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LEGISLATIVE SUMMARY

Bill C-4:
An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts

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Legislative Summary of Bill C-4

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-4: AN ACT TO AMEND THE YOUTH CRIMINAL JUSTICE ACT AND TO MAKE CONSEQUENTIAL AND RELATED AMENDMENTS TO OTHER ACTS

1 BACKGROUND[1]

1.1 PURPOSE AND PRINCIPAL AMENDMENTS

Bill C-4, An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts (short title: Sébastien's Law [Protecting the Public from Violent Young Offenders]) was tabled in the House of Commons by the Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson, and passed on first reading on 16 March 2010. **The bill died on the *Order Paper* when the federal election was called on 26 March2011.**

The purpose of the bill is to amend certain provisions of the *Youth Criminal Justice Act*[2] (YCJA) to emphasize the importance of protecting society and to facilitate the detention of young persons[3] who reoffend or who pose a threat to public safety. More particularly, the bill:

- establishes **specific** deterrence and denunciation as sentencing principles similar to the principles provided in the adult criminal justice system (clause 7);
- expands the case law definition of a violent offence to include reckless behaviour endangering public safety (clause 2);
- amends the rules for pre-sentence detention (also called "pre-trial detention") to facilitate the detention of young persons accused of crimes against property punishable by a maximum term of five years or more (clause 4);
- authorizes the court to impose a prison sentence on a young person who has previously been subject to a number of extrajudicial sanctions (clause 8);
- requires the Crown to consider the possibility of seeking an adult sentence for young offenders 14 to 17 years of age convicted of murder, attempted murder, manslaughter or aggravated sexual assault (clauses 11 and 18);
- facilitates publication of the names of young offenders convicted of violent offences (clauses 20 and 24);
- requires police to keep a record of any extrajudicial measures imposed on young persons so that their criminal tendencies can be documented (clause 25);
- prohibits the imprisonment of young persons in adult correctional facilities (clause 21).

Bill C-4 also includes the essential aspects of the two features contained in the former Bill C-25: [4] the addition of deterrence and denunciation as sentencing principles and, second, rules facilitating the pre-sentencing detention of young persons.

1.2 General Background to Proposed Reform

Youth crime in general, and violent youth crime in particular, are a significant source of concern to many Canadians. According to some, the phenomenon is on the rise, although the most recent statistics reported by police indicate that violent and non-violent crime committed by individuals 12 to 17 years of age has declined. According to Statistics Canada figures, the overall youth crime rate[5] fell by **1% in 2009 relative to 2008**. As for violent crime, the statistics indicate a **2%** drop from the previous year.[6] This is the **third** consecutive decline in the rate of violent crime involving young persons. Table 1 shows the rate of violent and non-violent crimes committed by young persons from **1999 to 2009**.

Table 1 – Youth Accused, **1999–2009**

Year	Total Youth Crime	Violent Crime	Property Crime	Other Offences
	Rate (per 100,000 young persons)			
1999	6,438	1,682	3,766	991
2000	6,915	1,917	3,909	1,088
2001	7,158	1,957	3,973	1,228
2002	6,945	1,870	3,878	1,196
2003	7,280	1,924	4,133	1,223
2004	6,957	1,894	3,858	1,205
2005	6,596	1,869	3,551	1,175
2006	6,812	1,952	3,612	1,248
2007	6,782	1,950	3,582	1,250
2008	6,574	1,905	3,442	1,227
2009	6,490	1,864	3,424	1,202

Source: Statistics Canada, Canadian Centre for Justice Statistics, *Uniform Crime Reporting Survey*.

The data generated by Statistics Canada's new Crime Severity Index (CSI)[7] in 2009 show that the severity of all youth crimes combined has generally been declining since 2001, although violent youth crime–while unchanged from 2008 to 2009–has increased by 10% since 1999.

In attempts to address the concerns of Canadians and to react to youth crime, Parliament has, from time to time, proposed amendments to youth justice legislation (we will briefly describe the development of youth justice in the next section). A number of those amendments were motivated in part by violent incidents involving young persons that had made the headlines and contributed to increased feelings of insecurity among the public. Bill C-4 is similar in that regard. The first part of its short title – Sébastien's Law – was chosen in memory of Sébastien Lacasse, who, in 2004, was chased down by a group of youths and killed on a Laval, Quebec, street by a 17-year-old.

In his speech in the House of Commons, the Minister of Justice (the Minister) emphasized that the bill would "make the protection of society a primary goal of our youth criminal justice system, and it will give Canadians greater confidence that violent and repeat young offenders will be held accountable."[8] The Minister noted a number of times that the proposed reform was based on the recommendations of the commission of inquiry chaired in Nova Scotia by the Honourable D. Merlin Nunn.[9]

The commission's mandate was to examine the charges laid against AB, a 16-year-old teenage male responsible for the death of Theresa McEvoy in Halifax on 14 October 2004, and the reasons leading to his release two days before that tragic incident. AB, who was driving around in a stolen car at the time of the incident, had been released on 12 October 2004, even though 38 criminal charges had been laid against him.

