Canada. Department of Justice

Consultation document on the custody and review provisions of the Young Offenders Act

CONSULTATION DOCUMENT

ON THE CUSTODY AND REVIEW PROVISIONS

OF THE YOUNG OFFENDERS ACT

Department of Justice Canada

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I INTRODUCTION

It was not long after the Young Offenders Act was proclaimed in force in 1984 that sentence-related concerns began to emerge in some quarters. Given the magnitude of change from the previous Juvenile Delinquents Act to the Young Offenders Act, growing pains were inevitable as governments and professionals working within Canada's youth justice system faced change:

- the interpretation of a new law with an emphasis on responsibility for one's actions, rights of an accused, and protection of the public, as well as on the needs of young persons in conflict with the law; and

- the need for realignment of provincial/territorial legislation and service delivery systems to accommodate the shift in the law and the changes in the age limits.

It was therefore considered premature to respond to the initial concerns associated with sentencing generally given the lengthy study, debate and consultation which had preceded the passage of the Young Offenders Act. In short, these issues were seen to require greater experience, more comprehensive data, time for national patterns to emerge and the opportunity for further consultation with a wide range of professionals. At this juncture, however, a comprehensive assessment of the custody and review provisions is timely and warranted. A great deal of discussion has already occurred at the governmental level. Broader input from the non-governmental sector has also been sought. In 1989, a consultation document, entitled "The Young Offenders Act: Proposals for Amendment", was distributed to more than a hundred organizations active in youth justice issues. This document addressed four distinct issues:

- the appropriate legislative response to murder allegedly committed by a young person;

- custody and review provisions;

- admissibility of statements made by young persons to persons in authority; and

- assessments and dispositions for youth with special needs.

Bill C-58, An Act to Amend the Young Offenders Act and the Criminal Code, has been tabled in the House of Commons and is now at the Report Stage. It is the government's response to the first issue outlined above. The other issues were not included in the same legislative package for numerous reasons, the most important being an absence of consensus as to how best to proceed.

The 1989 consultations revealed that, in the custody area, there were strong concerns with the apparent rise in and/or duration of custody orders. Opinions on the source of the problems varied among the provinces and territories. Non-governmental associations were equally concerned with the apparent increase in resort to custody. They were, however, generally unwilling to state a preference for desired directions

of change, particularly on the issue of whether the judiciary or administrators should determine the level of custody, in the absence of data. Data has now been compiled and is included in Appendix A to this document. The document has also been revised substantially to reflect concerns and suggestions received in the course of the first round of public consultations and as a result of ongoing federal-provincial-territorial discussions.

This document is not a comprehensive compilation of all of the issues concerning custody and review. Neither are the concerns included in the document shared by all constituencies involved in Canada's juvenile justice system. Its content and format were adopted to provide a workable framework for participants in the consultation process to review the fundamental concerns, envision the most viable options, and recommend a preferred course. In this regard, extracts from a number of international instruments are included which provide an invaluable framework within which to assess the Young Offenders Act and the proposals for reform.

The concerns fall within three main areas -

- What should the legislative criteria for custody be?
- Who should decide the level of custody? and
- What should the criteria for review and the structure for release from custody be?

Accordingly, the information in the sections on "Current Law", "Summary of Concerns" and "Proposed Options" will be presented as it relates to these three areas. This approach reflects the fact that the three areas of concern are distinct from one another and that changes could be desirable within one area and not supportable in another.

II BACKGROUND

A. CURRENT LAW

A.1 THE LEGISLATIVE CRITERIA FOR CUSTODY DISPOSITIONS

The Declaration of Principle (s.3 of the Young Offenders Act) sets out a number of principles which are to be relied upon and applied in interpreting the provisions of the Act. Certain of these are particularly relevant to the issue of appropriate legislative criteria:

- *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 (para. (a));*

- *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 (para. (b));*

- *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 (para. (c));*

- *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 (para. (f)); and*

- *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 (para. (h)).*

More specifically, the Act provides in subs. 24(1) a statutory test which is to be applied before a custodial disposition is imposed:

> *The youth court shall not commit a young person to custody unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person.*

This test applies to committals to both open and secure custody. This provision initially applied only to orders for secure custody and was extended to open custody in 1986 in an attempt to meet the concern at that time that the custodial provisions were not adequately restricting access to custody.

Finally, the Act provides in s. 24.1(3) and (4) for offence-based criteria which restrict a court's access to secure custody:

> *24.1(3) Subject to subsection (4), no young person who is found guilty of an offence shall be committed to secure custody unless the young person was, at the time the offence was committed, fourteen years of age or more and unless*
>
> *(a) the offence is one for which an adult would be liable to imprisonment for five years or more;*
>
> *(b) the offence is an offence under section 26 of this Act in relation to a disposition under paragraph 20(1) (j), an offence under section 144 (prison breach) or subsection 145(1) (escape or being at large without excuse) of the Criminal Code or an attempt to commit any such offence; or*
>
> *(c) the offence is an indictable offence and the young person was*
>
> *(i) within twelve months prior to the commission of the offence, found guilty of an offence for which an adult would be liable to imprisonment for five years or more, or adjudged to have committed a delinquency under the Juvenile Delinquents Act, chapter J-3 of the Revised Statutes of Canada, 1970, in respect of such offence, or*
>
> *(ii) at any time prior to the commission of the offence, committed to secure custody with respect to a previous offence, or committed to custody in a place or facility for the secure containment or restraint of a child, within the meaning of the Juvenile Delinquents Act, chapter J-3 of the Revised Statutes of Canada, 1970, with respect to a delinquency under that Act.*
>
> *24.1(4) A young person who is found guilty of an offence and who was, at the time the offence was committed, under the age of fourteen years may be committed to secure custody if*
>
> *(a) the offence is one for which an adult would be liable to life imprisonment;*

(b) the offence is one for which an adult would be liable to imprisonment for five years or more and the young person was at any time prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more or adjudged to have committed a delinquency under the Juvenile Delinquents Act, chapter J-3 of the Revised Statutes of Canada, 1970, in respect of such offence; or

(c) the offence is an offence under section 26 of this Act in relation to a disposition under paragraph 20(1) (j), an offence under section 144 (prison breach) or subsection 145(1) (escape or being at large without excuse) of the Criminal Code or an attempt to commit any such offence.

A.2 WHO DECIDES THE LEVEL OF CUSTODY

Dispositional Stage

Once a court has determined that custody is appropriate, the court is then to specify whether the custody is to be open custody or secure custody.

These levels are defined in s. 24.1 of the Act:

> *"Open custody" means custody in*
>
> *(a) a community residential centre, group home, child care institution, or forest or wilderness camp, or*
>
> *(b) any other like place or facility designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated.*
>
> *"Secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.*

Beyond the initial decision of level, the youth court essentially retains control over custody level throughout the disposition.

Transfer from Open Custody to Secure Custody

Section 24.2(8) provides:

> *Subject to subsection (9), no young person who is committed to open custody may be transferred to a place or facility of secure custody.*

The effect of this section is that, even on a youth court review, it is not possible to change a disposition of a young person from open custody to secure custody. Such a transfer was permitted in the original Young Offenders Act under certain circumstances in certain jurisdictions pursuant to a s.33 review. In Bill C-106, however, this mechanism was removed from the Act. Furthermore, a judge may not otherwise alter the disposition once it is made since the judge is, at law, functus officio. The only circumstance in which a young person may be transferred, from open to secure custody even for a temporary period is that described in s.24.2(9):

The provincial director may transfer a young person from a place or facility of open custody to a place or facility of secure custody for a period not exceeding fifteen days if

(a) the young person escapes or attempts to escape lawful custody; or

(b) the transfer is, in the opinion of the provincial director, necessary for the safety of the young person or the safety of others in the place or facility of open custody.

Transfer from Secure Custody to Open Custody

Subsection 24.2(7) provides:

No young person who is committed to secure custody may be transferred to a place or facility of open custody except in accordance with sections 28 to 31.

The effect of this section is that it is not possible to transfer a young person from secure custody to open custody except by youth court review. Therefore, a young person who is subject to a secure custody disposition may not be placed in open custody for a few days to determine his/her suitability for formal transfer to an open custody facility. Furthermore, if the disposition is changed from secure to open custody by review, the young person, once transferred, cannot be returned to secure custody except for the temporary period allowed by s. 24.2(9) described above.

A.3 THE REVIEW CRITERIA AND THE RELEASE STRUCTURE

Inapplicability of Remission and Parole

Young persons in custody are not eligible for remission or consideration for parole as are adults sentenced to imprisonment.

The exclusion of young persons from remission does not violate s.15 of the Charter (Re M. and the Queen (1985) 21 C.C.C. (3d) 116 (Man. Q.B.)).

Release from Custody

A young person may, of course, be entitled to release from custody simply by serving the entire disposition imposed. He or she would then be released on the final day of disposition with no mandated community supervision unless the court had, at the time of the original disposition, imposed a community-based disposition such as a probation order to follow.

A young person may be released from custody prior to the end of the original disposition if the disposition is varied by the youth court under s.28 or s.29. There are three types of reviews which are brought under s.28:

- *mandatory reviews one year after disposition for dispositions exceeding one year (s.28(1) and (2));*
- *on application at any time after 6 months from the date of the most recent disposition (s.28(3));*
- *with leave of the youth court at any time (s.28(3)).*

Section 28 contains the procedure to be applied in reviews including the submission of a progress report on the performance of the young person since the disposition took effect.

