: taking a more retributive approach to the relatively small numbers of youth who commit the most serious offences, in particular murder, while limiting the use of custody for most youths and attempting rehabilitation for all. Unfortunately, it is not clear that Bill C-37 will achieve even these objectives.

This paper offers a discussion of the political and legal context of Bill C-37, and analyzes the most important features of the new law, pointing out some of its limitations and some of the provisions that were amended in the legislative process.

II. BACKGROUND TO BILL C-37: DECADES OF CONTROVERSY REACH A CRESCENDO

The *Juvenile Delinquents Act* (*J.D.A.*), enacted in 1908, created a juvenile justice system separate from the adult system, with a distinctive child welfare oriented philosophy, treating the delinquent youth "in so far as practicable...not as a criminal, but as a misguided and misdirected child...needing aid, encouragement, help and assistance."[4] The *J.D.A.* created an informal justice system, with little emphasis on legal rights, and very significant discretion for a range of justice officials, including probation officers, judges and correction officials. With its treatment orientation, sentences were indeterminate, to be served until rehabilitation was effected. There was also very substantial interprovincial variation in the implementation of the *J.D.A.*

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[1] R.S.C. 1985, c. Y-1 [hereinafter *Y.O.A.*].

[2] Bill C-37, *An Act to Amend the Young Offenders Act and the Criminal Code*, 1st Sess., 35th Parl., 1994 (First reading 2 June 1994). The version of the Bill that is discussed in this paper is as passed at Third reading by the House of Commons, February 28, 1995, and by the Senate, June 21, 1995. The Bill is expected to come into effect by the end of 1995.

[3] The Minister of Justice, Allan Rock, prefers to use the term "balance", with its moderate connotations and judicial allusions, to the term "compromise", with its more political connotations. See House of Commons, *Justice and Legal Affairs Committee*, 34 (23 June 1994) [hereinafter *Legal Affairs*] *e.g.* at 15: "The conclusion to which we came in preparing the bill is that it does strike a balance."

[4] *Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40, s. 38.

The process of reforming the *J.D.A.* began in the 1960s and was contentious, but most of the debate was conducted by various professional groups, and between the federal and provincial governments. By the early 1980s, the introduction of the *Charter of Rights and Freedoms*[5] made major juvenile justice reform inevitable. The lack of procedural rights in the *J.D.A.* was inconsistent with the emphasis on due process in the *Charter*. Further, the provincial disparities in treatment of juveniles permitted under the *J.D.A.*, especially in regard to the differing minimum and maximum ages, was considered to be contrary to section 15 of the *Charter* which came into effect in 1985 and guaranteed equality before the law.[6]

There was also a recognition that the exclusively welfare oriented focus of the *J.D.A.* was neither realistic nor appropriate, and indeed did not reflect actual practices under that *Act*. Rehabilitation can be achieved with some youth, but it cannot be the sole focus for legal intervention. Accountability and the protection of the public must also be important considerations.

The *Young Offenders Act* was enacted in 1982, and came into force in 1984. Given the contentious nature of the process of reform prior to 1982, and the present controversy, it is a little surprising, but the *Act* received the unanimous support of Parliament at that time. The *Y.O.A.* gives youths very significant legal rights, and established a uniform age jurisdiction of 12 to 18. The *Act* provides for determinate sentencing, and formal "alternative measures" programs to divert less serious cases from the youth court. The *Act* also contains a "Declaration of Principle" that provides decision-makers with guidance for dealing with young persons in conflict with the criminal law:

> 3(1) It is hereby recognized and declared that
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> (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;
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> (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;
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> (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;
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> (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;

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[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[6] See R.R. Corrado & A. Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada" in R.R. Corrado *et al.*, eds., *Juvenile Justice in Canada* (Toronto: Butterworths, 1992) 137.

> (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;
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> (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
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> (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.

Given Parliament's failure to prioritize these principles, it is not surprising that section 3 has not in practice provided significant direction for decision-makers. Perhaps more accurately, there is sufficient vagueness to each of the principles, and even more in the Declaration as a whole, that judges and others can find support for virtually any decision in them. Decision-makers may feel that their actions are in some sense directed by the Declaration, but in reality, there is substantial discretion. As a result of this lack of guidance, there is substantial variation in how the *Y.O.A.* is applied, with very significant differences in sentencing practices and rates of custody use between the provinces, as well as in the use of such programs as alternative measures.[7]

While the Declaration is therefore not unproblematic, it is nevertheless more realistic to recognize that dealing with a complex problem like juvenile crime will inevitably require a balancing of principles and objectives, rather than having a single simplistic statement of principle like that found in the welfare-oriented *J.D.A.* It must also be appreciated that the "ambivalence" found in the Declaration,[8] and in some of the substantive provisions of the *Act*, reflects a fundamental tension in Canadian society about youth crime, and perhaps even an ambivalence towards adolescents in general. Society is demanding protection from youth, and wants adolescents held accountable for their acts; at the same time, adolescence is recognized as a time of growth, change and making mistakes, and it is recognized that adolescents need to be nurtured to become productive adult citizens.

The *Y.O.A.* came into force in the midst of optimistic hopes that it would usher in a "new era" in juvenile justice. While there have been significant changes, the optimism of the early 1980s[9] has disappeared, as has the political support for the *Y.O.A.*

By far the greatest publicly expressed concern in recent years has been that the *Y.O.A.* is not "tough" enough on youth crime. Some of this reflects a belief that in terms of moral accountability (or punishment or vengeance) sentences in youth court are too short, and transfer to the adult court system, where there is fuller accountability, occurs

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[7] See *e.g.* Statistics Canada, *Youth Court Statistics 1993-94* (Ottawa: Queen's Printer, January 1995) [hereinafter *Youth Court Statistics*].

[8] See *R.* v. *M. (J.J.)* (1991), 75 Man. R. (2d) 296, 6 W.A.C. 296 (C.A.), affirmed [1993] 2 S.C.R. 421 at 426, 20 C.R. (4th) 295 at 299 [hereinafter *M. (J.J.)* cited to S.C.R.]. Cory J. commented:

> A quick reading of that section indicates that there is a marked ambivalence in its approach to the sentencing of young offenders. Yet that ambivalence should not be surprising when it is remembered that the Act reflects a courageous attempt to balance concepts and interests that are frequently conflicting.

[9] For an example of the optimism of that period, see commentaries written by three men who are now youth court judges: O. Archambault, "Young Offenders Act: Philosophy and Principles" (1983) 7:2 Prov. Judges J. 1; A.P. Nasmith, "Paternalism Circumscribed" (1983) 7:2 Prov. Judges J. 16; and H. Lilles, "Beginning a New Era" (1983) 7:2 Prov. Judges J. 21.

too rarely. Much of the public concern about the *Y.O.A.* appears to be based on a belief that the *Act* does not provide an adequate deterrent to crime, and has therefore contributed to a significant increase in youthful criminality.

There are a number of problems with this critique of the *Act*. To begin with, although youth crime is a serious social problem with significant costs for victims (many of whom are other adolescents)[10] there is significant controversy among criminologists about whether there has actually been an increase in youthful criminality in recent years in Canada, or whether we simply have awareness of the existence of youth crime.

While there has been a very substantial increase in youths being charged and brought before the courts, criminologists like Tony Daub and Paul Brantingham have argued that this is due to an increased public sensitivity to crime,[11] especially violent crime, and a greater willingness to report youth crime to the police, both by victims and agencies like schools, and to increased charging practices by police.[12] These experts point to the fact that youth homicide, the one offence that is not influenced by public reports or police charging practices, has remained relatively constant for many years[13] and even fell in 1993-94, the last year for which data is available. However, other criminologists, like Raymond Corrado and Alan Markwart, have argued that there has been a significant increase in violent crime by adolescents in Canada; this perception is widely shared by police and professionals who work with adolescents.[14]

The empirical question of whether there has *really* been an increase in youth crime in the past few years in Canada is probably unresolvable, since we have great difficulty in determining present rates of criminality and no way of accurately determining previous rates. There is, however, a clear perception among the public and professionals that in the past few years youths have been committing more violent offences and made greater use of weapons, and this has led to a demand for law reform. It is important to observe that even those criminologists who argue that there has been an increase in youth crime recognize that this is still a less serious problem in Canada than in the United States,[15] and that its causes are complex and cannot be blamed on the *Y.O.A.*

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[10] See *e.g.* "Study Documents School Violence" *The [Toronto] Globe & Mail* (24 August 1994) A7; and R.B. Smith *et al.*, *A Study of the Level and Nature of Youth Crime and Violence in Calgary* (Calgary: Solicitor General of Canada, 1995).

[11] See *e.g.* "Views on Crime Distorted, Study Says" *The [Toronto] Globe & Mail* (31 December 1994) A1, reporting on a study by J. Roberts, *Public Knowledge of Crime and Justice* (Department of Justice, 1995) [unpublished], indicating that the Canadian public overestimates the amount of crime in this country. See also A.N. Doob *et al.*, *Youth Crime and the Youth Justice System in Canada: A Research Perspective* (Toronto: Center of Criminology, University of Toronto, 1995) at 16-22 [hereinafter *Youth Crime*].

[12] R.R. Corrado & A. Markwart, "The Need to Reform the YOA in Response to Violent Young Offenders: Confusion, Reality or Myth?" (1994) 36 Can. J. Crim. 343 at 366.

[13] Statistics Canada reported that for 1993-94 the number of murder charges for young persons fell from 45 the previous year to 32; manslaughter charges were down from 10 to 7; attempted murder fell from 75 charges to 52, while aggravated assault fell slightly from 311 to 309.

[14] Corrado & Markwart, *supra* note 12 at 354. *Youth Court Statistics*, *supra* note 7, reported an increase in sexual assault charges from 1,793 in 1992-93 to 2,076 in 1993-94, and assault with a weapon rose from 3,685 to 3,836.

[15] While in Canada youth homicide rates have remained essentially constant over the past two decades, youth homicide rates in the U.S.A. doubled in the six years to 1991, and are at levels six times higher than in Canada. See "Homicide Rate Doubled for U.S. Teens" *The [Toronto] Globe & Mail* (14 October 1994) A9; "Murders by Teens Soaring, [U.S.A.] Study Says" *The [Toronto] Globe & Mail* (18

Criminologists and academic commentators widely acknowledge that there is no evidence that longer sentences or more transfers to adult court actually have an impact on youthful crime. The available social science evidence clearly indicates that youths who are committing crimes lack judgment and foresight, and are not considering the consequences of their acts, let alone weighing the possible sanctions. While improving police enforcement *may* have some impact on offending behaviour by adolescents, a "tougher" law will not. Indeed, there is some evidence that longer custodial sentences and more transfers to adult court may actually increase the likelihood of recidivism.[16]

Another problem with the public perception that the *Y.O.A.* is not "tough enough" is that there has actually been a very substantial increase in the number of young persons in custody in recent years. One indicator of this is that between 1986-87 and 1992-93 the daily incarceration rate per 10,000 youths in Canada increased from 17.8 to 21.3.[17] Most of the youths who are placed in custody are there for non-violent offences. While it is difficult to get an accurate picture, it would seem that youths charged with more serious offences, including violent offences, actually serve shorter sentences than adults charged with the same offences.[18] However, a very significant number of youths committing less serious offences, in particular violations of court orders for probation or court attendance, as well as property offences, are receiving custodial dispositions, and may actually be serving longer periods in custody than adults charged with the same offences,[19] at least in part because some youth court judges may be using these dispositions out of a desire to achieve social rehabilitative objectives.