Commissioner Nunn's report, presented on 5 December 2006,[10] contains 34 recommendations, of which 19 concern the need to simplify the administration of justice and improve accountability, six concern reinforcement of the YCJA, and nine relate to the prevention of youth crime. In general, Mr. Nunn found that the YCJA "provides an intelligent, modern, and advanced approach to dealing with youths involved in criminal activities."[11] In his view, Canada is now "far ahead of other countries in its treatment of youth in conflict with the law."[12] He nevertheless felt that certain amendments to the YCJA were necessary "to give flexibility to the courts in dealing with repeat offenders, primarily by opening a door to pre-trial custody and enlarging the gateways to custody."[13] Mr. Nunn's recommendations specifically addressing the YCJA were as follows:

> Recommendation 20: The Province should advocate that the federal government amend the "Declaration of Principle" in section 3 of the *Youth Criminal Justice Act* to add a clause indicating that protection of the public is one of the primary goals of the act.
>
> Recommendation 21: The Province should advocate that the federal government amend the definition of "violent offence" in section 39(1)(*a*) of the *Youth Criminal Justice Act* to include conduct that endangers or is likely to endanger the life or safety of another person.
>
> Recommendation 22: The Province should advocate that the federal government amend section 39(1)(*c*) of the *Youth Criminal Justice Act* so that the requirement for a demonstrated "pattern of findings of guilt" is changed to "a pattern of offences," or similar wording, with the goal that both a young person's prior findings of guilt and pending charges are to be considered when determining the appropriateness of pre-trial detention.
>
> Recommendation 23: The Province should advocate that the federal government amend and simplify the statutory provisions relating to the pre-trial detention of young persons so that section 29 will stand on its own without interaction with other statutes or other provisions of the *Youth Criminal Justice Act*.
>
> Recommendation 24: The Province should advocate that the federal government amend section 31(5)(*a*) of the *Youth Criminal Justice Act* so that if the designated "responsible person" is relieved of his or her obligations under a "responsible person undertaking" the young person's undertaking made under section 31(3)(*b*) nevertheless remains in full force and effect, particularly any requirement to keep the peace and be of good behaviour and other conditions imposed by a youth court judge.
>
> Recommendation 25: The Province should advocate that the federal government amend section 31(6) of the *Youth Criminal Justice Act* to remove the requirement of a new bail hearing for the young person before being placed in pre-trial custody if the designated "responsible person" is relieved of his or her obligations under a "responsible person undertaking."[14]

It will be seen in the "Description and Analysis" section of this legislative summary how Bill C-4 provides for action on Recommendations 20 to 23 of the Nunn Report. However, the bill does not include provisions implementing Recommendations 24 and 25.

In October 2007, the Minister announced an exhaustive review of the YCJA for 2008, the fifth anniversary of the Act and the 100th anniversary of the youth criminal justice system.[15] One month later, he tabled Bill C-25 in the House of Commons.

At the Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety, held in Winnipeg in November 2007, the Minister discussed these issues with his provincial and territorial counterparts.[16] At the 2008 meeting, which was held in the city of Québec, the Minister and his counterparts agreed that the YCJA was too complex and that "areas of concern identified by all ministers include improving responses to serious and repeat youth offenders, giving greater discretion to judges regarding pre-trial detention and sentencing."[17]

In May 2008, the Minister made an announcement on the Department of Justice website inviting interested persons and organizations to submit their written comments on the YCJA before August 15 of that year. During the summer, news releases were issued stating that the Minister was also taking part in round tables across the country to gather the views of various partners and stakeholders in the youth criminal justice system.

The results of that consultation do not appear to have been published by the Department of Justice. We are therefore unable to determine whether the amendments made by Bill C-4 are a response to concerns raised during that review of the YCJA, which received the support of all federal, provincial and departmental ministers responsible for justice and public safety. **The ministers also discussed Bill C-4 at federal–provincial–territorial meetings in 2009 and 2010. However, news releases issued after these meetings contained no specific information regarding the bill.**

1.3 History of Youth Justice in Canada From 1908 to the Present

1.3.1 From 1908 to 1984

The approach to young offenders has evolved considerably since the *Juvenile Delinquents Act* (JDA), the first statute in Canada exclusively concerning young persons in conflict with the law, was passed in 1908.[18] Under that Act, young people in conflict with the law were seen as not-yet-mature beings in need of "aid, encouragement, help and assistance." According to the JDA, "every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child."[19] The response was therefore to protect the young offender by focusing on the factors that gave rise to the criminal behaviour rather than punishing the young person for the offence that brought him or her into contact with the justice system.

In the opinion of some, the involvement of the criminal justice system under the JDA resembled "more of a social welfare exercise than a judicial process."[20] This

approach, on which there was general agreement until the 1960s, was strongly criticized by some who felt that the JDA gave too much arbitrary power to legal authorities in the name of the welfare of the child and too little attention to a fairer and more equitable system. Young offenders were given indeterminate sentences that bore no relation to the seriousness of the offences. Some also decried the inconsistencies in the treatment of young offenders from province to province and the fact that young offenders had no basic rights or recourse in criminal law procedure, such as the right to consult a lawyer or to appeal a decision.

The process of reforming the JDA took a long time. It began in 1961, when a committee in the Department of Justice was given the task of examining youth crime,[21] and it ended in 1982 with the passage of the *Young Offenders Act*.

1.3.2 FROM 1984 TO 2003

When the *Young Offenders Act* (YOA) came into force in 1984,[22] it marked the beginning of a new era in dealing with young people in conflict with the law.[23] Compared to the JDA, it contained a much narrower definition of the term "young offender." Under the 1908 Act, the range of offences for which a young person could be prosecuted was very broad. Anyone from 7 to 15 years of age was a "juvenile delinquent" if he or she had committed an offence contained in the *Criminal Code*[24] or in any federal or provincial Act or regulation or municipal by-law, or who was guilty of "sexual immorality or any similar form of vice." Under the new YOA, a "young offender" was anyone from 12 to 17 years of age alleged to have committed an offence created by federal statutes or by regulations made there under (except Territorial ordinances). The new Act also set the threshold of criminal responsibility at 12, and standardized the age of criminal majority at 18 all across Canada.[25] But, as in the 1908 Act, under the YOA a youth court could send cases to adult court if they involved young people aged 14 or older alleged to have committed a serious crime.

The YOA also moved away from the exclusively "protective" approach of the 1908 Act in favour of an approach that attempted to balance the protection of a young offender with accountability. The young person was still seen as not yet mature, but his or her responsibility in a given matter was recognized. A young offender was therefore no longer seen simply as the product of his or her environment, but also as an involved and accountable participant. This change in approach also gave rise to the establishment of fundamental procedural guarantees for young people in conflict with the law, such as the right to a lawyer and the right to appeal a decision.