The grounds for an optional review are set out in s.28(4):

> *A disposition made in respect of a young person may be reviewed under subsection (3):*
>
> *(a) on the ground that the young person has made sufficient progress to justify a change in disposition;*
>
> *(b) on the ground that the circumstances that led to the committal to custody have changed materially;*

(c) on the ground that new services or programs are available that were not available at the time of the disposition; or

(d) on such other grounds as the youth court considers appropriate.

It would appear that where leave is necessary for a review earlier than six months from disposition, additional grounds to those set out in s.28(4) are necessary. (R. v. Darren M., March 25, 1986 unreported, B.C. Prov. Ct.); R. v. Anthony James S., unreported, October 28, 1987 (Alta. Prov. Ct.)).

Courts have noted that release on review is not automatic as a function of having served a portion of the disposition as it is for adult inmates. This has been taken as an indication that Parliament intended that, unlike adults, young persons are to serve their entire disposition unless they can demonstrate a reason why the disposition should be changed. (R. v. Darren M., supra).

A review of a disposition may not be taken until all appeals against the finding of guilt or disposition are completed (s.28(5)). This is unlike the adult system in which an inmate is entitled to pursue an appeal at the same time as being granted early release by way of remission or release on parole.

The alternatives available to the youth court at the conclusion of a s.28 review are set out in s.28(17):

Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parent, the Attorney General or his agent and the provincial director an opportunity to be heard, having regard to the needs of the young person and the interests of society,

(a) confirm the disposition;

(b) where the young person is in secure custody, by order direct that the young person be placed in open custody; or

(c) release the young person from custody and place him on probation in accordance with section 23 for a period not exceeding the remainder of the period for which he was committed to custody.

If released, it is important to note that the young person is on probation for the balance of the disposition. Unlike parole, probation does not allow for the return of a young person to custody unless a new offence under s.26 has been committed.

Section 29 provides a scheme for the provincial director to recommend an early release and if no party, including the youth court, objects to the proposed alteration, the disposition may be altered. If a party objects, a s.28 review is held.

Sections 30 and 31 provide for the establishment of an administrative tribunal to carry out the function of transfers from secure to open custody but not release from custody. If a party is not satisfied, it may apply to the youth court for review. While one province did establish a board under s.30 for a short period, no jurisdiction presently has a board in operation.

Young persons may be considered for temporary release for up to 15 days from either level of custody. This decision is made by the provincial director under s.35:

> *(1) The provincial director of a province may, subject to any terms or conditions that he considers desirable, authorize a young person committed to custody in the province pursuant to a disposition made under this Act*
>
> *(a) to be temporarily released for a period not exceeding fifteen days where, in his opinion, it is necessary or desirable that the young person be absent, with or without escort, for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or re-integrating him into the community; or*
>
> *(b) to be released from custody on such days and during such hours as he specifies in order that the young person may*
>
> *(i) attend school or any other educational or training institution;*
>
> *(ii) obtain or continue employment or perform domestic or other duties required by the young person's family; or*
>
> *(iii) participate in a program specified by him that, in his opinion, will enable the young person to better carry out his employment or improve his education or training.*
>
> *(2) A young person who is released from custody pursuant to subsection (1) shall be released only for such periods of time as are necessary to attain the purpose for which the young person is released.*
>
> *(3) The provincial director of a province may, at any time, revoke an authorization made under subsection (1).*

(4) Where the provincial director revokes an authorization for a young person to be released from custody under subsection (3) or where a young person fails to comply with any term or condition or release from custody under this section, the young person may be arrested without warrant and returned to custody.

(5) A young person who has been committed to custody under this Act shall not be released from custody before the expiration of the period of his custody except in accordance with subsection (1) unless the release is ordered under sections 28 to 31 or otherwise according to law by a court of competent jurisdiction.

Several courts have criticized the practice of "back to back" temporary releases (R. v. Abigail D.M. unreported, October 16, 1984, (Man. C.A.); R. v. A.L. unreported, Oct. 3, 1986, (Man. Prov. Ct.)).

B. SUMMARY OF CONCERNS

The concerns will be presented in the same format as the Current Law section above.

B.1 CONCERNS WITH EXISTING CRITERIA FOR CUSTODY DISPOSITIONS

The concerns are as follows:

- generally speaking, that there has been a marked increase in committals to custody and a widening of the net in terms of the type of offenders and offences where custody is used;
- that resort to custody may not always be desirable from a rehabilitative point of view and may be contrary to the principles and philosophy of the Young Offenders Act; and
- that any disproportionate expenditure of resources for the provision of custodial services limits the funds available for other juvenile justice programs (for example, intensive community-based programs and enhanced treatment programs for violent/serious offenders within custody programs).

Data Respecting the Use of Custody

Available data respecting the use of custody under the YOA have been analyzed and set out in Appendix A to this document. Summary observations are set out below. It should be noted that no data is unequivocal. How the data is interpreted, and what inferences or conclusions are drawn from it, are very much dependent on whether greater or lesser weight is given to one of three different measures of custody use: the incidence of committals to custody, average custodial sentence length, or average daily population in custody.

Whether greater or lesser weight is placed on these three different measures will vary according to one's focus of concern, which can include: costs, management of a custodial system, frequency with which young offenders are deprived of their liberty, length of deprivation of liberty, and so on. For example, is it "better" or "worse" to have one of every ten young offenders committed to custody for six months each or to have two of every ten committed to custody for three months each (resulting in no difference in the average daily population)?

Another, and a most important consideration, is that the data only point to changes in trend in the use of custody associated with the Act; the data are correlational and

do not establish a cause and effect relationship between the use of custody and the Act itself, nor any particular aspect of the Act (e.g. open and secure custody).

The data support the following observations:

- In the three provinces where there is comparable data available which permit separating out the effects of the uniform maximum age (UMA) and comparisons of the use of custody/training schools under the Juvenile Delinquents act (JDA) and the Young Offenders Act (YOA):

  (i) British Columbia experienced marked increases (greater than 80%) in committals to custody, but also a marked decrease (30%) in average custodial sentence length.

  (ii) Manitoba experienced a doubling (or more) in average daily custodial population, particularly associated with open custody, but these apparent increases also appear to be associated, to an unknown extent, with internal systemic changes in the use of custodial/residential resources and with an apparent decrease in transfers to adult court.

  (iii) Ontario 12 to 15 year olds experienced a marked (68%) increase in court committals to secure custody (versus JDA training schools) but also a marked (30%) decrease in average daily population, a difference likely attributable to reduced lengths of stay in custody under the YOA.

- Among the non-UMA population, there have been marked increases in the proportions of youth court cases committed to custody in six of eight provinces since the Act was proclaimed in 1984/85; similar increases are also evident in the volume of Ontario young offenders committed to custody by Ontario courts responsible for 12 to 15 year olds.

- With respect to the above-noted changes, there have been greater increases, and more consistently so across provinces, in the proportions of cases committed to open custody than in secure custody, although the reliance on secure custody (excluding Quebec) has also apparently increased in several provinces.

- An increase in the proportions or volume of youth court cases being committed to custody does not necessarily translate into corresponding increases in average daily populations in custody; this is likely attributable, in large part, to shorter sentence lengths.

- Generally speaking, average daily custodial populations have been relatively stable in the 1987/88 to 1989/90 period.

- There has been a general trend toward shorter custodial sentence lengths under the YOA, particularly with open custody sentences.

- The 1986 amendment which made the "protection of society" sentencing consideration applicable to open custody has not been associated with decreased proportions of youth court cases committed to custody or with a decrease in court committals/admissions (B.C., Ontario) to custody. In two of four jurisdictions where there is average daily population data unconfounded by the UMA, the population did decrease considerably after the amendment. This phenomenon is likely attributable to substantially decreased open custody sentence lengths in these two jurisdictions (Quebec and Manitoba).

- The most common offences leading to a committal to custody are property offences; less than 15% of young offenders are committed to custody for violent offences, but 70% of those committed to custody are recidivists.

- Comparable pre and post-YOA data available in two provinces - Ontario and British Columbia - indicate that the youth population brought under the jurisdiction of the YOA (i.e. 16 and/or 17 year olds) by the change in the uniform maximum age is either committed to youth custody for longer periods or there is a greater average daily population in custody under the YOA when compared to their former treatment as adults under the Criminal Code.

B.2 CONCERNS WITH WHO DETERMINES THE LEVEL OF CUSTODY AT THE DISPOSITION STAGE AND THROUGHOUT ITS TERM

The concerns are as follows:

- the provisions may result in unsuitable placement as the youth court does not have the benefit of a post-sentencing intake assessment nor the opportunities for ongoing observation of a youth in a particular facility/program. While a court does have the benefit of a pre-disposition report, such a report does not contain insights as to how a youth will behave and adapt to a custodial environment. The effect could be harmful from a protection of the public and residence staff perspective and/or from the perspective of a youth's needs;

- the provisions, in the opinion of some, assign to the judiciary classification issues which are properly the responsibility of correctional administrators. While a judge is technically limited to choosing the level and the decision of particular facility within the level rests with administrators, the decision about level generally determines the type of facility and, in some jurisdictions, the actual facility and program;

- the provisions may operate counter to a young person's needs:

  - for youth in custody who may constitute a minority (e.g. youth in remote areas, native youth and girls) and who may have special needs, the initial choice of level by the court and the subsequent restrictions on movement between levels may prevent youth from access to suitable programs or necessitate sub-dividing already small populations;

  - the offence criteria which are central to the decision of level of custody may result in over or under-classification. In the first instance, a youth may be better suited for placement in open custody but on the basis of the most recent offence is placed in secure custody with the result that his/her rehabilitation process may be impeded. In the second instance, a youth who may require a more structured setting, may be placed in open custody due to the lack of criminal antecedents and thereby set up for failure, including increased resort to s.24.2(9) transfers; and

- the provisions which restrict movement from one level to another until a review has been held cause delay and stand in the way of timely movement down and out into the community under supervision. Indeed, an anomaly results in the situation where a youth who is ordered to secure custody can be temporarily released into the community by the provincial director currently for a period up to fifteen days but can't be moved by the provincial director from secure to open custody.