At the same time, some critics of the *Y.O.A.* have argued that the *Act* undermines certain types of rehabilitative efforts, pointing in particular to section 22 which requires the consent of a youth if the judge wants to impose a disposition requiring detention in a mental health facility. Since few offending youths are willing to consent, very few "treatment" orders are made. It should, however, be appreciated that mental health services and other rehabilitative resources can be made available to youths sentenced to custody. Youths in custody can usually be persuaded to participate in rehabilitative efforts with the prospect of sentence review and early release, though, at least in theory, without their tacit consent, they cannot be required to receive such services. In reality, the main blockage in terms of achieving access to rehabilitative services is not the issue

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February 1995) A9; W. Meloff & R.A. Silverman, "Canadian Kids Who Kill" (1992) 34 Can. J. Crim. 15; and J.P. Hornick *et al.*, *The Response to Juvenile Crime in the United States: A Canadian Perspective* (Calgary: Canadian Research Institute for Law & the Family, 1995).

[16] Corrado & Markwart, *supra* note 12 at 366; *Youth Crime*, *supra* note 11 at 56. See also R.J. Sampson & J.H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* (Cambridge, Mass.: Harvard University Press, 1993) who argue, based on a 40 year longitudinal study of American adolescents and adults, that significant periods of incarceration in the 16-24 year age period greatly decrease the prospects for forming stable long term adult relationships and securing employment, and increase the prospects for future offending. This study controlled for actual levels of adolescent offending.

[17] T. Leesti, "Youth Custody in Canada, 1992-93" (1994) 14:11 Juristat 17 [hereinafter "Statistics 1992-93"].

[18] Contrast "Statistics 1992-93", *ibid.* at 18, with J. Roberts, "Criminal Justice Processing of Sexual Assault Cases" (1994) 14:7 Juristat 14 at 15.

[19] S. Bell & P. Smith, "Youth and Adult Custody Sentences in Nova Scotia: A Test of the 'Get Tough' Proposals" (Paper presented at Canadian Sociology and Anthropology Association Meeting, Calgary, Alberta, June 1994) [unpublished].

of consent, but rather that, while some youth custody facilities (such as Ontario's Syl Apps Centre which deals with youths aged 12-15 convicted of very serious offences) have excellent treatment and educational services, many custodial facilities have very limited rehabilitative resources.

From a legal perspective, the concept of "rehabilitation" applies to young offenders in a very ambiguous fashion. While for adults rehabilitative concerns invariably support non-custodial dispositions, or relatively short custodial sentences, for young persons the concept of rehabilitation may support longer sentences.

This was illustrated and reinforced by the 1993 Supreme Court of Canada decision in *R.* v. *M.(J.J.)*, the first *Y.O.A.* disposition case to reach the Court. The Supreme Court affirmed a sentence of two years in open custody for an aboriginal youth convicted of three counts of break and enter, and one of breach of probation. He came from an abusive home environment, which the Court characterized as "intolerable", and therefore the Court felt that "child welfare considerations" justified the relatively long sentence.[20]

Justice Cory emphasized that youth courts need to make individualized assessments about young offenders' sentencing, balancing the protection of society and the reformation of the youth. He accepted the "proportionality principle" for sentencing young offenders, but indicated that it was less important than for adults, and had to be weighed against child welfare concerns.

> It is true that for both adults and minors the sentence must be proportional to the offence committed. But in the sentencing of adult offenders, the principle of proportionality will have a greater significance than it will in the disposition of young offenders.[21]

The Supreme Court also indicated that general deterrence should have a role in sentencing youths, but less than for adults. The primary aim the Court emphasized was rehabilitation.

> The aim must be both to protect society and at the same time to provide the young offender with the necessary guidance and assistance that he or she may not be getting at home. Those goals are not necessarily mutually exclusive. In the long run, society is best protected by the reformation and rehabilitation of a young offender. In turn, the young offenders are best served when they are provided with the necessary guidance and assistance to enable them to learn the skills required to become fully integrated, useful members of society.[22]

Although *R.* v. *M.(J.J.)* resolved the relatively abstract controversies about the legitimacy of considering general deterrence and child welfare concerns when sentencing a young offender, it gives judges little specific direction. The Supreme Court emphasizes individualized decision-making and judicial discretion, and gives only a limited sense of priority for different sentencing factors.

The decision also raises concerns that youths may perceive themselves as receiving more severe dispositions because of their difficult family backgrounds. In a dissenting opinion in *R.* v. *M.(J.J.)* at the Manitoba Court of Appeal level, Madam Justice Helper felt that a sentence of one year was appropriate as a "fit sentence" for the offences, arguing that the "criminal justice system ought not to be used to supplement the lack of

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[20] *M.(J.J.)*, *supra* note 8.

[21] *Ibid.* at 431-32.

[22] *Ibid.* at 433.

resources that exist in the child welfare system".[23] In *R.* v. *M.(J.J.)* the youth had actually sought assistance from child protection workers before the offences, but failed to receive it. However, the Supreme Court decision accepts that for a variety of reasons, including inadequate funding, child welfare services may not always be available for troubled youths, and that judges may feel that the *Y.O.A.* has to be used to meet the needs of adolescents.

Decisions like *R.* v. *M.(J.J.)* emphasize the discretionary nature of the *Y.O.A.*, and have contributed to the creation of a youth justice system where there is still very substantial variation in how youths in different parts of the country are treated. Different provincial policies about administrative structures and resources, as well as differences in police charging practices and prosecutorial discretion, have also played a major role in shaping interprovincial variations. As a result of these administrative and judicial factors, there are, for example, very substantial differences of custody use between provinces, with, for example, Saskatchewan having a rate three times higher than Quebec.[24]

In regard to transfers to adult court, where judicial (and prosecutorial) discretion and interpretation play a determinative role, there are also enormous differences between provinces, with Manitoba and Alberta having by far the highest transfer rates in the country.[25]

At the same time as receiving critiques of various aspects of the *Y.O.A.* from different perspectives, the federal government is also acutely aware of mounting fiscal problems for itself and the provinces. While politicians are sometimes loath to publicly emphasize fiscal concerns when dealing with justice issues, there is no doubt that financial considerations are weighing on their minds, especially when faced with enormous increases in the use of expensive custody resources.[26]

III. Amending the *Y.O.A.*: 1986-1995

The federal Parliament amended the *Y.O.A.* in 1986 and 1992, and in 1994-95 enacted the most ambitious set of amendments to the *Act* since it came into force in 1984. While each of these reform initiatives have been set in a broadly similar context, the heightened public perceptions about the inadequacy of the *Y.O.A.*, as well as increased fiscal concerns, have pushed the new government towards more aggressive responses.

The 1986 amendments[27] were relatively minor and received little public attention. Most of these amendments were intended to facilitate implementation of the *Act*, for example simplifying record keeping provisions. Some were intended to increase the

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[23] *M.(J.J.)* (Man. C.A.), *supra* note 8 at 297.

[24] *Youth Court Statistics*, *supra* note 7. See also P. Carrington & S. Moyer, "Interprovincial Variations in the Use of Custody for Youth Offenders: A Funnel Analysis" (1994) 36 Can. J. Crim. 271 [hereinafter "Carrington & Moyer"].

[25] *Youth Court Statistics*, *supra* note 7 at 13 & 104. In 1992-93 there were 33 youths transferred to adult court; 12 were in Alberta and 2 in Manitoba. In 1993-94, there were 94 youths transferred, with 14 in Alberta and 46 in Manitoba.

[26] *Legal Affairs*, *supra* note 3 at 6. Mr. Rock commented on youth custody costing $70,000 to $100,000 per year per youth, for a total of $350,000,000 in Canada, with the federal government contributing $130,000,000.

[27] *An Act to Amend the Young Offenders Act, the Criminal Code, the Penitentiary Act and the Prisons and Reformatories Act*, S.C. 1986, c. 32, s. 29 [hereinafter *Y.O.A. 1986*].

protection of the public, for example by allowing for the police to obtain a court order permitting the publication of identifying information to aid in the apprehension of a potentially dangerous youth who is at large.[28] There were some relatively weak provisions that were intended to signal the courts to reduce unnecessary use of custodial facilities,[29] but they seem to have had no appreciable effect on sentencing practices.

By the late 1980s, public concerns about violent youth crime and the perceived inadequacy of the *Y.O.A.* were increasing. In 1989 the Progressive Conservative government proposed amendments to the *Y.O.A.* to deal with murder sentencing and transfer to adult court. These amendments proceeded slowly through Parliament, in part because of a lack of a sense of urgency at that time, but also because the Liberals and New Democrats were then expressing concerns about the unwarranted "toughening" of the approach of the *Y.O.A.* These amendments were enacted in 1992, with the government emphasizing that they were intended to increase the protection of the public.[30] The maximum sentence that a youth court could impose for murder was increased from three years to 5 years less a day; the test for transfer was altered to state that the "protection of the public" was to be "paramount", but the test still left great discretion to trial judges. To decrease judicial reluctance to transfer for murder cases, the date of parole eligibility for transferred youth in these cases was reduced from a range of 10 to 25 years to a range of 5 to 10 years, and provisions were added to allow transferred youths to remain in youth custody facilities and avoid immediate placement with adults.

No transfer cases have yet been appealed to the Supreme Court of Canada under the 1992 amendments. Because of the vagueness, or ambiguity, of some of the 1992 transfer provisions, there have been radically different approaches to transfer in different provinces since they came into effect. These disparities are more fully discussed below.

By the election of 1993, public concerns about the *Y.O.A.* were reaching a crescendo, and every party except the Bloc Québécois took a position in effect "running against" the *Y.O.A.* The Reform Party took by far the strongest stance, advocating such measures as lowering of minimum and maximum ages, and automatic transfer to adult court for offences like murder or for a second violent offence.[31] The Liberal platform had to accommodate both the "law and order" and the "progressive" elements within the Party. Parts of the Liberals' election platform *Red Book* emphasized concerns about violent crime, and the recommendations included such measures as increased sentences for violent crimes, the development of a concept of "dangerous youth offender" who would be automatically transferred to adult court, and release of identifying information about violent young offenders. However, reflecting the ambivalence of Canadian society in regard to youth crime, other passages of the *Red Book* put adolescent criminality in a social context, emphasized the need for rehabilitation and even recommended restricting the range of offences for which a youth could be transferred to adult court.

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[28] *Ibid.* at s. 38.

[29] See *e.g. ibid.* at s. 24(1).

[30] For a detailed description of these amendments, see N. Bala & H. Lilles, "Transfer to Adult Court & Bill C-12: The Most Serious Disposition" (1993) 33 Young Offenders Service C&A:75.

[31] J. Hylton, "Get Tough or Get Smart? Options for Canada's Youth Justice System in the Twenty-first Century" (1994) 36 Can. J. Crim. 229 at 238. Indeed, some members of the Reform Party have advocated total abolition of the *Y.O.A.*, presumably with the intent of treating juveniles in the same manner as adults – a return to the nineteenth century.