From the time it took effect, the YOA was criticized for not setting out clear principles to guide those with the task of upholding the law. Some claimed that this gave rise to disparity and injustice across the country. Another criticism of the YOA was that it placed more value on reintegration into society and rehabilitation than on public protection, particularly in cases in which young offenders were charged with serious crimes.

In response to these criticisms, the YOA was amended in 1986, 1992 and 1995. The amendments toughened the Act for young people charged with serious crimes. Among the amendments were longer sentences for murder, and reversal of the onus

of proof so that, in relevant cases, young offenders would have to prove that they should not be tried in adult court.[26]

1.3.3 FROM 2003 TO THE PRESENT

The YCJA[27] took effect in April 2003. Longer, more detailed and more complex than the Act that preceded it, the YCJA is an attempt to address the problems identified in the Act it replaced, such as over-reliance on court involvement and incarceration and too little consistency in the way the Act was enforced across the country. In addition to adding new sentences[28] and replacing trials in adult court with a system of adult sentences that can be imposed on young people over 14 years of age, it has a preamble and principles that are intended to provide clear direction to those with the responsibility of imposing penalties on young people convicted of criminal offences.

The preamble to the Act states that the youth criminal justice system should take the interests of victims into account, foster responsibility and ensure accountability through meaningful consequences and effective rehabilitation and reintegration through the elimination of the underlying causes of crime among young persons, and reduce over-reliance on incarceration for non-violent young persons. The YCJA also has a number of other underlying principles:

- The intent of the youth criminal justice system is to promote the long-term protection of the public.
- Young offenders should be held accountable for their behaviour by making them acknowledge the consequences of their offences and by encouraging them to repair the harm done to victims and the community.
- The parents of young offenders as well as the community as a whole should be, as appropriate, involved in the measures taken for the social integration of young offenders.
- The expectations of victims should be taken into consideration, and victims should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system.
- Ethnic background, language and gender must be respected when deciding how to hold a young person accountable, while the overriding principle remains that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.[29]

The YCJA also aims to provide justice more fairly and equitably through, for example, sentences that appreciably vary with the gravity of the offence. This means lighter penalties for those convicted of minor offences and more serious penalties for those convicted of serious offences.

The YCJA clearly establishes that a sentence must be “proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.”[30] In this sense, the YCJA reaffirms the responsibility of young people in conflict with the law; it also sets accountability as an objective that must guide all sentences imposed by youth courts as well as measures taken outside the court process (extrajudicial measures).

1.3.4 SUCCESS OF THE *YOUTH CRIMINAL JUSTICE ACT* OF 2003[31]

Most young people brought before the courts are charged with non-violent offences.[32] While the YOA provided for alternative measures to incarceration in such cases, these measures were rarely made available. In 1997, for example, they were used in only 25% of cases.[33] This is partially explained by the fact that the YOA was not clear enough in setting out the goals of extrajudicial measures, in describing the measures that were available and in establishing the cases in which their use was valid.

One of the objectives of the YCJA is to remedy the lack of sentencing guidelines in the YOA in order to have less court involvement for those who committed minor offences. Official crime statistics seem to show that the YCJA has met these expectations. "In 2008, 43% of youth accused of committing a *Criminal Code* offence were formally charged, while the remaining were dealt with through other means."[34] That year, the rate of charges laid against youth fell 4% from the previous year. According to the most recent statistics, 26% fewer cases were heard in youth court in 2006–2007 than in 2002–2003, the year before the YCJA came into effect. All provinces and territories saw their numbers drop: the largest reductions were in the Northwest Territories (52%), Newfoundland and Labrador (47%) and Yukon (45%).[35]

Lastly, the YCJA also appears to have achieved expected results in reducing the use of incarceration for young offenders. Under the YOA, about 80% of all custodial sentences were for non-violent offences[36] and Canada was known for having the highest rate of incarceration for young offenders between 12 and 17 of any Western country. In 2007–2008, non-violent offences were the cause of 43% of admissions to custody following conviction.[37] Since the YCJA came into force, the youth incarceration rate has also decreased substantially. In 2008–2009, the average number of youth in detention following conviction had fallen 42% relative to 2003–2004, the year in which the YCJA came into force.[38] The decrease in incarceration rates was not followed by an increase in the youth crime rate; as shown in Table 1, the youth crime rate has generally dropped since the Act came into force.

2 DESCRIPTION AND ANALYSIS

2.1 BASIC PRINCIPLES OF THE YCJA (CLAUSE 3)

In 2006, in his report for the public inquiry conducted in Nova Scotia, Commissioner Nunn recommended that protection of the public (in the short and long term) be included among the principles stated in clause 3 of the YCJA to assist in solving the problem presented by the small number of dangerous offenders and re-offenders.[39] The YCJA expressly includes "long-term protection of the public" as a principle.[40] Clause 3 of the bill amends paragraph 3(1)(*a*) of the YCJA, which will now refer to "protecting the public" (in the short and long terms), by holding young persons accountable, promoting their rehabilitation and reintegration and referring them to programs or agencies in the community to address the circumstances underlying their offending behaviour.