B.3 CONCERNS WITH THE REVIEW CRITERIA AND THE RELEASE STRUCTURE

The concerns are as follows:

- some youth courts have ruled that they have no authority to assume jurisdiction for a case dealt with by a court in another jurisdiction. As sections 28, 29, 31 and 32 involve review of a disposition by "the youth court", this has been interpreted to mean the youth court sitting where the original disposition was made. One result is that youth sentenced in one region of a province and incarcerated in another may not apply for, or provincial directors initiate, optional reviews for such reasons as transportation and accommodation of a youth;

- the grounds for review in section 28 do not provide sufficient direction with respect to the rehabilitative success of the young person, or to the greater suitability of the community, compared to custody, in a given case in terms of a youth's prospects for rehabilitation and successful reintegration into the community;

- the ground in para. 28(4)(c) that "new services or programs are available that were not available at the time of the disposition" is too restrictive in scope and thereby excludes services that may not be "new" but were simply inappropriate or unavailable at the time;

- the 15-day restriction on temporary release provisions for medical purposes is too restrictive;

- the 15-day restriction on temporary release provisions for re-integrative purposes may be problematic:

    - it is too restrictive to accommodate a variety of programs which often run for thirty days;

    - it contributes to the reality that early release, albeit administratively determined, is not available for youth serving short-term sentences. The incentive of a longer temporary absence at the end of a young offender's term, which could facilitate his or her participation in a program, is absent. Further, in such cases where the benefits of custodial placement have been achieved, the scope for preserving custody and the high cost associated with it for those who require it is minimized by the 15-day limit; and

- the nature of probation, which is the only form of release from custody available to the youth court, may discourage early release for a number of reasons:

  - probation as a form of supervision for some cases is less than effective given obstacles to enforcing breaches of probation;

  - the release is "one-way" which, it is believed, makes some courts reluctant to release some young persons. As a result, the youth may stay in custody longer and there may be little transitional support upon the youth's return to the community. Another result is that a provincial director is unable to provide short-term crisis custodial care where circumstances deteriorate and such intervention in required to prevent future criminal activity.

C. SUMMARY OF THE CUSTODY AND REVIEW INITIATIVE

The issues surrounding the custody and review provisions of the Young Offenders Act began to be examined by territorial, provincial and federal officials in 1985. At that time and until the Spring of 1989, the focus of the discussion was particularly on the appropriateness of judicially determined levels of custody and also on whether the review process could be expedited. Given the newness of the legislation, some were of the view that it was premature to alter the legislation and that sentencing patterns would stabilize. Others were of the view that the sentencing patterns were being altered in the direction of increased resort to custody. Longer-term trend data to support any position was initially not available, given the need to adjust for the changes in the uniform maximum age.

Issues concerning custody and review were included in the consultation document entitled "The Young Offenders Act: Proposals for Reform" which was forwarded to all jurisdictions and over a hundred non-governmental groups and individuals with an interest and expertise in juvenile justice in the summer of 1989. Non-governmental associations were concerned with the apparent increase in resort to custody. They were, however, generally unwilling to state a preference for desired directions of change, particularly on the issue of whether the judiciary or administrators should determine the level of custody, in the absence of data. Data has now been compiled and is included in Appendix A to this document.

At a Meeting of Ministers Responsible for Juvenile Justice on June 14, 1990, a unanimous Resolution was passed by Provincial and Territorial Ministers urging amendments to the Young Offenders Act, including the following:

> That the custody provisions of the Act be amended to provide the provincial director with greater flexibility in the placement of young persons while also providing for mechanisms to protect the liberty of young persons against inappropriate custodial placements.
>
> Where a young person has been released on a Section 28 review, the Act should provide for conditional release resulting, where necessary, in the apprehension and judicially authorized return to custody of the young person for the balance of the disposition. This would be in addition to the current option of release on probation.
>
> That Section 35 of the Act, providing for temporary release, be amended to extend the maximum duration of release to facilitate treatment or other rehabilitative goals.

D. INTERNATIONAL PERSPECTIVES

Extracts from a number of international instruments, developed over a period of years, are included below to provide a framework within which the Young Offenders Act provisions and the proposals for reform can be assessed.

It should be noted that the context in which these instruments are drafted has to take into account varying perspectives and the wording is, therefore, necessarily general and subject to a variety of interpretations. Further, it must be realized that Canada's obligations under these instruments vary. For example, United Nations instruments, adopted at quinquennial Congresses on the Prevention of Crime and the Treatment of Offenders, establish exemplary standards in the field of criminal justice to which all states can refer. These instruments do not require ratification on the part of states and do not impose obligations on states in the same manner as multilateral conventions. By ratifying multilateral conventions, Canada and other states have undertaken obligations to comply with the terms of such conventions. In the case of multilateral conventions, states may accept a convention as a whole or make specific exceptions relating to existing legislation or practice. Finally, it should be noted that the multilateral conventions that have been developed in 1989 and 1990 have not yet been ratified by Canada.

The instruments included in this document are:

- International Covenant on Civil and Political Rights (1966) - Canada ratified this multilateral convention in 1976;
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders - 1985)*;
- United Nations Convention on the Rights of the Child (A multilateral convention adopted by the United Nations in 1989 and in force for those nations that have ratified);
- International and Interregional Co-operation in Prison Management and Community-Based Sanctions and Other Matters (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990)*;
- United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules - Adopted by the UN General Assembly December 1990)*; and
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Adopted by the UN General Assembly December 1990)*.

* As a United Nations instrument, as distinct from a multilateral convention, it requires no ratification.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)

Article 10(3) - *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (Beijing Rules - 1985)

The General Assembly,

Bearing in mind the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and other international human rights instrument pertaining to the rights of young persons

. . .

4. *Adopts the United Nations Standard Minimum Rules for the Administration of Juvenile Justice recommended by the Seventh United Nations Congress, and decides also to approve the recommendation of the Seventh United Nations Congress that the Standard Minimum Rules be known as 'the Beijing Rules';*

. . .

General Principles

Fundamental Perspectives

1.1 *Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family.*

1.2 *Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.*

1.3 *Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.*

1.4 *Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.*

. . .

Scope of the Rules and Definitions Used

2.1 *The following standard minimum rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language . . .*

2.2 *For purposes of these rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal concepts and systems.*

(a) A juvenile is a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult;

(b) An offence is any behaviour that is punishable by law under the respective legal system;

(c) A juvenile offender is a young person who is alleged to have committed or who has been found to have committed an offence.

2.3. *Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed*

a) To meet the varying needs of juvenile offenders, while protecting their basic rights;

b) To meet the needs of society;

c) To implement the following rules thoroughly and fairly.

Extension of the Rules

. . .

3.3 *Efforts shall also be made to extend the principles embodied in the rules to young adult offenders.*

. . .

Aims of Juvenile Justice

5.1. *The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.*

Scope of Discretion

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts should be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specifically qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

. . .

Guiding Principles in Adjudication and Disposition

17.1. The disposition of the competent authority shall be guided by the following principles:

a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also the circumstances and the needs of the juveniles as well as to the needs of the society;

b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response; and

d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

. . .

17.4 The competent authority shall have the power to discontinue the proceedings at any time.

Various disposition measures

18.1 A large variety of dispositions shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

(a) Care, guidance and supervision orders;

(b) Probation;

(c) Community Service Orders;

(d) Financial penalties, compensation and restitution;

(e) Intermediate treatment and other treatment orders;

(f) Orders to participate in group counselling and similar activities;

(g) Orders concerning foster care, living communities or other educational settings;

(h) Other relevant orders.

18.2 No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

Least Possible Use of Institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

. . .

Institutional Treatment

Objective of Institutional Treatment

26.1 The objective of training and treatment of juveniles placed in institution is to provide care, protection, education and vocational skills with a view to assisting them to assume socially constructive and productive roles in society.

26.2 Juveniles in institutions shall receive care, protection and all necessary assistance - social, educational, vocational, psychological, medical and physical - that they may require because of their age, sex and personality and in the interest of their wholesome development.

26.3 Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution holding adults.

26.4 Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.

. . .

Frequent and early recourse to conditional release

28.1 Conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.

28.2 Juveniles released conditionally from an institution shall be assisted and supervised by an appropriate authority and shall receive full support by the community.

Semi-institutional arrangements

29.1 Efforts shall be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society.

* * * * * *

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (Adopted 1989)

PREAMBLE

The States Parties to the present Convention,

. . .

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need for extending particular care to the child has been stated in the Geneva Declaration on the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the United Nations in 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in its article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,

. . .

Have agreed as follows:

Article 1

For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, the age of majority is attained earlier less than 18

. . . .