Interestingly, attitudes towards the *Y.O.A.* have been very different in Quebec from the rest of Canada. Public opinion polls indicate that there is much more support for the *Y.O.A.* in Quebec than elsewhere in Canada, and the Bloc Québécois was the only party in the 1993 election to "speak out against law and order rhetoric" during the campaign,[32] and to oppose amending the *Y.O.A.* to "toughen" the law. Quebec has long had a distinctive juvenile justice policy, with a high degree of integration between child welfare and young offenders services,[33] and the lowest rate of custody orders in Canada.[34] It is an interesting question why Quebec has a different attitude towards the *Y.O.A.* The province in general has more supportive policies towards children, reflected in their cash payments to parents after children are born. There may well be distinctive attitudes in that province towards juvenile crime and punishment, as well as towards children and families.

Since the 1993 election Canada has had a new Liberal Minister of Justice, Allan Rock, a man viewed as a skillful new figure on the Canadian political stage, and perhaps a future Prime Minister.[35] Faced with a very broad range of criticism of the *Y.O.A.*, and a host of political, constitutional and fiscal constraints, he introduced Bill C-37 in June 1994. There were House of Commons hearings in the autumn of 1994. The Bill was passed, with amendments, by the House of Commons on February 28, 1995, and is expected to come into force by the end of 1995.

These are by far the most extensive amendments in the *Act*'s history, and deal with:

- longer maximum sentences for murder in youth court;
- transfer to adult court;
- the Declaration of Principle & dispositional guidelines
- alternatives to custody, levels of custody, and placement in mental health facilities;
- information sharing and records;
- medical and psychological assessments and victim impact statements;
- conditional discharges; and
- youth statements to police.

The Minister of Justice has also asked the House of Commons Committee on Justice and Legal Affairs to undertake a broad review of the *Act* as the "Second Phase" of *Y.O.A.* reform, though it seems that most of the contentious aspects of the *Y.O.A.* are already dealt with in the 1995 reforms, other than the issue of age jurisdiction.

In introducing Bill C-37, the Minister of Justice was clearly playing to the dominant political law and order sentiments in Canada, emphasizing the murder sentencing, transfer and information sharing provisions:

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[32] See "A Voters' Guide to the Issues" *The [Toronto] Globe & Mail* (2 October 1993) A7. A public opinion poll revealed that only 47% of Canadians favour having special provisions and sentencing for young offenders with by far the highest support, 71%, in Quebec. See "Try Young Offenders Like Adults, 48% Say" *The Toronto Star* (2 January 1992) A11.

[33] M. Le Blanc & Beaumont, "The Effectiveness of Juvenile Justice in Quebec: A Natural Experiment in Implementing Formal Diversion and A Justice Model" in R.R. Corrado *et al.*, *supra* note 4. During the 1994 House of Commons Committee hearings on Bill C-37, a number of witnesses from Quebec testified about the different approach to juvenile justice in that province; see *e.g.* Judges A. Ruffo, House of Commons, *Justice and Legal Affairs Committee* (27 September 1994); D. Trudeau & N. Bastier (29 September 1994); and C. Bilodeau (4 October 1994).

[34] Carrington & Moyer, *supra* note 24.

[35] See "Rock's Skills Being Put to the Test" *The [Toronto] Globe & Mail* (3 June 1994) A4.

> the government is sending a strong message – we are dedicated to ensuring that Canadians can continue to live...in communities that are safe and free from fear....Public protection must be our primary objective in dealing with young offenders.[36]

But the Bill is very much a compromise, containing provisions that are intended to satisfy the progressive wing of the Liberal Party as well as the law and order advocates within the Party. For example, provisions aimed at reducing the use of custody for non-violent offenders are clearly intended to appease the progressives in the Liberal caucus. Even the new transfer provisions are drafted in a balanced fashion, and their ultimate effect on the number of youths who will be transferred is not clear.

The Minister also recognized that changing the legislation will not, by itself, have an impact on youth crime; resources, staffing and facility issues need to be addressed, and there must be at the very least a "retargeting" of spending in this area.[37] However, the reality is that the provinces have the responsibility for spending and resource decisions in this field. While the federal government may influence provincial spending decisions by placing conditions on its cost-sharing programs for youth justice and corrections, it is not clear that federal initiatives alone can have much impact on the provision of youth corrections programs in custody or the community.

IV. Murder Sentencing

Murder is the youth offence that has, perhaps understandably, most captured public attention. Relatively few youths (30 to 60 per year) are charged with this offence, and the majority of those charged with murder are ultimately convicted only of manslaughter,[38] since the Crown cannot prove that these often unpredictable and senseless acts were deliberate.

For youths *not* transferred to adult court, the maximum sentence under Bill C-37 will be ten years for first degree murder, with a maximum six years of custody and the balance on conditional supervision, presumably served in the community.[39] For second degree murder, the maximum sentence in youth court will be seven years, with a maximum initial sentence of four years in custody and the balance on conditional supervision. These are maximum custodial sentences, and in appropriate cases youth courts may impose shorter sentences or release earlier on review. However, it seems

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[36] "Rock Lowers Boom on Violent Teens" *The Toronto Star* (3 June 1994) A1 [hereinafter "Boom"].

[37] *Legal Affairs, supra* note 3. See "Less Jail Urged" *Canadian Press* (2 June 1995), where Mr. Rock reiterated his intent to negotiate new funding arrangements with the provinces, to channel more money into community based dispositions instead of youth custody. He stated:

> If that kind of alternative was there, I think fewer kids would be in custody for the non-violent type of offences and we might end up with a better outcome.

At present, about $130 million of the $150 million that Ottawa gives the provinces for youth justice is spent on custody.

[38] For example, in 1992-93, 40 youths were charged with murder, of whom 6 were transferred to adult court, 16 were found guilty in youth court, and 18 had the murder charges dropped, but some other conviction registered. In 1993-94, 30 youths were charged with murder, of whom 6 were transferred, 13 were found guilty in youth court, and 10 had murder charges dropped but some other conviction registered; 1 was acquitted. See *Youth Court Statistics, supra* note 7 at 18 and *supra* note 14.

[39] Bill C-37, *supra* note 2 at s. 20(1)(k)(1).

likely that most judges will view the amendments as a signal to increase the sentences imposed. The longer periods of community supervision have the potential to help youths, provided that adequate resources are devoted to assist for meaningful supervision, counselling and reintegration into the community. In appropriate cases of apprehended danger, a youth may be detained in custody by a youth court judge during the period of community supervision.[40]

While some of the statements of the Minister of Justice and the Liberal *Red Book* suggest that the longer youth court sentences may be needed for rehabilitative purposes, there is no real evidence that the present provisions were inadequate in this regard. Clearly, the dominant purpose for having longer sentences is to satisfy public demands for greater accountability or punishment, as the Minister acknowledged in introducing Bill C-37.[41]

In the Committee Hearings on Bill C-37, the Minister admitted that it is still too early to draw definite conclusions about the effect of the 1992 transfer amendments; indeed, at the time that Bill C-37 was introduced, few, if any, youth courts had dealt with conditional supervision provisions introduced in 1992. However, this did not prevent him from proposing further amendments to these provisions, as the government believed that the maximum youth court murder penalty was "simply wrong", "as a matter of principle".[42] That is, the issue of accountability is the dominant concern in the increase in the maximum youth court sanction.

It is not clear in what manner long sentences by "young offenders" who will ultimately be in their 20s will be served. Clearly this is an issue that will face correctional officials and youth courts in the future. Presumably most will be released on community supervision before reaching the age of 20, or transferred into adult correctional facilities by youth court order under section 24.5 of the *Y.O.A.* sometime after reaching their eighteenth birthday.

The *Y.O.A.* will provide for youths charged with murder and *not* transferred to be able to elect trial by jury,[43] since the *Charter* guarantees this.[44] If the youth chooses to have a jury trial, it will be conducted by a superior court (*i.e.* federally appointed) judge, albeit sitting as a "youth court" judge pursuant to the *Y.O.A.* with its provisions governing such matters as publicity. These superior court judges will be responsible for sentencing, even if the conviction is for a lesser and included offence; there is a concern that they may not be as aware of the needs and facilities for adolescents as regular youth court judges.

To limit the overlap between the youth system sanction and the adult system sanctions, the minimum periods of parole eligibility for transferred youths who are 16 or 17 at the time of the offence and are convicted of murder in adult court have also been

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[40] *Ibid.* at s. 26.2.

[41] See "Boom", *supra* note 36. The Justice Minister stated: "we're not going to tolerate violence by any age group". A Reform Party critic responded: "What they're really doing is putting off the fact that tougher legislation is needed, but they don't have the guts to do it."

[42] *Legal Affairs*, *supra* note 3 at 19. See "Serious Violence by Youth Drops" *Whig Standard* (1 February 1995) 8 for similar comments by Val Meredith, Reform Party critic: "If [youth] murders are down [without changing the law], that's great. But that doesn't mean that those who commit these kinds of crimes shouldn't be dealt with in a different fashion."

[43] Bill C-37, *supra* note 2 at s. 19(4).

[44] *Charter*, *supra* note 5 at s. 11(f). A person is entitled "to the benefit of trial by jury where maximum punishment for the offense is imprisonment for five years or a more severe punishment."

increased to ten and seven years for first and second degree murder respectively.[45] Transferred youths who are under 16 at the time of the offence and transferred will have parole eligibility dates set at five to seven years.[46]

One would expect that the effect of the longer youth court sentences and longer periods to adult court parole eligibility, considered *alone*, should actually tend to *decrease* the number of youths facing murder charges who are being transferred, as these charges will tend to make youth court sentences seem more appropriate for murder. However, any assessment of the total effect of the 1995 amendments on transfer has to also take account of other conflicting changes in the section 16 transfer test.

V. Transfer to Adult Court

While only a relatively small number of youths commit very violent offences or are considered for transfer to adult court, these are the cases that are the primary focus of media attention and public concern.

The *Y.O.A.*, as originally enacted, stipulated that transfer was to occur if, upon application, invariably by the Crown, a youth court was satisfied that this was "in the interest of society...having regard to the needs of the young person." Not surprisingly there were great differences in the judicial interpretations of this very vague standard, with the result being enormous variation in how youths in different provinces were treated. A youth in Quebec facing a first-degree murder charge was likely to remain in the youth system and receive a maximum three year sentence in a youth custody facility, while one in Alberta or Manitoba would most likely be transferred, and face life imprisonment in an adult penitentiary with no parole eligibility for twenty-five years.[47]

The 1992 amendments to the *Y.O.A.* significantly reduced some of the discrepancies, especially as to the consequences of a decision about transfer. Youths remaining in the youth system and facing murder charges were to receive a maximum sentence of five years less a day, while those transferred and convicted in adult court were to receive life sentences, but have parole eligibility in 5 to 10 years. Further, a transferred youth facing an adult sentence could be confined, at least for some time, in a youth custody facility before going to an adult facility.[48]

The 1992 test for transfer is *somewhat* more structured than the 1984 test. The primary aspect of the 1992 test is the "interest of society" which "*includes* the protection of the public" and "the rehabilitation of the offender". This provision specifies that if these latter two objectives cannot be reconciled by the youth remaining in the youth system, then "the protection of the public shall be paramount" and the youth transferred. It does not, however, specify what is to occur if both be reconciled, but rather leaves the vague concept of the "interest of society" as the dominant factor.