By amending paragraph 3(1)(*b*) of the YCJA, clause 34 of the bill also provides that the youth criminal justice system is based on the principle of diminished moral blameworthiness or culpability of young persons. The Supreme Court of Canada has previously held that there is a rebuttable presumption of diminished blameworthiness or culpability in young persons by reason of the fact that they are more vulnerable, less mature and less able to exercise moral judgment.[41]

2.2 Detention Prior to Sentencing (Clause 4)

In general, the *Criminal Code* provisions concerning bail hearings apply to release and detention prior to sentencing.[42] The YCJA may, however, override those provisions by providing specific rules applying to young persons.[43]

Under the current rules, youth court must direct the release of a young person, except where the prosecution can justify detaining that young person under section 515 of the *Criminal Code*.[44] In addition, subsection 29(2) of the YCJA (in reference to paragraphs 39(1)(*a*) to (*c*), which concern imprisonment upon conviction) provides for a specific presumption in favour of releasing a young person until sentencing. However, in three specific cases that presumption does not apply, and the young person may be detained until sentencing:

- The young person has been charged with a violent offence.[45]
- The young person has failed to comply with non-custodial sentences.
- The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history of findings of guilt.

The bill amends subsection 29(2) of the YCJA to provide, in that subsection alone, all reasons justifying the detention of young persons prior to sentencing. By simplifying the pre-sentencing detention regime, the bill implements Recommendation 23 of the Nunn Commission.

Clause 4 of the bill provides that the pre-sentencing detention of young persons is prohibited, except where the young person is charged with a “serious offence” and where the Crown prosecutor satisfies the Court, on a balance of probabilities, that:

- there is a substantial likelihood that the young person will not appear in court[46] or will commit a “serious offence”; and
- no condition or combination of conditions of release would reduce that substantial likelihood.

Clause 2(3) of the bill defines “serious offence” as “an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more.” A large number of *Criminal Code* convictions are punishable by a maximum prison term of five years or more, such as child pornography, murder, impaired driving, assault, sexual assault,[47] theft over $5,000, breaking and entering and fraud.

In addition, unlike the definition of "violent offence" established by the Supreme Court, which excluded offences solely against property,[48] the definition of "serious offence" in clause 2(3) includes offences against both property and the person. Consequently, the bill extends the potential application of pre-sentencing detention to young persons charged with offences against property that may result in maximum terms of imprisonment of at least five years.

To determine whether there is a substantial likelihood that the young person will not appear in court or will commit a serious offence, the court may, for example, consider prior convictions as well as outstanding charges against the young person. The bill therefore appears to implement Recommendation 22 of the Nunn Commission, which suggested that courts be allowed to consider outstanding charges so that they can more easily detain, before sentencing, young persons charged with a series of offences committed in rapid succession.

Note, lastly, that the YCJA expressly provides that the court sentencing the young person must consider time served in detention prior to sentencing.[49] The court then has the discretion to decide on the credit that should be granted in computing the term of imprisonment.[50]

2.3 Sentencing Principles: Denunciation and Deterrence (Clause 7)

The purpose of sentencing under the YCJA is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences promoting his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.[51]

In addition to the general principles stated in section 3 of the Act, subsection 38(2) states the principles that must guide a youth justice court in appropriate sentencing. For example, subsection 38(2) provides that the sentence imposed must be proportionate to the seriousness of the offence and to the degree of responsibility of the young person for that offence and afford the best chances for rehabilitation and reintegration into society. It must also be the least restrictive sentence that is capable of achieving the sentencing purpose and must in no case be greater than punishment appropriate for an adult.

In amending subsection 38(2) of the YCJA, clause 7 of the bill adds the following two objectives to these sentencing principles: "to denounce unlawful conduct" and "to deter the young person from committing offences." These two principles are already included in the framework for sentencing adults.[52] **Nonetheless, the deterrence principle is more general in the latter case, since the punishment may be used to deter the adult from committing a new offence and the public from committing this type of offence (specific deterrence vs. general deterrence).** In its decision in *R.* v. *B.W.P.*; *R.* v. *B.V.N.*,[53] the *Supreme Court of Canada* held that deterrence does not constitute a sentencing principle for young offenders under the current regime of the YCJA. While deterrence had to be considered under the YOA,[54] the Court noted that the YCJA had introduced an entirely different and new sentencing regime.[55]

Like the former Bill C-25 on the youth criminal justice system, which also provided for the principles of denunciation and deterrence, Bill C-4 makes those principles subject to the application of the fundamental principle of the proportional nature of the sentence to the seriousness of the offence and to the degree of responsibility of the young offender for the offence.[56]

2.4 Keeping a Police Record of Extrajudicial Measures (Clause 25)

Sections 4 to 12 of the YCJA provide for measures that police officers and Crown prosecutors may take instead of instituting legal proceedings. For all offences, they must first determine whether an extrajudicial measure will be sufficient to make the young person accountable and to ensure the long-term protection of the public. Whenever a young person has committed a non-violent offence and has not previously been convicted of an offence or had previously committed an offence for which an extrajudicial measure was used, the YCJA provides that police or the Crown should use extrajudicial measures, except in exceptional cases.[57]

Police or Crown prosecutors wishing to use the available extrajudicial measures must, in all cases, have reasonable grounds to believe that the young person has committed an offence. They have full discretion in deciding which extrajudicial measure they deem to be appropriate in each case.[58] They may thus:

- take no measures (police);
- issue the young person a caution (police);
- issue the young person a formal warning (police and Crown);
- refer the young person to a program or agency in the community that may help him or her stop offending (police); or
- refer the young person to a program of extrajudicial sanctions (police and Crown).

Currently, a police department conducting an investigation of a young person *may* establish a file that includes, among other things, measures taken with the young person, as well as police notes, victim statements, fingerprints and photographs.[59] Clause 25 of the bill *requires* the police force to keep a record of any extrajudicial measures taken to deal with the young person. If that person is convicted of the offence, the police force will then be required to forward the file to the Royal Canadian Mounted Police for the purpose of keeping criminal history files or records of the offenders.[60]

2.5 Custodial Sentences Specific to Young Persons (Committal to Custody) (Clause 8)

For all offences except murder, a court sentencing a young offender under the YCJA[61] must first consider the many options that do not involve custody.[62] Section 42 of the Act sets out a wide range of sentences such as a formal reprimand from the judge, community service, restitution, compensation, or placement in an intense program of support and supervision.