Article 3

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be a primary consideration.*

2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.*

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this Convention. In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

. . .

Article 20

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

2. *States Parties shall in accordance with their natural laws ensure alternative care for such a child.*

3. *Such care could include, inter alia, foster placement, Kafala of Islamic Law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*

. . .

Article 24

1. *States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

. . .

Article 37

States Parties shall ensure that:

a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by a person below eighteen years of age;*

b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*

c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;*

d) *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.*

. . .

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. *States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

. . .

4. *A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.*

. . .

* * * * * *

INTERNATIONAL AND INTERREGIONAL CO-OPERATION IN PRISON MANAGEMENT AND COMMUNITY-BASED SANCTIONS AND OTHER MATTERS
(Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990)

A

Custodial and non-custodial treatment of offenders

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Bearing in mind the important role of the United Nations in the field of criminal justice through the medium of the quinquennial United Nations Congresses on the Prevention of Crime and the Treatment of Offenders,

. . .

Recognizing the necessity and relevance of imprisonment as a penal sanction against some offenders in the overriding interests of public safety,

Emphasizing the importance of the Standard Minimum Rules for the Treatment of Prisoners and other international instruments in relation to the treatment of prisoners and prison management,

Conscious of the heavy demands made by the criminal justice system on the human and material resources of Member States,

Taking account of the high economic and social costs of imprisonment as a penal sanction,

Bearing in mind the effects of imprisonment on the psychological, emotional and social aspects of the personality of the individual offender,

Bearing in mind also the potentially damaging consequences of imprisonment for the family and the social relationship of the offender,

Taking into account the lower economic and social cost of non-custodial sanctions,

Cognizant of the need to intensify the search for credible non-custodial sanctions and to expand their application,

Reaffirming that crime prevention, criminal justice and the treatment of offenders are important elements in the overall social defence and socio-economic development of States that embody respect for human rights and fundamental freedoms,

. . .

Invites Member States:

(a) To consider the extent to which the use of imprisonment might be replaced by non-custodial sanctions consistent with public safety;

(b) To emphasize that non-custodial sanctions constitute sanctions in their own right and should not be seen as merely substitutes for sentences of imprisonment;

(c) To create the necessary infrastructure and resources and to foster favourable attitudes on the part of the community at large, especially legislators, judges, prosecutors and administrators to their use;

(d) To broaden the availability of non-custodial sanctions as judicial sanctions;

(e) To take into consideration, in the framework of non-custodial sanctions, the availability of alternatives to pre-trial custody which could be adopted more extensively;

(f) To avoid, reduce or eliminate overcrowding in prisons by considering the use of a combination of factors: a reduction in the length of prison sentences available; the substitution of non-custodial sanctions or measures; . . .

. . .

(i) To acknowledge that penal institutions are an integral part of the society they serve and that, in consequence, staff should be encouraged and enabled to play an active part in community affairs, as should prisoners, so far as is consistent with public safety;

. . .

(n) To examine ways in which reconciliation between offenders and their victims might be facilitated by the development of programmes designed to provide opportunities for mediation and reparation;

. . .

C

Drugs

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Acknowledging that drug-related issues deserve particular attention in view of their impact on the functioning of society and also the need to develop greater knowledge concerning the medical and social treatment of drug users,

Considering that the abuse of drugs is a global problem of great complexity requiring social policies on preventive measures and treatment,

Recognizing its adverse effects on the administration of the criminal justice system,

Invites Member States to consider the extent to which they may wish:

(a) To differentiate in the application of the criminal law and in the nature and type of treatment provided to occasional users from those physically and/or psychologically dependent; to the user from the dealer; and to those whose offences are directly related to their drug dependence from those whose offences are not so related;

(b) To give preference to the use of non-custodial measures in relation to the personal use of drugs;

(c) To provide medical, psychological and social treatment programmes for drug-dependent offenders, to be applied in appropriate cases;

. . .

E

Juveniles

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

. . .

Calls upon Member States to maintain progress towards the treatment of juveniles as a special category in the application of the criminal law and the administration of justice, . . . and, as far as possible, to avoid the use of imprisonment for persons below 16 years of age.

. . .

* * * * * *

UNITED NATIONS STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES (The Tokyo Rules - 1990)

The General Assembly,

. . .

Convinced that alternatives to prison can be an effective means of treating offenders within the community to the best advantage of both the offenders and society,

Aware that the restriction of liberty is justifiable only from the viewpoints of public safety, crime prevention, just retribution and deterrence and that the ultimate goal of the criminal justice system is the reintegration of the offender into society,

Emphasizing that the increasing prison population and prison overcrowding in many countries constitute factors that create difficulties for the proper implementation of the Standard Minimum Rules for the Treatment of Prisoners,

. . .

1. *Adopts the United Nations Standard Minimum Rules for Non-Custodial Measures, contained in the annex to the present resolution, and approves the recommendation of the Committee on Crime Prevention and Control that the Rules should be known as the Tokyo Rules;*

2. *Recommends the Tokyo Rules for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;*

3. *Calls upon Member States to apply the Tokyo Rules in their policies and practice;*

4. *Invites Member States to bring the Tokyo Rules to the attention of, for example, law enforcement officials, prosecutors, judges, probation officers, lawyers, victims, offenders, social services and non-governmental organizations involved in the application of non-custodial measures, as well as members of the executive, the legislature and the general public;*

. . .

Annex

I. GENERAL PRINCIPLES

1. Fundamental Aims

1.1 The present Standard Minimum Rules provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

1.2 The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

1.3 The Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.

1.4 When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.

1.5 Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

2. The Scope of Non-Custodial Measures

2.1 The relevant provisions of these Rules shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice. For the purposes of the Rules, these persons are referred to as "offenders", irrespective of whether they are suspected, accused or sentenced.

2.2 The Rules shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.

2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.

2.5 *Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.*

2.6 *Non-custodial measures should be used in accordance with the principle of minimum intervention.*

2.7 *The use of non-custodial measures should be part of the movement toward depenalization and decriminalization instead of interfering with or delaying efforts in that direction.*

3. Legal Safeguards

3.1 *The introduction, definition and application of non-custodial measures shall be prescribed by law.*

3.2 *The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.*

3.3 *Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.*

. . .

3.7 *Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.*

3.8 *Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.*

3.9 *The dignity of the offender subject to non-custodial measures shall be protected at all times.*

3.10 *In the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.*

. . .

8. Sentencing Dispositions

8.1 *The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender,*

the protection of society and the interests of the victim, who should be consulted whenever appropriate.

8.2 *Sentencing authorities may dispose of cases in the following ways:*

(a) *Verbal sanctions, such as admonition, reprimand and warning;*

(b) *Conditional discharge;*

(c) *Status penalties;*

(d) *Economic sanctions and monetary penalties, such as fines and day-fines;*

(e) *Confiscation or an expropriation order;*

(f) *Restitution to the victim or a compensation order;*

(g) *Suspended or deferred sentence;*

(h) *Probation and judicial supervision;*

(i) *A community service order;*

(j) *Referral to an attendance centre;*

(k) *House arrest;*

(l) *Any other mode of non-institutional treatment;*

(m) *Some combination of the measures listed above.*

IV. POST-SENTENCING STAGE

9. Post-sentencing Dispositions

9.1 *The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.*

9.2 Post-sentencing dispositions may include:

(a) Furlough and half-way houses;

(b) Work or education release;

(c) Various forms of parole;

(d) Remission;

(e) Pardon.

9.3 The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender.

9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

V. IMPLEMENTATION OF NON-CUSTODIAL MEASURES

10. Supervision

10.1 The purpose of supervision is to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.

10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.

10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.

10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

11. Duration

11.1 The duration of a non-custodial measure shall not exceed the period established by the competent authority in accordance with the law.

11.2 Provision may be made for early termination of the measure if the offender has responded favourably to it.

12. Conditions

12.1 *If the competent authority shall determine the conditions to be observed by the offender, it should take into account both the needs of society and the needs and rights of the offender and the victim.*

12.2 *The conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender's chances of social integration, taking into account the needs of the victim.*

12.3 *At the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights.*

12.4 *The conditions may be modified by the competent authority under the established statutory provisions, in accordance with the progress made by the offender.*

13. Treatment Process

13.1 *Within the framework of a given non-custodial measure, in appropriate cases, various schemes, such as case-work, group therapy, residential programs and the specialized treatment of various categories of offenders, should be developed to meet the needs of offenders more effectively.*

13.2 *Treatment should be conducted by professionals who have suitable training and practical experience.*

13.3 *When it is decided that treatment is necessary, efforts should be made to understand the offender's background, personality, aptitude, intelligence, values and especially, the circumstances leading to the commission of the offence.*

13.4 *The competent authority may involve the community and social support systems in the application of non-custodial measures.*

. . .

14. Discipline and Breach of Conditions

14.1 *A breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure.*

14.2 *The modification or revocation of the non-custodial measure shall be made by the competent authority; this shall be done only after a careful examination of the facts adduced by both the supervising officer and the offender.*

14.3 *The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.*

14.4 *In the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.*

14.5 *The power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law.*

14.6 *Upon modification or revocation of the non-custodial measure, the offender shall have the right to appeal to a judicial or other competent independent authority.*

. . .