Until we have a Supreme Court of Canada decision interpreting the 1992 amendments, it is not possible to fully assess the 1992 amendments. The reported case law clearly indicates great variation in the interpretation of section 16(1.1), and that relatively few

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[45] Bill C-37, *supra* note 2, amending *Criminal Code*, R.S.C. 1985, c. C-46, at s. 742.1.

[46] *Ibid.* at s. 744.1.

[47] Bala & Lilles, *supra* note 30 at C&A:95-98. See also N. Bala, "Dealing With Violent Young Offenders: Transfer to Adult Court and Bill C-58" (1990) 1 Can. J. Fam. L. 11.

[48] *Young Offenders Act*, S.C. 1992, c. 11 at ss. 16.1 & 16.2 [hereinafter *Y.O.A. 1992*].

cases are being transferred.[49] However, in those cases involving murder, and a youth who does not appear amenable to rehabilitation in the youth system, the courts are required to make the protection of the public paramount and have done so by transferring the youth to adult court where a very long sentence may be imposed.[50]

In 1993-94 (the last year for which data is available), there were 94 youths transferred, including 6 of 30 youths charged with murder. Over half of all transfers were in Manitoba and Alberta, where the courts are interpreting section 16(1.1) broadly, and including deterrence, accountability and the value of public trials as aspects of the "interest of society".[51] In dealing with transfer, judges in Alberta and Manitoba have not only been considering the young person before the court and his or her potential future dangerousness, but also broader societal factors.

Other provinces have had lower transfer rates, with most provincial appeal courts interpreting section 16(1.1) as not permitting transfer if the court is satisfied that rehabilitation is sufficiently likely to occur in the youth system and hence the protection of the public can be achieved without transfer.[52] Most judges have therefore not directly assessed accountability, general deterrence or other societal concerns as factors in transfer, but rather have focussed exclusively on the youth before the court, and attempted to assess his or her future danger to the public if not transferred.

The provisions of Bill C-37 which deal with transfer are complex. For youths under 16, there will be an onus under the new section 16(1) for the applicant, invariably the Crown, to apply to the youth court for transfer, and satisfy the court that transfer is necessary. The new section 16(1.1) will apply to youths 16 and 17 years of age and charged with:

- murder (25 in 1992-93);
- attempted murder (45 in 1992-93);
- manslaughter (5 in 1992-93); or
- aggravated sexual assault (4 in 1992-93).[53]

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[49] Statistics Canada reports only 94 cases were transferred in 1993-94: see *Youth Court Statistics*, *supra* note 7 at 16. For further discussion of varying interpretations of the new provisions, see N. Bala, "Transfer to Adult Court: Controversy Continues" (Paper presented to the Canadian Association of Provincial Court Judges, 20 April 1994) [unpublished]. Some of the transfers are situations where a "young person" is over 18 by the time of appearance in youth court, charged with a less serious offence, and requests transfer. In these situations, the "young person" may face a significantly shorter sentence in adult court, where he will be a "first offender", and will serve less time because of more liberal adult parole rules.

[50] See *e.g. R.* v. *L. (M.)* (1994), 89 C.C.C. (3d) 264, A.Q. No. 171 (C.A.) (QL) where the Quebec Court of Appeal transferred a 14-year-old youth charged with murder and expert evidence indicated that treatment was likely to take a minimum of 5 years. Quebec courts have, in general, been among those most reluctant to transfer.

[51] See *e.g. R.* v. *G.J.M.* (1993), 135 A.R. 204 at 211, 33 W.A.C. 204 at 211 (C.A.); and *R.* v. *D.M.S.*, [1993] A.J. No. 717 (C.A.) (QL). The Saskatchewan Court of Appeal has taken the same interpretative approach to s. 16(1.1); see *R.* v. *E.J.C.*, [1994] S.J. No. 125 (C.A.) (QL).

[52] *R.* v. *B.(C.)* (1994), 86 C.C.C. (3d) 214, [1993] O.J. No. 2593 (C.A.) (QL); *R.* v. *C.(D.)* (1993), 14 O.R. (3d) 705, (1994), 85 C.C.C. (3d) 547 (C.A.); *R.* v. *K.(C.J.)* (1994), 88 C.C.C. (3d) 82, M.J. No. 74 (C.A.) (QL); *R.* v. *P.P.*, [1994] B.C.J. No. 150 (C.A.) (QL); *R.* v. *A.C.W.* (1993), 121 N.S.R. (2d) 301, 335 A.P.R. 301 (N.S.C.A.); and *R.* v. *T.C.*, [1994] A.Q. No. 199 (C.A.) (QL).

[53] Bill C-37, *supra* note 2.

Under section 16(1.01) the case will presumptively be dealt with in adult court, but the youth (or Crown) may seek "transfer down" by applying to youth court.

For all situations, the new test for transfer is:

> s.16(1.1) In making the determination...[whether to transfer] the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth being under the jurisdiction of the youth court, and
>
> (a) if the court is of the opinion that those objectives can be so reconciled, the court shall
>
> (i) in the case of an application under subsection (1), refuse to make an order that the young person be proceeded against in ordinary court, and
>
> (ii) in the case of an application under subsection (1.01) [reverse onus for 16 and 17 year olds charged with listed offences] order that the young person be proceeded against in youth court; or
>
> (b) if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall
>
> (i) in the case of an application under subsection (1), order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence, and
>
> (ii) in the case of an application under subsection (1.01), refuse to make an order that the young person be proceeded against in youth court.
>
> (1.11) Where an application is made under subsection (1) or (1.01) [the reverse onus provision for murder, attempted murder, manslaughter and aggravated sexual assault], the onus of satisfying the youth court of the matters referred to in subsection (1.1) rests with the applicant.[54]

The public rhetoric of the Liberal government about the new transfer provisions suggests that they expect substantially more youths charged with the more violent offences, in particular those who are 16 and 17 years of age, to be transferred to adult court, and serve longer sentences. The provision is complex, however, and its overall effect will depend upon how provincial governments, police, prosecutors and judges react.

The new test for transfer would appear to resolve some of the issues that have arisen in the conflicting jurisprudence under the 1992 law.

The new section 16(1.1) indicates that the "interest of society" includes *only* an assessment of rehabilitation of the youth and protection of the public. Factors such as accountability and the value of publicly reported hearings, which have, for example, influenced the Alberta and Manitoba courts to have a relatively high transfer rate, should *not* be taken into account. In this regard, the new provision may actually make it more difficult for the Crown to have youths transferred.

While the new provision does not explicitly resolve the existing controversy over whether general deterrence should be a factor in assessing the "protection of the public", it can be argued that there is an implicit signal for the courts in the new section 16(1.1). The Alberta courts have used general deterrence as a factor in favour of transfer in

[54] *Ibid.*

serious cases, as they believe that this will enhance the "protection of the public". While it might have been desirable for Parliament to explicitly deal with this issue, as it has not, it is submitted that general deterrence should not be a factor under the new section 16(1.1). Otherwise the individualized assessment of the youth contemplated by that section will not occur. If accountability or general deterrence were to be factors one might expect that all very serious charges should be transferred, and the new provisions clearly do not contemplate automatic transfer for any offence. Further, all available social science evidence indicates that increasing the number of youths transferred does *not* have a deterrent effect and enhance the protection of society.[55]

Finally, consideration must be given to the amendment to the Declaration of Principle found in the new section 3(1)(c.1), which provides that "the protection of society...is best achieved by rehabilitation, wherever possible...and rehabilitation is best achieved by addressing the needs and circumstances of a young person". This statement of Parliamentary intent also supports the view that the appropriate interpretation of section 16(1.1) should focus on the youth before the Court, and his or her amenability to rehabilitation. If the interpretive approach to the new section 16(1.1) that is advocated here is adopted by the courts, there is the prospect that the substantial interprovincial variation in the application of the transfer provisions will be reduced by Bill C-37.

For 14 and 15-year-olds (12 out of 94 transfers in 1993-94), even those charged with murder, the new test in section 16(1.1) combined with the longer sentences for murder in the youth system as well as the longer period before parole eligibility in the adult system are very likely to decrease transfers.

The shift in onus under section 16(1.01) for 16 and 17-year-olds will presumably cause some more of these youths to be transferred, though it would seem from the case law under the present transfer provision that relatively few cases would be decided differently because of the change in onus.[56] Already in transfer cases involving very violent offences, many judges have indicated that they will only refuse a transfer application if the prospects of rehabilitation in the youth system are "sufficiently promising".[57] Conversely, in cases where a youth facing a charge like murder is not able to satisfy the court that rehabilitation is "likely" to occur in the youth system, but only is "possible", transfer has been ordered.[58] That is, in practice there has generally already been a tactical onus on the youth to adduce evidence of amenability to rehabilitation within the youth system, and the shift in onus created by Bill C-37 *may* not be that

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[55] M. Frost, J. Fagan & T.S. Vivona, "Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment – Custody Dichotomy" (1989) 40 Juv. & Fam. Ct. J. 1 at 11-12; S. Singer & D. McDowall, "Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law" (1988) 22 Law & Soc'y Rev. 521; E.L. Jensen & L.K. Metsger, "A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime" (1994) 40 Crime & Delinquency 96.

[56] For cases which illustrate that even under existing provisions there is a significant onus to adduce evidence of amenability to rehabilitation in the youth program, see *R.* v. *R.V.B.*, [1994] A.J. No. 41 (C.A.) (QL), and *R.* v. *M.S.*, [1994] M.J. No. 302 (Prov. Ct.) (QL). For a case that might have had a different outcome, see *R.* v. *A.C.W.*, *supra* note 52.

[57] *R.* v. *P.P.*, *supra* note 52.

[58] *R.* v. *C.(D.)*, *supra* note 52 and *R.* v. *L.(M.)*, *supra* note 50; see however, *R.* v. *W.A.C.*, *supra* note 52, which appeared to place a significant onus on the Crown to adduce evidence about lack of amenability to rehabilitation.

significant.[59] Of course, it will ultimately be for the courts to interpret the new reverse onus provision of section 16(1.01) and they may feel that this is intended to dramatically alter the nature of transfer proceedings.

For youths *not* facing murder charges the new provisions do nothing to clarify the complex issues surrounding the length of time in custody actually served by young offenders or the place where sentences are served. Under the 1992 law, very few youths who are *not* transferred and are convicted in youth court of offences other than murder receive the maximum disposition of three years (or two years if the maximum adult sentence is less than life imprisonment).[60] However, any disposition actually imposed by a youth court judge is more likely to be fully served than a sentence imposed by an adult court judge as youth court judges are much more reluctant to permit for early release at *Y.O.A.* review hearings than are adult parole officials dealing with those in the adult system. On the other hand, one can expect that youths who are transferred to adult court will have their age taken into account as a mitigating factor on sentencing, and at a parole hearing, and they will generally serve less time than adults convicted of the same offences.[61]

The *Y.O.A.* sections 16.1 and 16.2 (allowing transferred youths to remain in a youth custody facility by court order) and section 24.5 (allowing a youth court to order a "young person" to serve his sentence in an adult facility, once he has reached the age of 18) will also continue to provide some flexibility over the place where sentences are served. Those youths who are transferred may nevertheless serve a significant portion (or all) of the "adult" sentences in youth facilities, while those who are not transferred to adult court may later be transferred at some point after sentencing in youth court by a youth court judge to an adult correctional facility, provided they have reached the age of 18.