The YCJA seeks to limit custody to cases of young offenders who are violent or who otherwise present a danger to the public. In sentencing a young person under subsection 39(1) of the YCJA, a court can currently choose incarceration only in the following four cases:

- the young person has committed a violent offence;[63]
- the young person has failed to comply with two or more non-custodial sentences;
- the case is an exceptional one, where the aggravating circumstances warrant a custodial sentence;
- the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has several findings of guilt under the YCJA or YOA.

Clause 8 of the bill amends subsection 39(1) of the YCJA to add a fifth case in which a custodial sentence may be imposed:

- the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has had a number of extrajudicial sanctions under the YCJA or the YOA.[64]

Extrajudicial sanctions differ from other types of extrajudicial measures – such as cautions, warnings and referrals by police officers – in that the young person must formally acknowledge responsibility for the offence.[65] Under the current provisions of the YCJA, unlike failure to comply with the other types of judicial measures, failure to comply with an extrajudicial sanction may result in judicial proceedings, and the information that a young person has been subject to an extrajudicial sanction may be adduced in evidence in court to establish that person's criminal conduct.[66] However, an admission of guilt by a young person in order to receive an extrajudicial sanction is never admissible in evidence.[67]

The YCJA does not define what constitutes a "violent offence." However, as we have already mentioned, the Supreme Court of Canada defined it in 2005 as: "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm."[68] However, this definition excluded offences during which bodily harm is only reasonably foreseeable.[69] Bill C-4 expands this definition by adding reckless behaviour that endangers the safety of the public. More specifically, clause 2(3) of the bill defines "violent offence" variously as:

- an offence causing bodily harm;
- an attempt or a threat to cause bodily harm; and
- an offence that endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.[70]

Consequently, the bill also increases the opportunity for the court to impose a custodial sentence on a young person convicted of this kind of reckless offence.[71] This is consistent with Recommendation 21 of the Nunn Commission, which suggested including in the definition of violent offence behaviour that is likely to endanger the life or safety of another person.

2.6 Application of Adult Sentences to Young Persons (Clauses 11 and 18)

The YCJA precluded the possibility of referring young persons to adult courts. Since 2003, all proceedings involving young persons have been conducted in youth court, which may currently impose a sentence applicable to adults solely in the following cases:

- where a young person (aged 14 or older at the time of the offence) is found guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years;[72]
- where a young person (at least 14 years of age at the time of the offence, but the provinces may increase the age limit to 15 or 16)[73] is found guilty of murder, attempted murder, manslaughter, aggravated sexual assault or the third in a series of serious offences involving violence, there is a presumption that a conviction will bring with it an adult sentence, but the presumption may be rebutted if the court is persuaded that the length of a youth sentence would be sufficient to hold the young person accountable.[74]

The courts have addressed this presumption, and in 2008, the Supreme Court of Canada[75] rendered a decision in *R.* v. *D.B.* similar to those of the appellate courts of Quebec[76] and Ontario,[77] finding that requiring young people to challenge the presumption that an adult sentence applies, rather than having the Crown attempt to prove that an adult sentence is justified, violates section 7 of the *Canadian Charter of Rights and Freedoms*.

Bill C-4 repeals this presumption.[78] As a result, a youth court may impose an adult sentence solely in the following case: where a young person (aged 14 or older at the time of the offence) is found guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years.

In this case, then, under clause 11 of the bill,[79] the Crown prosecutor *may* ask a youth court to impose an adult sentence, and where the young person was at least 14 years of age at the time of the offence (although the provinces may increase the limit to 15 or 16) and the offence is a “serious violent offence,” the Crown prosecutor *will be required* to determine whether an application to impose an adult sentence should be filed; should the prosecutor decide not to file such an application, he or she *will be required* to inform the court of that fact.

According to subclause 2(2) of the bill, a “serious violent offence” means murder, attempted murder, manslaughter or aggravated sexual assault. These are essentially designated offences which currently give rise to the presumption that the offender should be subject to an adult sentence.

The onus of proof lies with the Crown prosecutor who files an application to impose an adult sentence on a young person. To have an adult sentence imposed, the prosecutor will have to convince the youth court, beyond a reasonable doubt, that:

- the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and

- a youth sentence would not be of sufficient length to hold the young person accountable for his or her offending behaviour (clause 18 of the bill).

Under the current rules of the YCJA, in its decision to impose an adult sentence, a youth court must consider the seriousness and circumstances of the offence, the age, maturity, character, background and previous record of the young person and any other factors it deems relevant.[80]

2.7 Place of Detention (Clause 21)

Currently the youth court decides, after a hearing, on the appropriate place of detention. Subsection 76(2) of the YCJA provides for a presumption based on the age of the young person:

- If the young person is under the age of 18 years at the time that he or she is sentenced, the court shall order that he or she be placed in a youth custody facility.
- If the young person is 18 years or older at the time that he or she is sentenced, the court shall order that he or she serve the sentence in a provincial correctional facility for adults or, if the sentence is two years or more, in a federal penitentiary for adults.[81]

However, the court may order that a young person under the age of 18 will serve his or her sentence in a correctional facility for adults if the Crown prosecutor proves, for example, that the young person is preventing or impeding the progress of other young persons confined at a place of detention and presents a threat to their safety.[82]

Clause 21 of the bill replaces subsection 76(2) of the YCJA in order to remove the possibility that a young person under the age of 18 might serve his or her sentence at an adult correctional facility. The bill thus provides that young persons under the age of 18 will, in all cases, serve their sentences at a youth custody facility.