VII. VOLUNTEERS AND OTHER COMMUNITY RESOURCES

17. Public Participation

17.1 *Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community. It should complement the efforts of the criminal justice administration.*

17.2 *Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society.*

18. Public Understanding and Co-operation

18.1 *Government agencies, the private sector and the general public should be encouraged to support voluntary organizations that promote non-custodial measures.*

18.2 *Conferences, seminars, symposia and other activities should be regularly organized to stimulate awareness of the need for public participation in the application of non-custodial measures.*

18.3 *All forms of the mass media should be utilized to help to create a constructive public attitude, leading to activities conducive to a broader application of non-custodial treatment and the social integration of offenders.*

18.4 *Every effort should be made to inform the public of the importance of its role in the implementation of non-custodial measures.*

. . .

VIII. RESEARCH, PLANNING POLICY FORMULATION AND EVALUATION

20. Research and Planning

20.1 *As an essential aspect of the planning process, efforts should be made to involve both public and private bodies in the organization and promotion of research on the non-custodial treatment of offenders.*

20.2 *Research on the problems that confront clients, practitioners, the community and policy-makers should be carried out on a regular basis.*

20.3 *Research and information mechanisms should be built into the criminal justice system for the collection and analysis of data and statistics on the implementation of non-custodial treatment for offenders.*

21. Policy Formulation and Programme Development

21.1 *Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process.*

21.2 *Regular evaluation should be carried out with a view to implementing non-custodial measures more effectively.*

21.3 *Periodic reviews should be conducted to assess the objectives, functioning and effectiveness of non-custodial measures.*

22. Linkages with Relevant Agencies and Activities

22.1 *Suitable mechanisms should be evolved at various levels to facilitate the establishment of linkages between services responsible for non-custodial measures, other branches of the criminal justice system, social development and welfare agencies, both governmental and non-governmental, in such fields as health, housing, education and labour, and the mass media.*

* * * * * *

UNITED NATIONS RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (1990)

The General Assembly,

. . .

Aware that juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights,

. . .

1. *Affirms that the placement of a juvenile in an institution should always be a disposition of last resort and for the minimum period necessary;*

2. *Recognizes that, because of their high vulnerability, juveniles deprived of their liberty require special attention and protection and that their rights and well-being should be guaranteed during and after the period when they are deprived of their liberty;*

. . .

4. *Adopts the United Nations Rules for the Protection of Juveniles Deprived of their Liberty contained in the annex to the present resolution;*

. . .

6. *Invites Member States to adapt, wherever necessary, their national legislation, policies and practices, particularly in training all categories of juvenile justice personnel to the spirit of the Rules, and to bring them to the attention of relevant authorities and the public in general;*

. . .

9. *Requests the Secretary-General to conduct comparative research, pursue the requisite collaboration and to devise strategies to deal with the different categories of serious and persistent young offenders and prepare a policy-oriented report thereon to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;*

. . .

ANNEX

I. FUNDAMENTAL PERSPECTIVES

1. *The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.*

2. *Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules ... Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.*

3. *The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration into society.*

4. *The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, ... ethnic or social origin, and disability. The religious and cultural beliefs, practices and moral concepts of the juvenile should be respected.*

5. *The Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system.*

6. *The Rules should be made available to juvenile justice personnel in their national languages. Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to the services of an interpreter free of charge whenever necessary, in particular during medical examinations and disciplinary proceedings.*

7. *Where appropriate, States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach ...*

8. *The competent authorities should constantly seek to increase the awareness of the public that the care of detained juveniles and preparation for their return to society is a social service of great importance, and to this end active steps should be taken to foster open contacts between the juveniles and the local community.*

9. *Nothing in the Rules should be interpreted as precluding the application of the relevant United Nations and human rights instruments and safeguards, recognized by the international community, that are more conducive to the rights, care and protection of juveniles, children and all young persons.*

10. In the event that the practical application of particular Rules contained in parts II to V, inclusive, of these Rules presents any conflict with the Rules contained in part I, compliance with the latter shall be regarded as the predominant requirement.

II. SCOPE AND APPLICATION OF THE RULES

11. For the purposes of the Rules, the following definitions should apply:

(a) A juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law;

(b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will by order of an any judicial, administrative or other public authority.

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programs which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

. . .

14. The protection of the individual rights of juveniles with special regard to the legality of the execution of the detention measures shall be ensured by the competent authority, while the objectives of social integration should be secured by regular inspections and other means of control carried out, according to international standards, national laws and regulations, by a duly constituted body authorized to visit the juveniles and not belonging to the detention facility.

15. The Rules apply to all types and forms of detention facilities in which juveniles are deprived of their liberty...

16. The Rules shall be implemented in the context of the economic, social and cultural conditions prevailing in each Member State.

IV. THE MANAGEMENT OF JUVENILE FACILITIES

. . .

Admission, registration, movement and transfer

21. *In every place where juveniles are detained, a complete and secure record of the following information should be kept concerning each juvenile received:*

(a) Information on the identity of the juvenile;

(b) The fact of and reasons for commitment and the authority therefor;

(c) The day, hour of admission, transfer and release;

(d) Details of the notifications to parents and guardians on every admission, transfer or release of the juvenile in their care at the time of commitment;

(e) Details of known physical and mental health problems, including drug and alcohol abuse.

22. *The above-mentioned information on admission, place, transfer and release should be provided without delay to the parents and guardians or closest relative of the juvenile concerned.*

23. *As soon as possible after reception, full reports and relevant information on the personal situation and circumstances of each juvenile should be drawn up and submitted to the administration.*

24. *On admission, all juveniles shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance. For those juveniles who are illiterate or who cannot understand the language in written form, the information should be conveyed in a manner enabling full comprehension.*

25. *All juveniles should be helped to understand the regulations governing the internal organization of the facility, the goals and methodology of the care provided, the disciplinary requirements and procedures, other authorized methods of seeking information and of making complaints, and all such other matters as are necessary to enable them to understand fully their rights and obligations during detention.*

. . .

Classification and Placement

27. *As soon as possible after the moment of admission, each juvenile should be interviewed, and a psychological and social report identifying any factors relevant to the specific type and level of care and program required by the juvenile should be prepared. This report, together with the report prepared by a medical officer who has examined the juvenile upon admission, should be forwarded to the director for purposes of determining the most appropriate placement for the juvenile within the facility and the specific type and level of care and program required and to be pursued. When special rehabilitative treatment is required, and the length of stay in the facility permits, trained personnel of the facility should prepare a written, individualized treatment plan specifying treatment objectives and time-frame and the means, stages and delays with which the objectives should be approached.*

28. *The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.*

29. *In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special program that has been shown to be beneficial for the juveniles concerned.*

30. *Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment. Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community.*

Physical environment and accommodation

31. *Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.*

32. *The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities . . .*

. . .

Medical Care

49. *Every juvenile shall receive adequate medical care, both preventive and remedial, including ... mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.*

. . .

52. *Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, ... or any condition of detention should report this fact immediately to the director of the detention facility in question and the independent authority responsible for the well-being of the juvenile.*

53. *A juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release.*

54. *Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programs administered by qualified personnel. These programs should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug/alcohol dependent juveniles.*

. . .

Notification of illness, injury and death

. . .

58. *A juvenile should be informed at the earliest possible time of the death, serious illness or injury of any immediate family member and should be provided with the opportunity to attend the funeral of the deceased or go to the bedside of a critically ill relative.*

Contacts With the Wider Community

59. *Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organizations, to leave detention facilities for a visit to their home and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence.*

60. *Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and defense counsel.*

. . .

Disciplinary Procedures

66. *Any disciplinary measures and procedures should maintain the interest of safety, and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person.*

. . .

68. *Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles:*

(a) Conduct constituting a disciplinary offence;

(b) Type and duration of disciplinary sanction that may be inflicted;

(c) The authority competent to impose such sanctions;

(d) The authority competent to consider appeals.

69. *A report of misconduct should be presented promptly to the competent authority, which should decide on it without undue delay. The competent authority should conduct a thorough examination of the case.*

70. *No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force. No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full*

understanding of the juvenile, and given a proper opportunity of presenting his or her defence, including the right of appeal to a competent impartial authority. Complete records should be kept of all disciplinary proceedings.

. . .

Investigation and Complaints

72. *Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.*

73. *Qualified medical officers attached to the inspecting authority or the public health service should participate in the inspections, evaluating compliance with the rules concerning the physical environment, hygiene, accommodation, food, exercise and medical services, as well as any other aspect or conditions of institutional life that affect the physical and mental health of juveniles. Every juvenile should have the right to talk in confidence to any inspecting officer.*

74. *After completing the inspection, the inspector should be required to submit a report on the findings. The report should include an evaluation of the compliance of the detention facilities with the present rules and relevant provisions of national law, and recommendations regarding any steps considered necessary to ensure compliance with them. Any facts discovered by an inspector that appear to indicate that a violation of legal provisions concerning the rights of juveniles or the operation of a juvenile detention facility has occurred should be communicated to the competent authorities for investigation and prosecution.*

75. *Every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorized representative.*

76. *Every juvenile should have the right to make a request or complaint, without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay.*

77. *Efforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements.*

78. *Every juvenile should have the right to request assistance from family members, legal counsellors, humanitarian groups or others where possible, in order to make a complaint. Illiterate juveniles should be provided with assistance should they need to*

use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints.