The public pronouncements of the Minister of Justice do not dwell on the issues of his expectations about the actual place of custody or length of sentence, nor is it clear how these confounding factors will affect judges at transfer hearings. However, most transfer decisions compare the "real time" rather than the "paper time", suggesting that judicial consideration of the actual length of sentences likely to be served in the two systems will make judges reluctant to transfer for offences other than murder.[62]

Police and prosecutors may also have a very significant effect on the number of transfers. In many situations involving 16 and 17-year-old youths there will be significant police discretion about whether to lay a charge with a presumption of transfer, like aggravated sexual assault, or some lesser offence, like sexual assault causing bodily harm, where the onus remains on the Crown to satisfy the court of the necessity for transfer. In its original form, Bill C-37 included aggravated assault in the

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[59] It may be argued that the shift in onus under s. 16(1.11) violates the presumption of innocence, guaranteed in s. 11(d) of the *Charter*, but since it only affects the *place* of trial and length of sentence, and not guilt or innocence, this argument does not seem likely to succeed.

[60] *Y.O.A. 1992*, *supra* note 48 at s. 20(1)(k).

[61] See *e.g. R.* v. *Beaulieu*, [1994] M.J. No. 379 (C.A.) (QL) where a 17-year-old youth consented to transfer to adult court on a charge of firing a firearm with intent, and received a sentence of two years less a day, with the adult court noting that "this *young* accused has begun to turn his life around" (emphasis added).

[62] *R.* v. *A.S.D.*, [1993] B.C.J. No. 1081 (Prov. Ct.) (QL); *R.* v. *T.P.C.*, [1993] O.J. No. 719 (Prov. Div.) (QL). However, the Ontario Court of Appeal suggested that judges should avoid "speculation" about this issue; see *R.* v. *B.(C.)*, *supra* note 52.

list of offences for which there would be an onus on the older youth to justify not having the case in adult court. This would have resulted in many more transfer hearings (there were 212 such charges in 1992-93 for 16 and 17-year-olds, compared to only 69 for murder, manslaughter, attempted murder and aggravated sexual assault). Aggravated assault was removed from the list in section 16(1.01) during the House of Commons Committee hearings because of concerns that there would be a huge and unnecessary increase in the number of transfer hearings.

It is unclear how Crown prosecutors will respond to the new provisions; it is possible that in many cases under section 16(1.01) they will choose not to oppose "transfer down". When challenged by a Bloc Québécois member at the Committee hearings about section 16(1.01), the Minister of Justice suggested that a province could have a policy directive instructing Crown prosecutors to regularly request "transfer down" for certain types of cases. Such a policy may well be implemented in the province of Quebec, which could create very significant interprovincial variation in how the new law is applied.[63] Subsection 16(1.04), added to the Bill in the Committee hearings, provides that if the Crown does not file a notice opposing a youth's request to "transfer down", the case shall be transferred down without a hearing, facilitating provincial action to limit the number of transfer hearings.

In sum, the new transfer provisions are clearly intended to give the *public* the *impression* of a tough new regime for violent youth, especially 16 and 17-year-olds charged with more serious offences. The new provisions raise the corresponding spectre of relatively large numbers of adolescents serving sentences in adult correctional facilities, with their relatively brutal atmosphere and lack of appropriate services. It seems highly likely, especially in the first stages of implementation, that there will be *more transfer hearings* for 16 and 17-year-olds, with their concomitant expense and delay.

It is more difficult to accurately predict the actual effect of the new transfer provisions on the number of youths transferred. It seems likely that the net effect of these changes will be *an increase* in the number of 16 and 17-year-olds being transferred to adult court, but *a decrease* in the number of younger youths being transferred. On balance, one might expect little overall effect on total numbers being transferred as a result of Bill C-37, though it should be appreciated that numbers have fluctuated considerably under the 1992 law, going from 33 in 1992-93 to 94 in 1993-94, despite a drop in the most serious types of charges.

However, if the new provisions were to result in a large number of youths[64] serving time in the potentially abusive and inevitably corrosive adult prison environment, one might actually expect that the 1995 reforms will ultimately *decrease the long term protection* of society. At least some of those sentenced as adolescents to adult correctional facilities and serving lengthy sentences there may well pose a greater threat to the public upon release than if they were not transferred.

Research from the United States demonstrates that amending the law to have more transfers does not have a deterrent effect on youthful offending, and placing youths in

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[63] *Legal Affairs*, *supra* note 3 at 10.

[64] The 1993 Liberal Election policy, *Liberal Perspective on Crime and Justice*, August 1993, indicates that only a "very small" number of youths should be in the adult system.

adult court actually appears to have a negative impact on their future re-offending behaviour.[65]

As an alternative to having an increase in the number (and hence expense and delay) of pre-trial transfer hearings, Parliament should have given consideration to other changes in the *Y.O.A.* Transfer in its present form could be abolished, and provisions for longer maximum sentences in youth court be provided for a short list of very violent offences.

One of the problems with transfer hearings is that the youth court judge does not have complete information about the offence, but rather is obliged to essentially accept the Crown's evidence, which is usually based on hearsay at this stage, about the offence. For tactical reasons, defence counsel often declines to have the youth testify at the transfer hearing, so the court has an incomplete picture of the situation. It might be preferable to abolish pre-trial transfer hearings altogether, and deal with the issue of length and place of sentence after conviction.[66]

The complexity of the situation created by Bill C-37 is most obvious for murder, where there may be a transfer hearing; a jury trial whether or not there has been a transfer; if transfer has occurred, another hearing under section 16.2 of the *Y.O.A.* to determine whether part of the sentence will be served in a youth facility and if transfer has not occurred a hearing under section 24.5 of the *Y.O.A.* to have a youth serve the last portion of a sentence in an adult facility.

The pre-trial transfer hearing should be abolished. For murder and a few very violent offences, the Crown could be required to indicate before trial whether a sentence of longer than five years less a day will be sought, in which case the youth would have the right to elect for a jury trial. The issue of length and place of sentence should be dealt with after conviction. This would be fairer and more efficient.

VI. Dispositional Decision-Making: Assessment & Victim Impact Statements

Bill C-37 includes provisions to ensure that judges receive more information about youths for the disposition or transfer stage of proceedings, in particular in cases involving violence.

Section 13 is amended to make clear that a medical, psychological or psychiatric assessment may be ordered by the court on its own motion, as well as at the request of either of the parties. It will no longer be necessary for the court to believe that the youth is suffering from some emotional disturbance or disability to request an assessment. The judge will be able to order a report if the youth's history "indicates a repeated pattern of criminal conduct" or the youth is charged with "an offence involving serious personal injury".

Section 14 is amended to specify that a provincial director may include a "recommendation" as to disposition in a pre-disposition report, if the director considers this appropriate. It has been a common, but not universal, practice for reports to provide recommendations, and the new section 14(2)(d) clarifies that this is an acceptable practice. The youth workers preparing the reports will also be expected to contact, "where reasonably possible and appropriate", members of the youth's "extended

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[65] *Supra* note 55.

[66] This position is also advocated by Judge L.A. Beaulieu, "Youth Offences–Adult Consequences" (1994) 36 Can. J. Crim. 329 at 339.

family", and determine whether they can exert "control and influence" on the youth.[67] This will be especially relevant for aboriginal youth, and may allow for more community based dispositions involving members of the extended family.

The *Y.O.A.* is also to be amended to explicitly allow courts to receive victim impact statements under section 735(1.1) of the *Criminal Code*.[68] These statements are already being used in some youth courts. Increased use of these statements may give youth courts more information at the time of sentencing, as well as giving victims a greater degree of satisfaction with the justice system.[69]

These amendments are intended to ensure that courts have more information, in particular for cases involving serious violence. Together with amendments discussed below, they are also intended to ensure a more "efficient" (*i.e.* limited) use of custody facilities, and more use of non-custodial dispositions for youths who do not pose a significant risk to the community.

VII. The Declaration of Principle & Judicial Discretion at Sentencing

There are several critical areas where the *Y.O.A.* grants enormous discretion to judges and other decision-makers, and it is scarcely surprising that they have exercised their discretion in very different ways. Bill C-37 attempts to give somewhat more structure to the exercise of discretion.[70]

The present Declaration of Principles (s. 3) reflects the *Act*'s failure, in several crucial areas, to structure the exercise of discretion. While the relatively complex, generalized statements found in section 3 are undoubtedly more realistic than the single, simplistic philosophy of the *J.D.A.*, the lack of prioritization and ambiguity of most of the principles has meant that this statement in practice offers little guidance or constraint to decision-makers. In fairness to the legislators, the Declaration reflects not just a compromise, but also prevailing societal ambivalence and uncertainty about how to deal with problems of youth crime in general. Further, in the effort to ensure that judges meet the needs of the individual youth being dealt with, most pieces of Canadian legislation that govern children before the courts resort to vague statements of principle and highly ambiguous concepts like "the best interests of the child".

The courts have also emphasized the discretionary nature of the *Y.O.A.*, following the lead of the Supreme Court of Canada. In a 1989 transfer decision, the highest court wrote about the importance of respecting the individualized "*viewpoint of the tribunal* in question".[71] The 1993 Supreme Court judgment on youth court sentencing in *R.* v.

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[67] Bill C-37, *supra* note 2 at s. 14(2)(c)(v)-(vi).

[68] *Ibid.* at s. 20(8).

[69] R.C. Davis & B.E. Smith, "Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?" (1994) 22 J. Crim. Justice 1, report on American research that indicates that the use of these statements does *not* improve victim perception of the justice system.

[70] Shortly after Bill C-37 was introduced, the federal government introduced Bill C-41, *An Act to Amend the Criminal Code*, 1st Sess., 35th Parliament, 1994 (First reading 13 June 1994), proposing amendments to adult sentencing principles in the *Criminal Code*, also by articulating general guidelines. These provisions place greater emphasis on responding to offences in a manner proportionate to the offence (s. 7(8.1)), but also provide that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered" (s. 718.1(3)).

[71] *R.* v. *J.E.L.* (1989), 71 C.R. (3d) 301 at 305 (S.C.C.) (emphasis added).

M.(J.J.)[72] again emphasized the importance of individualized dispositional decisions, rejecting the idea that proportionality in responding to the offence should limit youth court sentences, at least to the extent that it does in adult court.

In significant measure, the *Y.O.A.*, as interpreted by the courts, has created a highly variable system of youth justice, with great differences between provinces, and even between individual judges in the same cities.[73] Some of the generalized criticism of the *Y.O.A.*, for example, that the *Act* is "too soft", may be inaccurate, both for missing variability and placing "blame" on the *Act*, rather than recognizing that the *Y.O.A. permitted* different decision-makers to do very different things. Many of the problems that critics associate with the *Y.O.A.* are not directly *caused* by the *Act*; rather, they have been *permitted* by the *Act*, but have been *caused* by individual decision-makers.