2.8 Publication of the Names of Young Persons (Clauses 20 and 24)

Since the JDA of 1908, the Canadian youth justice system has operated on the principle that publishing the identity of a young person would adversely affect his or her reintegration into society, would be prejudicial to him or her and, therefore, would compromise long-term public safety. The privacy principle is clearly stated in subparagraph 3(1)(*b*)(iii) of the YCJA.[83] The general rule therefore prohibits the publication of information revealing the identity of a young person.[84] However, the YCJA provides for certain exceptions to the ban on publication, in particular:

- where the young person has received an adult sentence, the information on the identity of that young person is automatically published;[85] and
- where an application has been filed for a young person to be subject to an adult sentence for certain offences (murder, attempted murder, manslaughter, aggravated sexual assault or a third serious violent offence) and the court has

> dismissed that application and instead imposed a young offender sentence, there is a presumption that information on the young offender's identity will be published.[86]

In the latter case, the young person may rebut the presumption by satisfying the youth court that there are grounds to ban publication. The court must then consider the public interest and the importance of the young person's rehabilitation.[87]

The Supreme Court of Canada[88] and the Quebec Court of Appeal[89] have held that this presumption violates section 7 of the *Canadian Charter of Rights and Freedoms*. Clauses 20 and 24 of the bill therefore replace it with the possibility of publishing information on the identity of a young person where the court has dismissed an application that was filed to impose an adult sentence on a young person and has instead imposed a young offender sentence for a "violent offence" within the meaning of clause 2(3) of the bill.

For publication to be permitted in that case, the Crown prosecutor must satisfy the youth court that there is a substantial likelihood the young person may commit another "violent offence" and that it is necessary to lift the ban in order to protect the public from that risk. The youth court must then consider the basic principles stated in sections 3 and 38 of the YCJA.

Contrary to the current presumption, with regard to which the young person carries the onus of proof justifying non-publication, the bill provides that the burden is on the Crown prosecutor to convince the court to authorize publication. However, the new definition of "violent offence" includes many more types of criminal behaviour than the offences giving rise to the current publication presumption (i.e., murder, attempted murder, manslaughter, aggravated sexual assault or a third serious violent offence). Note, in concluding, that the minimum age at which the court may authorize publication of information on the identity of a young person is 14 at the time of the offence, under both the current provisions and those of Bill C-4.

3 COMMENTARY

Since the YCJA came into effect in April 2003, debate has raged over the treatment that young people in conflict with the law should receive. Some say the Act is too lenient in its provisions regarding repeat offenders and those who commit serious crimes. Others say the Act places greater emphasis on protection of the public than on the rehabilitation and social reintegration of young people. The challenge for lawmakers is to design an approach that allows serious matters involving young people to be dealt with in a way that protects the public and meets victims' needs while still recognizing that young people do not have the same degree of responsibility as adults, given their age and level of maturity.

While the provision in Bill C-4 prohibiting the imprisonment of young persons in adult correctional facilities has significant support, opinion is divided on the other provisions of the bill, particularly the addition of **specific** denunciation and deterrence as sentencing principles, as is done for adults. In the view of Nicholas Bala, Professor of Law at Queen's University, this is a step in the wrong

direction, since research shows that "deterrence does not work with young persons."[90] According to Professor Bala, the punitive approach would be ineffective in combating youth crime because young persons frequently act impulsively and often do not have the necessary intellectual capability to fully assess the consequences of their actions.

Rachel Grondin, Professor of Law at the University of Ottawa, says that by emphasizing deterrence over rehabilitation, the bill favours immediate public safety to the detriment of long-term protection based on the rehabilitation of the young persons in question.[91] According to the bill's critics, this provision is contrary to the established principle that, as a result of their age and degree of maturity, young persons must be subject to a separate system from the adult system and that the emphasis should be on their rehabilitation and reintegration into society rather than on denunciation and deterrence.[92]

Also sharply criticized has been the amendment that would enable the court to take into account the extrajudicial sanctions to which a young person has been subject in order to justify a prison term where that young person is convicted of an offence for which an adult would be liable to a prison term of more than two years. Some believe that the use of this information is contrary to the normal course of justice. Lawyer Marie-Pierre Poulin, from the youth division of legal aid in Longueuil, Quebec, noted that young persons "have not had the opportunity to defend themselves" when extrajudicial sanctions are imposed.[93] Other critics say that if adopted, this provision could undermine efforts to keep cases out of the courts and to reduce the use of prison terms to manage the youth crime for which the YCJA was passed. "No family would go along with extrajudicial measures if there is a risk they will be used against a youngster at any time in the future. In one fell swoop an approach that has amply proven its worth could be undermined."[94]

Lastly, it has been argued that an increase in prosecutions and incarceration could have harmful effects over the long term. According to a study conducted in Montréal and published in the *Journal of Child Psychology and Psychiatry* in 2009, teenagers who come into contact with the justice system are nearly seven times more likely to be arrested for offences as adults, compared to youths of the same age with a similar history of criminal behaviour but who have not been taken into the justice system. The situation is apparently even more alarming for young persons who are incarcerated.[95] These findings confirm thinking that dates back to the 19th century, when the first reformers noted that youth correctional facilities often acted as "schools of crime." According to the study's authors, two solutions are needed in order to reduce the undesirable (or "iatrogenic") effects of the youth justice system: "The first is to implement early prevention, so as to reduce the number of minors who become involved with the justice system. The second is to reduce, as far as possible, the stigma attached to the justice system and to minimize the concentration of problem youths, thereby reducing the risk for both labelling and peer contagion."[96]

NOTES

1. Sections of this publication are drawn from the publication by Lyne Casavant, Robin Mackay and Dominique Valiquet, *Youth Justice Legislation in Canada*, Publication no. 2008-23-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 2008.

2. S.C. 2002, c. 1.

3. Under the YCJA, "young person" means a person 12 to 17 years old who is suspected of having committed an offence created by federal Act or regulation.