Return to the Community

79. *All juveniles should benefit from arrangements designed to assist them to returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.*

80. *Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles. These services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community.*

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* * * * * *

E. RELEVANT DEVELOPMENTS IN ADULT SENTENCING REFORM

A joint Consultation Package was released on July 6, 1990 by the Minister of Justice and the Solicitor General of Canada. The Package is the government's response to the report of the Standing Committee on Justice and Solicitor General and contains proposals for reform in the areas of sentencing, conditional release and corrections. Following its release, the two departments have been consulting with provincial officials, the voluntary sector, the legal profession and the judiciary in an effort to get feedback on the proposals.

Specific to sentencing, the overall objective of the proposals is to bring more openness, accountability and consistency to the sentencing process. In addition, the reforms are designed to establish a coherent framework of policy and process in sentencing matters approved by Parliament and to increase public accessibility to the law on sentencing.

The sentencing proposals call for the creation of a more rational and just range of sanctions. In particular, the proposals call for a reduced emphasis on incarceration and the use, wherever possible, of intermediate sanctions such as community service order and fine-option programs.

Previous sentencing reforms have often been characterized as piecemeal and ad hoc - the result is a sentencing process with neither clarity of organization nor general legislative direction to the courts as to the priority within the range of sanctions. To correct this, one of the proposals calls for the restructuring of Part XXIII of the Criminal Code, which outlines the current sentencing provisions, to produce a clearer, more logical format. Specifically, the proposal re-orders sanctions from least to most serious and provides for sanctions to be imposed in their own right without requiring the imposition of another sanction. For example, community service orders would not be a condition of probation.

It is also proposed that a legislated Statement of Purpose and Principles of Sentencing be incorporated within Part XXIII as a means to clarify sentencing objectives and provide guidance to judges on what they should consider in determining the most appropriate sentence. While providing guidance, the proposed Statement would maintain judicial flexibility to consider the individual situation of the offender and allow for relevant differences in the circumstances of different offenders.

Further, it is proposed that a Code of Evidence and Procedure for sentencing hearings be included within the new Part XXIII which would govern the conduct of the sentencing hearing to protect the rights of the offender, to ensure that the

sentence imposed by the court is the most appropriate one in the circumstances and to reduce unwarranted disparity in sentencing. The proposed Code would give offenders the right to speak to sentence and require the courts to provide reasons for sentence.

The proposed Code would also include reforms in the imposition and collection of fines. The objective of the fine proposals is to develop an uncomplicated, efficient scheme for fine default while minimizing the number of offenders who default in the payment of their fines because of inability to pay. Specifically the proposal requires a means inquiry at point of sentencing to ensure the offender has the resources to pay. The courts would be given the power to deal with default through civil processes such as seizure of assets and garnishment of wages. A further inquiry upon default would be held to determine the circumstances surrounding default. Where there is a reasonable excuse, the court may extend the payment period or alter any term of the sanction except the amount. Imprisonment would be considered only where there is no reasonable excuse for default or where the offender wilfully refuses to pay. Imprisonment is not an alternative sentence and jail would not vacate the original order.

Finally, there is a proposal to establish a Sentencing and Parole Commission as a vehicle by which both sentencing and parole issues would be considered within a consistent policy framework. Such a Commission would, among other things, develop sentencing guidelines and advise on decision-making policies for conditional release.

In corrections, two adult correctional proposals put forward by the Ministry of the Solicitor General have relevance to the young offender issues under study: judicial determination of parole eligibility dates and unescorted temporary absences for community service and personal development. The first proposal would give sentencing judges the discretion to determine the full parole eligibility date for violent and serious drug offenders sentenced to penitentiary, either at one-third (as currently fixed by law for all offenders), or at one-half the sentence.

While consultations are not yet complete, it is fair to say that the proposal for judicial determination of parole eligibility is contentious and not supported by the majority of people consulted. Significant opposition has come from the voluntary sector, lawyers, the judiciary and the provinces/territories. Provincial/territorial opposition has focused on involving judges in the administration of the sentence and the potential resource impact on the court process.

On the subject of temporary absence, it is proposed that eligibility for certain types of unescorted temporary absence vary according to the security classification of inmates. It is also proposed that a new type of temporary absence be created. This could be used for community service projects, for example, voluntary services in the community, and for personal development programs such as educational

programs or temporary community employment. Such programs could require the offender's presence in the community for periods no longer than fifteen days at any one time. Inmates classified at medium security would be eligible to apply for absences for personal development or community service, to a maximum length of fifteen days, no more than three times a year. Inmates classified at minimum security could apply for four absences per year for these purposes with a maximum length of 15 days. Finally, it is proposed that inmates classified at the maximum security level would not be eligible for such temporary absences.

III PROPOSAL

A. PROPOSED STATEMENT OF OBJECTIVES FOR THE CUSTODY AND REVIEW INITIATIVE

The following objectives were developed to set a framework for consideration of legislative reform:

- to keep the use of custody to the minimum level necessary consistent with the principles of the Act, of program effectiveness and of wise allocation of limited resources;

- to ensure the provision of a continuum of community dispositions including intensive community supervision and to encourage resort thereto;

- where custody is appropriate,

  - to ensure the provision of a range of residential programs;

  - to ensure that functionally open facilities are available and resort to them is encouraged as the preferred form of custody;

  - to ensure that functionally secure facilities are utilized minimally and only where absolutely necessary;

  - to facilitate the matching of programs to young persons throughout the term of the disposition;

  - to ensure judicial control over length of stay with the exception of temporary absences; and

  - to ensure timely review.

The above-noted objectives should be considered within the context of available fiscal resources.

B. PROPOSED OPTIONS

Below is a summary of the issues to provide an overview of the possible directions for reform. The issues are presented under the same categories that were used earlier in the document in the sections on Current Law and Summary of Concerns, these being

- Criteria for Custody
- Who Decides Level of Custody
- Review Criteria and Release From Custody.

This approach reflects the fact that the areas of concern are distinct from one another and that reform in one subject area could proceed independently from reform in another.

B.1 LEGISLATIVE CRITERIA FOR THE IMPOSITION OF CUSTODIAL DISPOSITIONS

Option 1: Status Quo
Option 2: More Defined Non-offence-Based Criteria
Option 3: Offence-Based Criteria

B.1 LEGISLATIVE CRITERIA FOR THE IMPOSITION OF CUSTODIAL DISPOSITIONS

The options presented below were developed with a view to realizing the first two objectives outlined above:

- keep the use of custody to the minimum level necessary; and
- ensure the provision of a broad continuum of community dispositions including intensive community supervision and encourage resort thereto.

Option 1 - Status Quo

As outlined above under Section I.A Current Law, there are offence-based criteria and non-offence-based criteria applicable to secure custody, and non-offence -based criteria applicable to open custody.

Suggested Advantages

- offers the most flexibility and latitude for judicial discretion.

Suggested Disadvantages

- does not provide sufficient direction to the youth courts and service providers to ensure that resort is made to community-based options whenever possible and to custody as a last resort; and
- does not offer a systematic response to the concerns enumerated above.

Option 2 - More-Defined Non-Offence-Based Criteria

This option would require an amendment to s. 24.1 respecting the considerations and criteria the court must take into account before imposing a custodial disposition, including, for example, the following:

- any criteria established would not preclude a custodial disposition for offences of violence, including serious personal injury offences referred to in section 752 of the Criminal Code such as sexual assaults, robbery, and so on;
- custody should only be imposed as a measure of last resort and the responsibility of young persons for their contraventions, and their special needs, should to the greatest extent possible be satisfied within the community;

- a committal to custody must be necessary:

  (i) to protect the public from crimes of violence; or

  (ii) where any other sanction would not sufficiently reflect the seriousness of the offence or the repetitive nature of the young person's history of previous convictions or adequately protect the public or the integrity of the administration of justice; or

  (iii) to ensure the young person is held accountable for any wilful failure or refusal to comply with the terms of any other disposition or order of the court that has been imposed on the young person where no other sanction appears adequate to compel compliance or to denounce the non-compliance;

- that non-custodial dispositions or programs have already been tried and no longer are suitable, are not presently suitable to the circumstances, or are not available;

- that the court be required to state reasons for the decision not to impose a non-custodial disposition.

A draft model of Option 2 is set out in Appendix B to this document.

<u>Suggested Advantages</u>

- would be more directive than the current law in terms of realizing the objective of community-based dispositions wherever possible;

- relative to Option 3 (offence-based criteria), offers more flexibility and latitude for judicial discretion;

- requires consideration of a broader number of factors rather than simply whether offence criteria have been satisfied and yet preserves the central consideration of whether protection of society requires incarceration; and

- gives a clear message to administrators of juvenile justice to develop community-based options particularly for youth involved in more serious or persistent offending where less intrusive community-based dispositions are inappropriate.

<u>Suggested Disadvantages</u>

- may not be as categorical in controlling custody admissions as Option 3;

- the 1986 amendment to the Young Offenders Act, which made the criteria in s. 24(1) applicable to open custody, whereas before it had only been applicable to secure custody, has not produced the desired result. This may suggest that general considerations are not as effective as offence-based criteria;

- does not provide the same degree of uniformity of application of the law as would Option 3; and

- imposes an additional burden on youth courts due to the requirement for a court to provide reasons why a community disposition is inappropriate .

Option 3 (Offence-Based Criteria)

This option would require the inclusion in the Young Offenders Act of offence and prior record criteria similar to or the same as the criteria for secure custody contained in subsections 24.1(3) and (4).

Suggested Advantages

- it would be the strongest guarantee that custody not be resorted to for certain classes of offences;

- it is consistent with the approach already taken in the Young Offenders Act to restrict access to secure custody by offence-based criteria.