For example, some critics charge that the enactment of the *Y.O.A.* has *caused* a large increase in the use of custody because it has deemphasized child welfare concerns. In reality, while it is true *most* jurisdictions in Canada have experienced substantial increases in the use of custody since the *Y.O.A.* came into force in 1984, in some places there has been little, if any, increase. Further, at least with some judges, the increase in use of custody may reflect rehabilitative concerns rather than a desire to be punitive. Similarly, critics on the right who argue that sentences are too short, fail to recognize that some judges impose quite lengthy sentences under the *Y.O.A.*[74]

While amending the Declaration of Principle is unlikely to have as much impact as more directly structuring specific decision-making, such as having sentencing grids, the Liberal government is providing some clear signals about its philosophy, in particular by explicitly adding crime prevention and rehabilitation to the Declaration:

> (a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;
>
> ....
>
> (c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour.[75]

The importance of crime prevention[76] and rehabilitation were recognized in a 1993 House of Commons Committee Report[77] and in the Liberal campaign policy *Red Book*, though one has to question whether other provisions of Bill C-37, in particular those relating to transfer, reflect that broader understanding. More fundamentally, without the

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[72] *Supra* note 8.

[73] A.N. Doob & L.A. Beaulieu, "Variation in the Exercise of Judicial Discretion with Young Offenders" (1992) 34 Can. J. Crim. 35.

[74] Public criticisms of *Y.O.A.* sentencing also ignore that youths are much more likely to serve their full sentences than adults. Judicially controlled release under the *Y.O.A.* does not occur as frequently as statutory remission and parole for adults.

[75] Bill C-37, *supra* note 2 at s. 3(1).

[76] In July 1994, the Liberal government established a 25 member National Crime Prevention Council, though it has yet to be seen what this Council will accomplish.

[77] Canada, House of Commons Standing Committee on Justice and the Solicitor-General, *Crime Prevention in Canada: Toward a National Strategy* (1993) [hereinafter "Horner Committee Report"].

expenditure of resources, the articulation of these goals may not be very significant. Further, as noted above, the concept of "rehabilitation" as a decision-making philosophy for young offenders is quite problematic, and has been used to justify longer custodial dispositions. Some of the proposed amendments to section 24, discussed below, are apparently intended to prevent this interpretative approach to section 3(1)(c.1).

There is a considerable body of research on delinquency prevention, which demonstrates that programs based in preschools, schools and the community, can provide a long term cost effective means of reducing levels of delinquency. These programs are most effective if they are long lasting (two to five years), start early (preferably in the first five years of life), focus on multiple risk families, and are broadly based.[78] They will not provide a "quick fix", but they offer the prospect of long term returns for our present social investment.

VIII. Alternatives to Custody

There is wide variation in how judges sentence young offenders, as well as substantial interprovincial differences in rates of custody use. However, in Canada as a whole, the number of youths receiving custody dispositions has increased significantly since the *Y.O.A.* came into force,[79] though the average time served is less than under the *J.D.A.*'s indefinite sentences.

Parliament enacted some relatively minor amendments to the *Y.O.A.* in 1986 with the apparent objective of ensuring that custody is not overused. For example, section 24(1) was amended to provide that a judge should not make a committal to custody unless it is considered "necessary for the protection of society, having regard to the seriousness of the offence and....the needs and circumstances of the young person." While the 1986 amendments were intended to reduce inappropriate use of custody, they have had no appreciable effect. Indeed, the amendment to section 24(1), combined with the 1993 Supreme Court judgment in *R.* v. *M.(J.J.)*,[80] can be interpreted as endorsing use of longer sentences than the offence itself might merit for "rehabilitative" purposes, in order to achieve the long term protection of society.

Some observers argue that the only way to substantially reduce dispositional disparity for juvenile offenders is to adopt a "sentencing grid", where there is presumption that the offence and prior record will produce a sentence within a particular range. This type of approach has been adopted in some American states for sentencing,[81] for both adults and juveniles. While this type of proposal merits consideration,[82] given the enormous geographical variation in available custodial and correctional resources, such a scheme may not be suitable for dealing with young offenders in Canada. Further, in

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[78] See *Youth Crime, supra* note 11 at 40-42, 85 & 124. See also Ontario Premier's Council on Health, Well-being and Social Justice, *Yours, Mine and Ours: Ontario's Children and Youth: Phase I* (Toronto: Queen's Printer for Ontario, 1994).

[79] See *e.g.* Statistics 1992-93, *supra* note 17.

[80] *Supra* note 8.

[81] See *e.g.* T.C. Castellano, "The Justice Model in the Juvenile Justice System: Washington State's Experience" (1986) 8 Law & Pol'y 479.

[82] Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services, 1987); see also J.P. Brodeur, "Some Comments on Sentencing Guidelines" in L.A. Beaulieu, ed., *Young Offender Dispositions: Perspectives on Principles and Practice* (Toronto: Wall & Thompson, 1989).

the present political climate, any grid that would be adopted would likely result in substantial increases in the use of custody without increasing social protection.

One of the major concerns about *Y.O.A.* dispositions has been the growing use of custodial dispositions, especially for youths not involved in violent offences.[83] This has been very expensive, both in financial terms and in regard to long term rehabilitation, which is often more likely to be achieved in community based programs.[84] Bill C-37 has a number of provisions intended to reduce inappropriate use of custody, beyond those dealing with assessment reports and the Declaration of Principle which were discussed above.

A new provision is added to section 24, with the obvious intent of avoiding unnecessary use of custody.

> s. 24(1.1) In making a determination under subsection (1), the youth court shall take the following into account:
>
> (a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures;
>
> (b) that a young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and
>
> (c) that custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.[85]

The evident intent of section 24(1.1)(a) is to reduce the inappropriate use of custody. This provision endorses the Ontario Court of Appeal judgment in *R.* v. *M.B.*[86] where it was held that a youth court sentence for a young offender must be "responsive to the offence", and *not* just a "sensible way of dealing with a youth who had a personality problem and needed a place to go". While not explicitly reversing the Supreme Court of Canada decision in *R.* v. *M.(J.J.)*, the new provision would at least appear to require some modification of the approach taken in that case, since it seems that the Court did not fully explore the alternatives to custody, especially in the child welfare system. Similarly, taking the authority away from the courts for specifying the level of custody, discussed below, is intended to reduce the tendency of some judges, illustrated in *R.* v. *M.(J.J.)*, to view open custody as a "therapeutic" sentence that might be longer than justified in terms of accountability.

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[83] 1992-93 youth court statistics reveal that less than 20% of custody dispositions were imposed for violent offences. About 10% of custodial dispositions were imposed for youths who were in the community, but failed to attend court or otherwise comply with court orders. See Statistics 1992-93, *supra* note 17.

[84] There is a considerable body of research that indicates that treatment programs for chronic young offenders are most likely to be effective in reducing recidivism if they address the underlying problems that youths are experiencing in their families, communities and schools. Even if use is made of custody, a crucial element of rehabilitation must be supportive reintegration into the community. See *e.g.*, P. Gendreau & R. Ross, "Revivification of Rehabilitation: Evidence from the 1980s" (1987) 4 Justice Quarterly 349; *Youth Crime*, *supra* note 11 at 14 & 87; and Center for the Study of Youth Policy, *Home-Based Services for Serious and Violent Young Offenders* (Philadelphia: Univ. of Pennsylvania, 1994).

[85] Bill C-37, *supra* note 2.

[86] (1987), 36 C.C.C. (3d) 573, 2 W.C.B. (2d) 363 (Ont. C.A.).

Youth court judges who impose a custodial disposition will be required under the new section 24(4) to give reasons why a non-custodial disposition would not have been adequate. This is intended to have judges specifically address the appropriateness and availability of non-custodial dispositions. However, in significant measure, the extent to which use is made of non-custodial dispositions will depend on the extent to which provinces make resources available for community based dispositions. The federal government has indicated that it will "re-target" some of its shared cost funding to encourage community based dispositions, though it remains to be seen whether this will occur.

Arguably, section 24(1.1) is expecting youth court judges to take a more activist role in developing non-custodial dispositions for youths. If this was intended, it would have been desirable to also give judges more explicit powers to fashion specific non-custodial dispositions when provincial correctional officials are unwilling to arrange or finance such dispositions. At least, a provision should have been enacted to allow judges sentencing under the *Y.O.A.* to order authorities to provide child welfare services in appropriate cases as an alternative to custody. Such a provision did not, however, appear in Bill C-37.

While judges will continue to determine the length of custodial dispositions, section 24.1 will be amended to allow provincial governments to have the provincial director – a juvenile correctional official – determine the level of custody: open or secure.

A number of provinces, including Ontario, have been seeking this transfer of responsibility from judges to correctional officials. At least in theory this should allow decisions about the level of custody to be made by those with most knowledge of available resources, and the professional background to assess the needs of young offenders. It may also cause judges to be a little more cautious about imposing a custodial disposition, since some judges appear to have been imposing *open* custody when they would not have considered a "purely" custodial disposition, based on the premise that these open facilities are less punitive and more rehabilitative[87] than secure custody. As there are weak statutory distinctions between the two types of facilities and provincial governments have enormous latitude in how facilities are designated, some of the judicial optimism about open custody may be unfounded.

The federal government evidently has some concern about exactly how provincial directors will exercise their discretion over placement in levels of custody. It provides some discretion structuring factors for the exercise of this discretion in section 24.1(4), emphasizing the "least degree of containment and restraint"; and also gives a youth or a parent the right to appeal to a youth court a placement by a provincial director in secure custody.[88] Regrettably, there is no statutory requirement for the appeal to be held within a stated period and there is a concern that a sentence may be largely or totally served before an appeal is heard. It should be noted that under section 24.1(4)(d) a youth court judge shall still be permitted to make a "recommendation" about the appropriate level of custody at the time of original sentencing to the provincial director, and in some cases this may have considerable influence on the initial decision of the director.

The new section 24.1 will also give provincial directors a broader power to transfer youths from one level of custody to another while a sentence is being served. If the

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[87] See *e.g. R.* v. *M.(J.J.)*, *supra* note 8 at 430-31.

[88] Bill C-37, s. 28.1, *supra* note 2.

director transfers a youth from open to secure custody, there is a right of appeal to the youth court.

One major concern is that decisions about the level of custody by provincial directors may be driven more by administrative and budgetary concerns than by the needs of the youth, or even of society.[89]

IX. Detention for Treatment

Mental health professionals and others have frequently attacked the provisions of the *Y.O.A.* that require a youth's consent before an order can be made for "detaining the youth for treatment", arguing that[90] "youth, especially those involved in offending, may not be in the best position to make ultimate decisions regarding the value of mental health intervention".

Bill C-37 abolishes sections 20(1)(i) and 22, provisions which allowed youth courts to order that a youth could be "detained for treatment" instead of being placed in custody, but only if the youth consented. These types of orders were very rarely made, in part because youths were unwilling to consent to being placed in mental health facilities, but probably more due to lack of suitable facilities. It will, of course, continue to be possible for provinces to provide substantial treatment services in custody facilities, subject only to general provincial laws about not imposing medical treatment (*i.e.* drugs, electro-shock) on unwilling, competent individuals. However, there remains some scepticism about whether the provinces will actually provide the necessary level of services.

X. Conditional Discharge

Under the *Y.O.A.*, as originally enacted in 1984, there were no provisions for conditional discharges, premised on the view that the various non-disclosure and deeming provisions meant that all youths who committed only one offence were in effect conditionally discharged. Many judges and youth justice professionals have expressed a desire to have an explicit conditional discharge option, to be able to give a youth receiving a sanction a clearer message that if the terms of the disposition are carried out, the youth will have the "record wiped clean", and will then not be viewed as "an offender".