4. Bill C-25: An Act to amend the Youth Criminal Justice Act, 2nd Session, 39th Parliament.

5. The crime rate is calculated per 100,000 young people in the 12- to 17-year-old age group who meet the following two conditions: (1) they are suspected of having committed an indictable offence under the *Criminal Code* and (2) they have been officially charged by the police or the police have recommended to the Crown that charges be laid against them or their case has been resolved without charges being laid (e.g., extrajudicial measures). **Mia Dauvergne and John Turner, "Police-reported crime statistics in Canada, 2009," *Juristat*, Statistics Canada catalogue no. 85-002-X, Vol. 30, No. 2, July 2010.**

6. It is important to emphasize that the violent crime rate now includes a number of offences that were not previously considered and that the related data collated by Statistics Canada have been comparable only since 1998. The "violent crime" offence category has been revised to include a number of offences which were previously considered to be "Other *Criminal Code*" offences. Those offences include criminal harassment, sexual offences involving children, forcible confinement or kidnapping, extortion, uttering threats and threatening or harassing phone calls.

7. **Mia Dauvergne and John Turner, "Police-reported crime statistics in Canada, 2009," *Juristat*, Statistics Canada catalogue no. 85-002-X, Vol. 30, No. 2, July 2010. The new Crime Severity Index (CSI) is a tool used to measure crime trends. It allows Statistics Canada to assign a weight to each crime according to its seriousness, based on the sentences handed down by the criminal courts across Canada. To calculate this figure, Statistics Canada assigns to each crime a different weight derived from the average of the sentences handed down by the courts for that offence. The more serious offences are assigned heavier weights than less serious offences. Consequently, the more serious offences have a more significant impact on the CSI.**

   The CSI allows Statistics Canada to track changes in the severity of police-reported crime from year to year. This tool, developed at the request of community police, makes it possible to determine whether crimes brought to the attention of police are more or less serious than before, and whether police-reported crime in a given city is more or less serious than in Canada overall. Lastly, since the time spent on police investigations depends in part on the seriousness of the offences, the CSI also allows police forces to show that, even though the volume of crimes reported in one city might be lower than the volume in another, the police resources needed in the former may be higher in light of the severity of the crimes reported and the ensuing complexity of the investigations.

   Additional information on the CSI is available at Statistics Canada, *Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey*, Statistics Canada catalogue no. 85-004-X, 2009.

8. The Honourable Rob Nicholson, Speech in the House of Commons, *Debates*, 19 March 2010.

9. On 29 June 2005, Nova Scotia commissioned this public inquiry and named the Honourable D. Merlin Nunn commissioner for that purpose.

10. D. Merlin Nunn, *Spiralling Out of Control: Lessons Learned from a Boy in Trouble – Report of the Nunn Commission of Inquiry*, December 2006 [Nunn Commission Report].

11. Ibid., p. 238.

12. Ibid.

13. Ibid., p. 230.

14. Ibid., pp. 237–248.

15. Department of Justice, "Backgrounder: Proposed Amendments to the *Youth Criminal Justice Act*," November 2007.

16. See Canadian Intergovernmental Conference Secretariat, "Federal, Provincial and Territorial Ministers Responsible for Justice and Public Safety Meet," Press release, 16 November 2007.

17. Department of Justice, "Federal/Provincial/Territorial Ministers Committed to Addressing Key Justice and Public Safety Issues Facing Canadians," News release, 5 September 2008.

18. S.C. 1908, c. 40, repealed.

19. Department of Justice, *The Evolution of Juvenile Justice in Canada*, International Cooperation Group, 2004.

20. Ibid.

21. Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada*, Queen's Printer, Ottawa, 1965.

22. R.S.C. 1985, c. Y-1, repealed.

23. The YOA was adopted in 1982, but did not come into force until 1984, as a way of addressing the concern to provide a sufficient transition between the two regimes.

24. R.S.C. 1985, c. C-45.

25. The age of criminal majority under the JDA was set at 16. The provinces, however, could ask that it be raised to 17 or 18. As a result, Quebec and Manitoba set the age of criminal majority at 18, whereas Newfoundland and British Columbia set it at 17.

26. The 1992 amendments increased maximum terms for murder to five years. Other amendments, made in 1995, raised terms to 10 years for first-degree murder and to seven years for second-degree murder.

27. S.C. 2002, c. 1.

28. The YCJA incorporates the alternative measures provided for in the JDA and adds new ones under the heading of extrajudicial measures.

29. Ss. 3, 5 and 38 of the YCJA.

30. Subsection 38(2) of the YCJA.

31. For detailed information on the impact of the YCJA on the youth justice system, see Nicholas Bala, Peter L. Carrington and Julian V. Roberts, "Evaluating the *Youth Criminal Justice Act* after Five Years: A Qualified Success," *Canadian Journal of Criminology and Criminal Justice*, Vol. 51, No. 2, April 2009.

32. See Department of Justice, "Principal Charge in Majority of Cases in Youth Court (Canada, 1998–99)," *YCJA Explained*.

33. It also provides that these measures are enforced by police (responsible for cautions and referrals) and by the Crown (responsible for warnings); Department of Justice, *A Youth Strategy for the Renewal of Youth Justice*, 1999.

34. Wallace (2009), p. 12.

35. Complete data are available in Canadian Centre for Justice Statistics, *Youth Court Statistics, 2006–2007*, Statistics Canada Catalogue No. 85-002-XIE, Vol. 28, No. 4, May 2008.

36. Department of Justice, "Youth Sentencing," *YCJA Explained*, May 2002.

37. Rebecca Kong, "Youth custody and community services in Canada, 2007–2008," *Juristat*, Statistics Canada Catalogue No. 85-002-SX, Vol. 29, No. 2, May 2009, p. 7.

38. Statistics Canada, "Adult and youth correctional services: Key indicators," *The Daily*, 8 December 2009.

39. Nunn Commission Report, Recommendation 20.

40. See para. 3(1)(*a*) and subsection 38(1) of the YCJA.

41. See *R.* v. *D.B.*, [2008] 2 S.C.R. 3, paras. 41 and 45.

42. S. 28 of the YCJA.

43. For a detailed analysis of the conditional release system, see Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law*, Toronto, Irwin Law, 2nd ed., 2009, p. 293 and following.