Suggested Disadvantages

- it might unduly fetter judicial discretion;

- it could affect the plea bargaining process;

- it would be very difficult at this point, given the absence of data and detailed consultation, to determine with confidence where the line should be drawn between those offences for which custody should be an option and those for which it should not taking into account such other factors as prior record and so on; and

- with offence-based criteria, there is the risk that such criteria might set the standard for custodial sentences without sufficient consideration of the possibility that even where the offence criteria have been met, protection of society does not necessitate incarceration for a given youth.

B.2 WHO SHOULD DECIDE LEVEL OF CUSTODY

B.2a Who Should Decide Level of Custody at the Dispositional Stage?

Option 1: Youth Court (Status Quo)
Option 2: Provincial Director

B.2b How Should the Criteria for Level of Custody Be Established?

Option 1: Provincial Legislation or Orders-in-Council
Option 2: The Young Offenders Act

Ancillary Issues If Youth Court Decides Level At Disposition Stage

B.2c Who Should Authorize Transfers From Secure Custody to Open Custody?

Option 1: Status Quo
Option 2: Status Quo plus 30-day Time-limited Transfer by Provincial Director
Option 3: Provincial Director

B.2d How Should Transfers From Open Custody To Secure Custody Be Authorized?

Option 1: Status Quo
Option 2: The Youth Court
Option 3: Status Quo with Duration and Criteria Broadened
Option 4: Options 2 and 3

Ancillary Issues if Provincial Director Determines Level of Custody At the Disposition Stage and Throughout the Term of the Disposition

B.2e What Should The Recourse Be For the Young Person, Parent Or Crown?

Option 1: Provincial Administrative Mechanisms and The Common Law
Option 2: The Youth Court
Option 3: An Administrative Board or Tribunal

B.2 WHO SHOULD DECIDE LEVEL OF CUSTODY

B.2a Who Should Decide Level of Custody at the Dispositional Stage?

The issue of who should decide the level of custody is premised on the assumption that there will be a multi-level system of custody required by the Young Offenders Act. It is also assumed that release from custody would be subject to court-based review.

The options below are presented with a view to addressing the following objectives:

- to keep the use of custody to the minimum level necessary consistent with the principles of the Act, of program effectiveness and of wise allocation of limited resources;
- to ensure that functionally secure facilities are utilized minimally and only where absolutely necessary; and
- to facilitate the matching of programs to young persons throughout the length of the disposition.

Two options suggest themselves:

Option 1: The youth court (status quo)

Option 2: The provincial director

Option 1 - The Youth Court (Status Quo)

Suggested Advantages

- it is beneficial to have the right to the least possible interference with freedom determined in a youth court and the decision made in a public forum and visible to the community;
- this forum allows for structured submissions from crown and defense counsel;
- this forum allows judicial decision-making to be unfettered by administrative considerations; and
- a court forum permits dispositions to not be unduly influenced by resource considerations.

Suggested Disadvantages

- youth court judges may not have the same training and experience as provincial directors with respect to decisions concerning classification;

- the information available to the court in a predisposition report is primarily a social and criminal history of the young offender. Insights with respect to how a youth will behave and adapt to a custodial environment may not be available at the time of sentencing;

- the present provisions can result in placement determinations being based more on offence considerations than offender considerations with undesirable results. The open custody environment may not be suitable to the initial needs and circumstances of some youth. The result is that such youth may abscond or commit disciplinary infractions and thereby escalate the number of infractions against them. In addition, some offenders sentenced to secure custody could be appropriate candidates for open custody; and

- judicial decision-making prevents efficient resource planning with serious financial consequences.

Option 2 - The Provincial Director

Suggested Advantages

- youth could be moved from secure to open custody on a conditional basis and, depending on performance, retained in open, or if necessary, returned to secure custody - i.e. movements between levels would be more flexible;

- the provincial director is in a better position to match the youth and his special needs to resources available on an ongoing basis and in a timely manner;

- provincial directors have more experience with respect to custodial placement;

- it takes into account the findings of an in-depth intake assessment which is performed after sentencing by the judge and ongoing assessments throughout the term of the disposition;

- it is consistent with the adult system;

- it is consistent with the provincial system where administrators have a range of facilities in youth institutional systems (e.g. child welfare) and any determinations of level are administratively made;

- it permits continuous involvement and review of level of custody by both the young person and the provincial director;

- access to and development of special programs for minority and special needs youths could be enhanced; and

- movement from secure to open custody could be more timely, thereby enhancing rehabilitation opportunities and better facilitating transition back into the community.

Suggested Disadvantages

- the process is not conducted in a public forum;

- there is no ready access to the decisions of provincial directors and therefore no body of reported decisions for research and monitoring;

- the placement decision is more susceptible to influence by administrative resource considerations;

- it is arguable that the provincial director may give greater weight to the interests of a young offender rather than to the interests of the public;

- it is arguable that a youth would be more likely to accept the order with respect to level from a youth court as final whereas administrative decisions might be frequently challenged; and

- the provincial director's placement may not accord with the judicial intent of the disposition ordered by the court.

B.2b How Should the Criteria for Level of Custody Be Established?

The options below are presented with a view to addressing the following objectives:

- to ensure that functionally open facilities are available and resort to them is encouraged as the preferred form of custody;
- to ensure that functionally secure facilities are utilized minimally and only where absolutely necessary; and
- to facilitate the matching of programs to young persons throughout the length of the disposition.

Two options suggest themselves:

Option 1: That the Young Offenders Act require the Lieutenant Governor in Council of the Province to establish criteria with respect to placement in open or secure custody pursuant to provincial legislation or Orders-in-Council.

Option 2: That the Young Offenders Act or federal regulation set out principles to guide the provincial director in the determination of level of custody throughout the term of the disposition. It is noted that this would not preclude provinces/territories from developing additional criteria.

NOTE: The issue of recourse is dealt with as a separate issue and would encompass provision for notice of initial placement decisions and any subsequent changes to level of custody.

Option 1 - Criteria Determined By Provincial Legislation or Orders in Council

Suggested Advantages

- relative to the status quo, there would be full flexibility to place a youth in the appropriate level according to the needs and interests of both the young person and society throughout the term of the disposition;
- this option is arguably more consistent with the constitutional power given to provinces/territories for the administration of justice than is the other option;
- this option is consistent with the adult system in which decisions concerning level are entirely the responsibility of administrators, be they provincial

(where the sentence is two years less a day) or federal (where the sentence is two years or more); and

- this option allows flexibility to determine how custodial services are to be delivered (e.g. the number of custodial levels and resort to specialized assessment facilities immediately following a committal to custody).

Suggested Disadvantages

- this option would contribute to a lack of minimum standards of uniformity across the country;

- this option would remove existing controls/ limitations on admissions to secure custody. It is uncertain whether this would result in more or less committals to secure custody; and

- there is a risk that management of the system would be unduly influenced by resource considerations.

Option 2 - Criteria Defined in the Young Offenders Act or by Federal Regulation

Pursuant to this option, the Young Offenders Act would specify the criteria upon which level of custody would be determined. While further study as to desirable criteria is required, the following are included to assist in the consideration of this option:

- a young person should be placed in a level of custody involving the least degree of containment and restraint, having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person and of other young persons in custody;

- the choice of level or facility should be, as far as practicable, consistent with the intent or recommendation of the court;

- the choice should allow for the best possible match of program to the young person's needs and behaviour throughout the custodial period;

- the risk of escape; and

- other considerations or criteria not inconsistent with the above that have been or could be established pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province.

The legislation could require the court to make a recommendation as the initial level of custody.

Suggested Advantages

- it would promote a greater degree of uniformity across the country while at the same time affording flexibility to provinces/territories to develop specific criteria;

- it would offer a moderate approach which would offset the concerns associated with any move to administrative control of level of custody from the current judicial model.

Suggested Disadvantages

- this option is more intrusive than Option 1 with respect to the constitutional power of provinces and territories for the administration of justice; and

- the system would be inconsistent with the adult system.

ANCILLARY ISSUES IF YOUTH COURT DECIDES LEVEL OF CUSTODY

Should the court continue to determine the level of custody, two ancillary issues need to be addressed:

- who should authorize transfers from secure custody to open custody?
- who should authorize transfers from open custody to secure custody?

B.2c Who Should Authorize Transfers From Secure Custody To Open Custody?

The following three options suggest themselves:

Option 1: Status Quo, i.e. approval by the youth court via a s.28 or s.29 process (or by way of a review board).

Option 2: Status Quo plus authority for the provincial director to approve a time-limited (30 day) conditional transfer from secure to open custody.

Option 3: The Provincial Director.

Option 1 - Status Quo - Approval By The Youth Court Via a s.28 or s.29 Process (or Review Board).

Suggested Advantages

- decisions would continue to be in a public forum;
- some would argue that the court, being independent of administrative concerns, is the best instrument to make these decisions and that affording some administrative flexibility may result in some decisions being unduly influenced by administrative concerns; and
- the court is in the best position to determine the original intent of the disposition and to ensure that this intent is not compromised.