Bill C-37 adds section 20(1)(a.1) allowing a court to order that a "young person be discharged on such conditions as the court considers appropriate". Conditions might include a donation to charity, undergoing counselling, paying a fine or doing community service work. The new section 45(1)(d.2) will provide that three years after the imposition of a conditional discharge records relating to that offence can no longer be used for any purpose, provided the terms of the discharge are honoured.

XI. Information Sharing & Records

The *Y.O.A.* has a number of provisions that are intended to promote the rehabilitation of young offenders by preventing the dissemination of information about them. These

[89] It is possible that this non-judicial type of decision-making model for custody may be challenged under the *Charter*, though it is consistent with the general practice for adults, where decisions about the level of security of imprisonment are made by correction officials.

[90] See *e.g.* A. Leschied & P. Gendreau, "Doing Justice in Canada: YOA Policies That Can Promote Community Safety" (1994) 36 Can. J. Crim. 291 at 293.

provisions have been controversial, as the media and members of the public have argued that they have a "right to know" about youthful offenders. Amendments were enacted in 1986 to permit police to apply to a youth court to allow publication of identifying information about youths considered dangerous and at large.[91] On the whole, the present scheme has much to commend it, reflecting the potential negative stereotyping and labelling that can result from the dissemination of information, and the reality that in general members of the public can do little to protect themselves as a result of having access to identifying information about young offenders in the media. There are, however, circumstances in which professionals working with or treating young offenders are not always getting access to information that would be helpful to them. In the case of young offenders in the community, some limited dissemination of information may help ensure public safety.

Bill C-37 allows for two new categories of disclosure: administrative disclosure (s. 38(1.13)) and disclosure by youth court order (s. 38(1.5)).

The new section 38(1.13) will allow provincial governments to have regulations to allow police and probation officers to share the information with designated school officials (such as a principal or vice principal), or other professionals, such as child welfare workers. These professionals will be able to disclose the information to other persons if necessary to monitor compliance with a court order or to protect "safety" in the school or other settings. While these officials are required to keep youth court based information separate from other records and destroy it when no longer required,[92] it seems likely that this amendment will result in significantly more access to information about offending behaviour within schools.

A new provision, section 38(1.5), will allow a youth court, after a hearing, to permit disclosure of information to members of the public where the youth is thought to pose a "risk of serious harm" and the disclosure of information is "necessary" to avoid risk. Although the media is still prohibited from publicizing the identity of the youth, it seems likely information will circulate widely in the community if an order is made under section 38(1.5). While section 38(1.5) does not specify whether the court should consider the potential harm to the youth from disclosure, the new section 13(2)(f) provides that the court may order a psychological or psychiatric assessment for a disclosure hearing. This suggests that the court should take account of the effect of disclosure on the youth, as well as the other criteria mentioned in section 38(1.5).

Section 38(1.5) is a response to widespread demands that the public has a "right to know" of offenders released into their community. In particular, it is a response to one highly publicized case in British Columbia involving a young sex offender who was released into the community where he later assaulted and killed a neighbourhood child.[93] Section 38(1.5) could in theory permit neighbours in such situations to be informed and neighbourhood children warned of the potential danger. There were actually many problems with how the British Columbia case was handled under existing law in terms of lack of communication between police and probation services. Furthermore, one can question whether this type of statutory change was necessary to deal with such situations more effectively.

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[91] *Y.O.A. 1986, supra* note 27 at s. 38.1.

[92] Bill C-37, *supra* note 2 at s. 38(1.15).

[93] See *e.g.* "Tracking Young Sex Predators" *The Vancouver Province* (31 March 1994) A3.

One can appreciate the sentiments behind section 38(1.5), especially the desire to protect children, but its ultimate effects may be very problematic. Unless all children in the community are warned, the protection afforded by this provision may be slight. Further, once neighbours and fellow students are "warned" about a particular youth, meaningful reintegration into the community will be very difficult, and offenders may be likely to move away from supports and seek anonymity in large urban centres, making rehabilitation much more difficult to achieve. There is no justification for this type of provision only for young offenders; if anything, it is more urgent for adults. The American experience with this type of provision suggests significant problems with implementation, and that it may actually be counterproductive to the objective of increasing community protection.[94]

Various record keeping provisions are also being amended by Bill C-37 to allow longer retention of records, especially where violent offences are involved. For murder, attempted murder, or aggravated sexual assault, records may be kept indefinitely in centralized police records, and for a longer list of less serious, violent and sexual offences, the period will be ten years as opposed to the present five years. On the other hand, for summary conviction offences, records will only be kept for three years from the completion of a disposition, reduced from the present five years, provided that there are no further offences.

These new provisions are obviously intended to address the criticisms of media, politicians, professionals and members of the public that more needs to be known about young offenders so that appropriate protective steps can be taken. While professionals who are treating and counselling youths should have adequate access to information about them, one has to wonder whether public safety will actually be increased if more information is made available in the community. One can expect more negative stereotyping and labelling of young offenders by their communities as a result of these changes. The longer period of retention for records of violent offences for possible use in subsequent adult criminal investigations or sentencing hearings is a justifiable attempt to increase public safety.

XII. Statements to the Police & Due Process

The *Y.O.A.* adopted a due process model of juvenile justice, which effectively guarantees every youth charged with an offence the right to a lawyer paid by the state,[95] and requires judges to exclude statements made by youths to the police unless detailed cautions are given to the youth.[96] These protections are more extensive than those afforded adults under the *Charter*.

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[94] See *e.g.* "Whitman Latest to Urge Laws on Notices of Sex Offenders" *The New York Times* (6 August 1994) 24, reporting on the Washington notification scheme, which has three levels of community notification depending on the offender's record and the likelihood of recurrence of an offence, and the judgement of experts. In one case in Washington the home of a sex offender was set on fire after the community was notified. There are concerns that the Washington scheme is "just creating a class of people that are going to move from community to community." See also National Center for Prosecution of Child Abuse, "Public Notification of Sex Offenders" in *Update* 8:1 (Alexandria, Va.: January 1995).

[95] *Y.O.A.*, *supra* note 1 at s. 11.

[96] *Ibid.* at s. 56.

Some critics decry the financial expense of providing such extensive legal services and argue that at least some of these resources might be better spent on providing therapeutic services to youths. However, the youth court process is complex and adolescents are less sophisticated and knowledgeable than adults: special measures to ensure that youths have adequate legal representation may be justified to ensure that they can understand and meaningfully participate in the process. But the unfortunate reality is that while some lawyers involved in this type of work are knowledgeable and have the social skills to communicate effectively with adolescents, others do not.[97] Adolescents are generally not sophisticated consumers of legal services, and may not even know when they are receiving inadequate legal representation. Provincial governments should ensure that lawyers involved in representing youths charged under the *Y.O.A.* have adequate training, just as lawyers in Ontario who represent children in child welfare cases must undergo specialized training.

Adolescents may be more easily pressured into making statements to police than adults,[98] and may even be coerced by authority figures into making false confessions. They also often lack appreciation of the legal and other consequences of making a statement to the police. This may justify affording them special protections when they are being questioned by the police. However, section 56 of the *Y.O.A.* imposes a very strict standard on the police. A police officer is required to give a youth, who is generally unknown to the officer, an explanation in, "language appropriate to his age and understanding" of relatively complex legal rights. At present even a relatively minor technical defect results in the automatic exclusion of the statement.[99]

A violation of the *Charter* in regard to an adult or youth only gives rise to a situation where the court has a *discretion* to exclude a statement if its "admission would bring the administration of justice into disrepute". While special legal protections for youths are justifiable, arguably there should be some judicial discretion for the admission of statements where there has been a good faith effort by police to comply with the statute. There are situations at present in which youths have confessed their guilt to the police, and cannot understand why they are not being held accountable. Bill C-37 deals with some of the difficulties faced by police, and clarifies some conflicting jurisprudence, though not all of the problems with section 56 are addressed.

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[97] D.K. Hanscom, *The Dynamics of Disposition in Youth Court* (LL.M. Thesis, University of Toronto, 1988), reported in "Lawyers' Performance Means Youths Go to Jail: Survey" *Lawyers Weekly* (18 May 1990) 5.

[98] See *e.g.* R. Abramovitch, K.L. Higgins-Biss & S. Biss, "Young Person's Comprehension of Waivers in Criminal Proceedings" (1993) 35 Can. J. Crim. 309.

[99] One case that caused particular public uproar was *R.* v. *J.(J.T.)*, [1990] 2 S.C.R. 755, 79 C.R. (3d) 219, where a confession by a relatively sophisticated 17-year-old boy to a brutal sexual assault and murder of a three-year-old child was ruled inadmissible because the police failed to obtain a written waiver for the making of a statement *after* he consulted a lawyer.

It is clear that the Supreme Court is taking a very protective attitude to the rights of youth, and in *R.* v. *R.(D.)*, [1994] 1 S.C.R. 881 ruled inadmissible a statement made to a police officer after an appropriate warning because a prior statement had been given which was inadmissible due to the lack of a proper caution. The Court found that the first statement "tainted" the second one. The police should have specifically told the youth before the second statement was made that he should not be influenced by the fact that he made a prior statement, as it might be inadmissible.

Section 56(2) is amended to clarify that police have an obligation to provide a warning to a youth who is arrested or detained, *or* where a youth is being questioned by a police officer who reasonably suspects the youth of having committed an offence.[100] By implication, however, section 56 will not apply to other situations where police are questioning a youth, for example if the young person is a potential witness, but there are *no* reasonable grounds at the time of questioning to believe that the youth committed an offence.[101]

In its original form, Bill C-37 contained a provision to clarify the effect of a 1993 Supreme Court of Canada decision[102] and alert police that a youth who is being questioned must be warned "when applicable", that he or she "may be dealt with as an adult, and if dealt with as an adult, could face the same consequences as an adult".[103] This provision was very broad since under section 16 any youth 14 or older charged with any indictable offence, other than some relatively minor property offences, *may* in theory face a transfer application; the provision therefore appeared to require that for virtually all indictable or hybrid offences the police would have had to provide this warning. This proposal was withdrawn from the final version of the Bill, as it was felt too draconian to statutorily require a police warning about a merely theoretical possibility for transfer in situations where transfer is not a realistic prospect. Unfortunately, in the absence of legislation, the Supreme Court of Canada decision appears to continue to require such a broad caution. A preferable solution would be for legislation to specify that such a statement is only admissible if such caution is given in a case where there is a presumption under section 16(1.01) or where the Crown actually applies to transfer.

Section 56(4) allows a youth to waive the right to consult a parent or lawyer in writing; this is amended to allow a videotaped waiver as well. This amendment is desirable as it should encourage more videotaping, which will provide a much more accurate record of questioning for any later court hearing than the common practice of police notetaking.