44. The reverse onus provisions in subsection 515(6) of the *Criminal Code* do not apply where the presumption referred to in subsection 29(2) of the YCJA applies (see Department of Justice, "Pre-Trial Detention," *YCJA Explained*.)

45. Noting the absence of a legal definition, the Supreme Court of Canada defined "violent offence" as "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm." However, that definition excluded offences strictly against property (*R.* v. *C.D.*; *R.* v. *C.D.K.*, [2005] 3 S.C.R. 668, paras. 17, 51 and 52).

46. Compare para. 515(10)(*a*) of the *Criminal Code*.

47. Common assault (s. 265 of the *Criminal Code*) and sexual assault (s. 271 of the *Criminal Code*) involve a broad range of behaviours.

48. See note 45.

49. Para. 38(3)(*d*) of the YCJA.

50. See on this point *R.* v. *B. (T.)*, (2006) 206 C.C.C. (3d) 405 (C.A. Ont.).

51. Subsection 38(1) of the YCJA.

52. Paras. 718(*a*) and (*b*) of the *Criminal Code*.

53. [2006] 1 S.C.R. 941, para. 4.

54. With less importance, however, than in the case of adult offenders (*R.* v. *M. (J.J.)*, [1993] 2 S.C.R. 421, 434).

55. *R.* v. *B.W.P.*; *R.* v. *B.V.N.*, paras. 4 and 21.

56. As is currently the case for the sentencing of adults (s. 718.1 of the *Criminal Code*).

57. Paras. 4(*c*) and (*d*) of the YCJA.

58. Citizens committees (called youth justice committees) or advisory groups may make recommendations on extrajudicial measures (ss. 18 and 19 of the YCJA).

59. Subsection 115(1) of the YCJA. See Pierre Hamel, *Loi sur le système de justice pénale pour les adolescents*, Cowansville, Éditions Yvon Blais, 2009, p. 444.

60. Subsections 115(2) and (3) of the YCJA.

61. Murder is the only offence for which the Act provides for mandatory custody (s. 42 of the YCJA).

62. Subsection 39(2) of the YCJA.

63. See note 45.

64. The extrajudicial sanctions set out in the YCJA are the equivalent of alternative measures in the YOA.

65. Para. 10(1)(*e*) of the YCJA.

66. Ss. 9 and 10 and subpara. 40(2)(*d*)(iv) of the YCJA. See also Hamel (2009), pp. 35 to 45.

67. Subsection 10(4) of the YCJA.

68. *R.* v. *C.D.*; *R.* v. *C.D.K.*, [2005] 3 S.C.R. 668, para. 17.

69. Ibid., paras. 76 and 77. In the Court's view, the YCJA should be designed in part as follows:

> … to reduce over-reliance on custody for young offenders, a narrow interpretation of the term "violent offence," which acts as a gateway to custody, is to be preferred. However, a definition of "violent offence" that includes offences where bodily harm is merely reasonably foreseeable is quite broad, since most *Criminal Code* offences may, at some point, lead to harm.

70. S. 2 of the *Criminal Code* defines "bodily harm" as "any hurt or injury that interferes with the person's health or comfort and is more than just brief or minor."

71. On recklessness, see *R.* v. *Hamilton*, [2005] 2 S.C.R. 432, paras. 27 and 28.

72. S. 62 of the YCJA.

73. S. 61 of the YCJA. Quebec set the age of presumption at 16 in March 2003 (Order 476-2003).

74. Ss. 62, 63 and 72 of the YCJA.

75. [2008] 2 S.C.R. 3.

76. *Québec (Ministre de la Justice)* c. *Canada (Ministre de la Justice)*, [2003] R.J.Q. 1118 *(Renvoi relatif au projet de loi C-7 sur le système de justice pénale pour les adolescents)*.

77. *R.* v. *B.(D.)*, (2006), 206 C.C.C. (3d) 289.

78. See, among others, clause 10 of the bill.

79. This clause also applies to an offence committed before the coming into force of the bill (see clause 29 of the bill).

80. Subsection 72(1) of the YCJA.

81. Subsection 76(9) of the YCJA establishes the principle that the young person may not remain in a youth custody facility after the age of 20.

82. Hamel (2009), p. 297.

83. See also the decision of the Supreme Court of Canada in *R.* v. *R.C.*, [2005] 3 S.C.R. 99.

84. Subsection 110(1) of the YCJA.

85. Para. 110(2)(*a*) of the YCJA. See *R.* v. *D.B.*, [2008] 2 S.C.R. 3, para. 29.

86. S. 75 and para. 110(2)(*b*) of the YCJA.

87. Subsection 75(3) of the YCJA.

88. *R.* v. *D.B.*, [2008] 2 S.C.R. 3, para. 87:

> Losing the protection of a publication ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled.

89. *Québec (Ministre de la Justice)* c. *Canada (Ministre de la Justice)* (2003).

90. Hélène Buzzetti, “Les critiques veulent une protection durable,” *Le Devoir* [Montréal], 18 March 2010, p. A2 [translation].

91. Ibid.

92. “Making things worse for young offenders,” Editorial, *The Gazette* [Montréal], 22 March 2010, p. A25.

93. Buzzetti (2010).

94. “Making things worse for young offenders” (2010).

95. Richard Tremblay and Frank Vitaro, “Iatrogenic effect of juvenile justice,” *Journal of Child Psychology and Psychiatry*, Vol. 50, No 8, August 2009. This research project was conducted in Montréal by Richard Tremblay and Frank Vitaro of the Université de Montréal, in cooperation with Uberto Gatti of the University of Genoa, in Italy.

96. Ibid., pp. 996 and 997.