A new provision, section 56(5.1), gives courts a relatively narrow jurisdiction to admit statements where the police have not adequately complied with the section 56 warning provisions because the young person has held himself or herself out as being 18 years of age or older at the time of the police questioning, and the officer made reasonable inquiries to establish the youth's age.[104]

These proposed amendments to section 56 are quite narrow, and do not erode the due process rights currently afforded youths under the *Y.O.A.*

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[100] See *e.g. R.* v. *J.(J.T.)*, *ibid.* It should be noted that s. 56(2) actually applies to any statement given to a "person in authority" and may, for example, be relevant when a statement is made to a foster mother; see *R.* v. *M.A.*, [1994] B.C.J. No. 1860 (B.C. Yth. Ct.) (QL).

[101] *R.* v. *P.E.P. and K.W.S.* (1994), 153 A.R. 52, [1994] A.J. No. 281 (Prov. Ct.) (QL).

[102] *R.* v. *I.(L.R.) and T.(E.)*, [1993] 4 S.C.R. 504, 26 C.R. (4th) 119; see also *R.* v. *G.M.R.*, [1994] N.S.J. No. 566 (N.S.C.A.) (QL).

[103] Bill C-37, *supra* note 2 at s. 56(2)(b)(ii.1) (First reading 2 June 1994).

[104] See *R.* v. *K.J.H.*, [1994] O.J. No. 2563 (Prov. Ct.) (QL), for a case where a young person lied to an officer about his age, and said he was an adult. In that case it was done as part of an effort by the youth to deceive the officer about his identity. In other cases, the youth may lie to avoid parental involvement, as to allow detention with adult friends.

XIII. Future Parliamentary Hearings

The House of Commons Committee studying Bill C-37, the Justice and Legal Affairs Committee, completed its hearings in December 1994 and the Bill received Third reading in the House of Commons February 28, 1995.

The Committee has also been asked by the Minister of Justice to carry out a Second Phase of its hearings, with a broader inquiry into the youth justice system. This Second Phase is not expected to begin before late in 1995. The issues that the Minister would like explored are:

- the nature and extent of youth crime and criminal behaviour in young adults;
- public knowledge of and attitudes towards youth crime, the *Young Offenders Act* and the youth justice system, including particularly the knowledge and attitudes of young people;
- the *Young Offenders Act*, including the underlying issues governed by the current provisions of the *Act*, including but not limited to: the age range of the *Act*, transfer to adult court, sharing of information and publication of names, records, parental responsibility, statements by young persons, and sentencing provisions;
- alternatives to legislative responses to juvenile crime;
- the inter-relationship of youth services and the legislation; and
- aboriginal youth and the justice system, with an emphasis on culturally appropriate crime prevention and rehabilitation.[105]

In light of the relatively extensive amendments to the *Y.O.A.* in Bill C-37 and the Liberal *Red Book* policy statements, as well as the limited scope for *legislative* reform in this area, one might expect few recommendations for further *statutory* reform after the Second Phase of the hearings, unless the Committee decides to fundamentally reconsider issues or principles.

The only major issue of legislative concern which Bill C-37 did not address is age jurisdiction, a matter of considerable interest, at least to some of the provincial governments. With Bill C-37 creating a new regime for 16 and 17-year-olds charged with the most serious offences, one might expect that the public pressure for lowering the maximum age will be reduced. The issue of minimum age continues to be controversial.

Under the *J.D.A.*, criminal liability began at age 7, though children under 14 could be acquitted if they lacked the capacity to appreciate the consequences of their wrongful conduct (the *doli incapax* defence). In practice relatively few children under 12 were charged under the *J.D.A.*, and even fewer were removed from parental care. The expectation of the drafters of the *Y.O.A.* was that children under 12 who commit offences could be adequately dealt with by their parents or child welfare authorities.

While the problem of children under 12 committing offences since the *Y.O.A.* came into force may be exaggerated in the media, the question of minimum age jurisdiction is a continued cause for concern. For most children in this younger age group who are committing offences, a parental response, with perhaps a police caution and a referral

[105] Letter of Minister of Justice A. Rock to W. Allmand, Chair, Standing Committee on Justice and Legal Affairs (2 June 1994).

to an appropriate social agency, is sufficient. For more serious situations, however, reliance on child protection agencies has not been totally successful. Although some child welfare agencies have responded with specific programs, offending by children under 12 is not a priority for many child welfare agencies, perhaps understandably given the rising child abuse caseloads and shrinking budgets.[106]

Longer sentences for young offenders may not have any deterrent effect, but effectively announcing to children under 12 that they have *no* legal responsibility can only tend to increase offending behaviour. Furthermore, earlier involuntary court ordered intervention may be desirable with some children in this age group.

The confidence of police, victims and members of the public in the justice system is understandably undermined when ten and 11-year-olds are committing offences without an effective societal response. There have been a few serious offences committed by children in this age group in Canada,[107] but if we ever face a situation such as those which have occurred in Britain and the United States where nine and ten-year-olds have committed homicide, there will understandably be an enormous public outcry. Even without a homicide, confidence in the justice system is being eroded by the apparent lack of response to offending behaviour by children under 12.

While any minimum or maximum age has an element of arbitrariness, ages 12 through 18 have the advantage of roughly coinciding with the adolescent stage of physical, social and psychological development. Children under 12 generally have not reached puberty, and have not achieved the level of moral development of older youths,[108] though most children ten and older can appreciate the differences between right and wrong and understand fundamental legal concepts.[109] Ideally the best approach for offending behaviour by children under 12 might be for provinces to establish regimes that deal with offending behaviour but focus on their welfare, providing for social protection by allowing long term involuntary intervention in appropriate cases.[110]

Unfortunately, such an ideal approach seems unlikely to be adopted in the present fiscal and political climate and it may be necessary to consider a criminal response. If the criminal option is pursued, the minimum age for *Y.O.A.* jurisdiction could be lowered, perhaps to ten, an age that England has adopted, and one that may be consistent with the views of adolescents themselves.[111] For offenders under 12, any youth justice

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[106] N. Bala & D. Mahoney, "Responding to Criminal Behaviour of Children Under 12: An Analysis of Canadian Law & Practice" (Ottawa: Dept. of Justice, 1994).

[107] Canadian Centre for Justice Statistics, *Report on the Involvement of Children Under 12 in Criminal Behaviour* (Ottawa: Queens Printer, 1992), reports on a study that revealed that 1.2% of all criminal behaviour involves children under 12, compared to 20.8% for young offenders (12-17) and 78% for adults. If all children under 12 were charged, this would represent about 5% of youth crime. Most of the behaviour involved property offences, but some involved violence. One Canadian study indicates that about 10% of sexual offending by those under 18 involves children under 12. See J.P. Hornick *et. al., Young Offenders and the Sexual Abuse of Children* (Ottawa: Dept. of Justice, 1994).

[108] H.D. Thornburg, *Development in Adolescence* (Monterey, Calif.: Brooks/Cole, 1975).

[109] J.T. Dalby, "Criminal Liability in Children" (1985) 27 Can. J. Crim. 137; B. Peterson-Badali & R. Abramovitch, "Grade Related Changes in Young People's Reasoning About Plea Decisions" (1993) 17 Law & Human Behaviour 537.

[110] See the recommendations of B. Clark & T. O'Reilly-Fleming, "Out of the Carceral Straightjacket: Under Twelves and the Law" (1994) 36 Can. J. Crim. 305.

[111] P. Jaffe, A. Leschied & J. Farthing, "Youth's Knowledge and Attitudes About the *Young Offenders Act*: Does Anyone Care What They Think?" (1987) 29 Can. J. Crim. 309.

response should be a last resort, with clear restrictions on removal from parental care, and provisions to ensure that these children are not placed with older offenders.

XIV. Conclusion

The history of juvenile justice in Canada is one of successive reform. In the nineteenth century the reformatories for juveniles replaced the adult prisons; in 1908 the *Juvenile Delinquents Act* created the juvenile justice system, and in 1984 the *Young Offenders Act* came into force. Each change brought improvements, but ultimately failed to fully satisfy the objectives of its proponents.

It is difficult to decide whether to be cynical or cautiously optimistic about the 1995 reforms. The cynicism may be easier to understand. In some respects Bill C-37 represents a too common political response, to *appear* to be "solving" the complex problem of youthful crime by enacting a new "tougher" law. In reality this type of new law cannot hope to have the effect of reducing the levels of adolescent offending.

Bill C-37 appears in large measure to be an attempt to respond to the public clamour for "getting tough" with youth crime, and to be seen as a relatively rapid implementation of the 1993 election promises of the Liberal *Red Book.* However, a detailed reading of the Bill suggests that it contains somewhat inconsistent messages, especially in the high profile area of transfer. Of course the different themes found in Bill C-37 reflect conflicting policies found in the *Red Book,* and a divergence of views within the Liberal caucus. Certainly it is *possible* to be cynical, or at very least doubtful, about whether the Bill will increase the long term protection of the Canadian public.

On the other hand, the present Minister of Justice, Allan Rock, appears to be a thoughtful politician, who understands the complex nature of juvenile crime and recognizes the limitations of a "get tough" approach. Before the introduction of Bill C-37, he observed:

> If the answer to crime was simply harsher laws, longer penalties, and bigger prisons, then the United States would be nirvana today....We are only going to be able to have long-term and effective results if we create a society in which we minimize conditions which breed crime.[112]

Viewed in this light, Bill C-37 may be considered a compromise measure, intended to satisfy the enormous public demands (outside Quebec) for government action while maintaining the fundamental integrity of the youth justice system. Although some measures, especially the presumptive transfer provisions for older youths, will be complex and expensive to implement and seem undesirable, others in the sentencing field may actually tend to produce a more rehabilitative community-based system for young offenders.

At least initially Bill C-37 may result in more transfer hearings, especially for 16 and 17-year-old youths charged with the very violent offences listed in section 16(1.01). However, it seems possible that once the courts resolve the appropriate interpretation of

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[112] R. Howard, "Longer Terms for Young Killers Expected in Legislation Today" *The [Toronto] Globe and Mail* (2 June 1994) A6; see also G. Gherson, "Rock's Recipe for Crime Prevention: Give People a Sense They Have a Future" *The [Toronto] Globe and Mail* (8 June 1994) A22; and G. Gherson, "Too Soft, Too Tough? Rock Figures Reforms Are Just Right" *The [Toronto] Globe and Mail* (9 June 1994) A24.

section 16(1.1), there may be no increase in the number of transfers. Indeed, for 14 and 15-year-olds and for older youths not charged with the designated very violent offences, the Bill holds out the prospect of fewer transfers and more consistent treatment between provinces. It should also be emphasized that relatively few youths are involved in very violent offences, and Bill C-37 holds out the prospect that a relatively large number of less serious offenders will be receiving more appropriate community-based dispositions rather than their present custody-based sentences.

As with all law reform efforts in the juvenile justice field, the ultimate effect of the 1995 Liberal initiative will depend more on judicial interpretation and provincial implementation than on Parliamentary intent. The actual effect of any merely legislative change on juvenile crime in Canada is unlikely to be significant, as even the Minister of Justice himself appeared to recognize.

Reducing the levels of juvenile crime will require more sophisticated educational and social policies,[113] addressing the underlying causes and reality of youthful offending. This will require more effectively addressing such problems as child abuse, neglect and poverty, adolescence substance abuse and youth unemployment. While changes to the youth justice and corrections system can have some effect, reforming the health, education, social service and day care systems will ultimately have much more of an effect on levels of youthful criminality in Canada, and will in the long term be much more likely to result in a safer, more productive society.

[113] See Horner Committee Report, *supra* note 77.