Suggested Disadvantages

- the delays inherent in the court process essentially make the opportunity for mitigation of a secure custody disposition unavailable in many cases of short sentences;

- delays also mean that the "window of opportunity" would, for transfer of some youths where timeliness is a critical factor, continue to be lost in some cases;

- correctional authorities would continue to be reluctant to apply and courts to approve transfers in "marginal" cases because of the inability to return the youth to secure custody, if transfer proves to be unsuccessful. In short, there would be no opportunity for trial periods in open custody; and

- as a result of the above three points, it is argued that the principle of minimal interference with freedom is compromised in some cases, as is the implied theory of gradually reduced levels of intervention (reintegration into the community). This, it is also argued, does not satisfy the special needs of these youths, nor the long-term interests of the community.

Option 2 - Status Quo Plus Authority for the Provincial Director to Approve a Time-limited (30 day) Conditional Transfer from Secure to Open Custody.

Suggested Advantages

- the timeliness of an administrative decision-making process would overcome the problems cited in Option 1 regarding transfers in cases of short sentences and the need for more timely transfers in some other cases;

- the conditional nature of administrative transfers, while facilitating a trial period in open custody, would still afford the opportunity for immediate response (i.e. transfer back to secure custody) in the event the trial placement proved to be unsuccessful;

- the provincial director would be afforded timely access to special programs that may be available in open custody centres, (e.g. short-term substance abuse treatment programs). This would provide for the efficient use of limited resources;

- greater administrative flexibility would likely lead to a greater number of transfers to open custody. This, it is argued, accords with the principle of minimal interference with freedom, gradually de-escalated levels of intervention, meeting the special needs of young persons, and the long-term interests of the public;

- the time-limited nature of the conditional transfer largely maintains the principle of the court retaining control over mitigation of an original secure custody disposition; and

- it accords with other provisions of the Act in that it seems anomalous that the provincial director has the administrative discretion to authorize a release

from secure custody for a time limited period (s. 35 temporary release) but does not have a similar capacity to temporarily authorize a transfer from secure to open custody.

Suggested Disadvantages

- the provincial director may be unduly influenced by administrative considerations in the authorization of such conditional transfers, this leading to inappropriate transfers in some cases; and

- in the case of short sentences, the court's original sentence - and the intent of that sentence - could be effectively usurped by an administrative body, for example, a 30-day secure custody sentence could theoretically be immediately converted into an open custody order by the provincial director. In practice, with short sentences, the provincial director's decision would effectively be a final decision and the principle of the court maintaining control over the mitigation of an original secure custody disposition would be compromised.

Option 3 - The Provincial Director

Suggested Advantages

- the timeliness of an administrative decision-making process would overcome the disadvantages cited in Option 1 regarding transfers in cases of short sentences, the need for more timely transfers in some other cases, and the capacity to transfer youth to open custody resources for trial periods;

- the greater administrative flexibility would likely lead to a increased number of transfers to open custody. This, it is argued, accords with the principle of minimal interference with freedom, gradually de-escalated levels of intervention, meeting the special needs of young persons, and the long-term interests of the community;

- the provincial director would be afforded timely access to the special programs that may be available in open custody centres (e.g. substance abuse treatment, sex offender treatment). This would provide for the efficient use of limited resources;

- the elimination of the need for court reviews would offer some relief to the courts and save court costs; and

- although the provincial director would be provided the capacity to subsequently alter the original secure custody disposition to open custody, administrators would still have to have regard for the intent of the original

sentence and the need for protection of the public and would thus, be reluctant to abuse the discretion accorded them.

Suggested Disadvantages

- the provincial director may be unduly influenced by administrative considerations in authorizing such transfers, thus leading to inappropriate transfers in some cases;

- the complete discretion accorded the provincial director, without the opportunity for court review of the administrative decision, could lead to situations where administrators could usurp the court's original sentence and intent of sentence in some or theoretically all cases;

- decision-making would not occur in a public forum; and

- the principle of the court maintaining control over the mitigation of an original secure custody disposition would be abandoned.

B.2d How Should Transfers from Open Custody to Secure Custody Be Authorized?

The following options suggest themselves:

Option 1: Status Quo

Currently, transfer from open custody to secure custody is not permitted by s.24.2(8), except in the very limited circumstances of s.24.2(9), which permits transfer of up to 15 days where necessary, for the safety of the young person or others in open custody, but not for the safety of the public.

Option 2: Transfer by youth court

This option would provide statutory grounds to permit the youth court to re-evaluate its initial placement decisions. The court could authorize open to secure transfer where it believed the youth ought to be in secure custody. The transfer from open to secure custody would be available to the court only if the young person could have been placed in secure custody for the original offence in accordance with the criteria in s.24.1(3) and (4).

Option 3: Expand Existing s.24.2(9) Criteria and Duration

This option would expand the criteria on which the provincial director could make a temporary transfer from open to secure custody. Examples of expanded criteria for transfer would include where the provincial director is of the opinion that transfer is necessary for the safety of the public or persons working in the place of open custody, or necessary to prevent significant disruption in a place of open custody. The maximum duration would be extended from 15 days to 30 days.

Option 4: Option 2 Plus Option 3

As Options 2 and 3 are not mutually exclusive, the two are blended in Option 4 with the result that: a youth court could alter the disposition as in Option 2; or the provincial director could temporarily transfer as in Option 3.

Option 1 - Status Quo.

Suggested Advantages

- it affords considerable certainty in terms of custody level throughout the term of the disposition; and
- it provides an incentive to develop staffing and programming responses to a youth's inappropriate behaviour which may not be resorted to where a higher security level is readily available.

Suggested Disadvantages

- lack of flexibility prevents a re-evaluation of a young person's needs or the public interest in protection as additional experience with a young person in custody is obtained;
- lack of effective deterrent for aberrant behaviour in open custody. Open custody programs by their nature and size are easily damaged by even a single uncooperative and disruptive young person to the detriment of others in open custody;
- safety concerns may be totally unrelated to the 15-day maximum yet "back-to-back" 15-day transfers were not intended by the legislation; and
- in some jurisdictions, the lack of flexibility encourages the development of specialized open custody units for disruptive youths with two adverse results: it may necessitate placement of such a youth far from family and community; and it results in a concentration of disruptive youths in one facility.

Option 2 - Transfer by youth court.

Suggested Advantages

- permits re-evaluation of initial decision;
- provides deterrent for aberrant behaviour in open custody;
- allows for decision to be made in a public forum;
- decision could help to ensure greater accountability regarding placement by directors of a facility; and
- decision would be unfettered by administrative considerations.

Suggested Disadvantages

- may result in increased court appearances; and
- does not provide a timely response to disruptive behaviour.

Option 3 - Expand Existing S. 24.2(9) Criteria and Duration

Suggested Advantages

- may improve behaviour in open custody;
- disruptive young persons would be placed where less damage could occur to programs;
- addresses public safety need; and
- longer transfer enables alternative open custody placement to be arranged, which can be particularly difficult with disruptive young persons.

Suggested Disadvantages

- concern that administrative authority could be inappropriately exercised.

Option 4 - Option 2 Plus Option 3

Suggested Advantages

- this option has the advantages of options 2 and 3; and
- in addition, the 30-day limit for s.24.2(9) transfers would enable the processing of an application to youth court for transfer of the balance of the disposition.

Suggested Disadvantage

- this option has the disadvantages of options 2 and 3.

ANCILLARY ISSUE IF PROVINCIAL DIRECTOR DETERMINES THE LEVEL OF CUSTODY AT THE TIME OF DISPOSITION AND THROUGHOUT THE TERM OF THE DISPOSITION

B.2e What Should the Recourse Be for The Young Person, Parent or the Crown?

The following options suggest themselves:

Option 1: Recourse to provincial administrative mechanisms and the common law.
Option 2: The Youth Court.
Option 3: Recourse to an administrative board or tribunal which would assume the functions of the youth court in determining level of placement.

Option 1 - Recourse to Provincial Administrative Mechanisms and the Common Law

Under this option, the federal law would not provide statutory recourse for a young person dissatisfied with the placement. Recourse would be in a manner similar to adult inmates dissatisfied with their correctional placement. These methods of recourse include application to a Minister to overturn a provincial director's determination, application to a provincially established administrative tribunal, complaint to the Ombudsman, or application to a superior court for habeas corpus and/or certiorari.

Suggested Advantages

° permits utilization of recourse structures which already exist in some jurisdictions;

° reduces duplication of remedy avenues;

° reduces court time; and

° may permit a more timely response depending on the mechanism chosen.

Suggested Disadvantages

° a lack of familiarity with and ready access to recourse mechanisms at common law;

° all remedies, except for prerogative writs, would not be carried out in a public forum and therefore lack the advantages thereof;

- there would be no uniformity across jurisdictions with respect to the provincial administrative mechanisms relied upon; and

- the young person would not have the same right to counsel as is presently provided for reviews under the Young Offenders Act unless amended.

Option 2 - The Youth Court

Suggested Advantages

- recognizes the roles of the judiciary in sentencing and the provincial directors in placement while at the same time providing for recourse to the court in exceptional cases;

- for contested placement, recourse to a public decision-making forum is desirable;

- for contested placement, it is desirable that the decision-making body be seen to be independent and unfettered by administrative concerns; and

- offers a greater degree of procedural uniformity.

Suggested Disadvantages

- adds another stage to the process;

- this mechanism does not provide for timely redress owing to the court process (i.e. notice requirements, appointment of counsel, hearing date, preparation of report by provincial director);

- notwithstanding the fact that the judge at this stage would have additional information, the appropriateness of judges making placement decisions remains at issue;

- the extent to which recourse to a court will be sought is unascertainable but the potential exists for a significant number of applications with cost implications (e.g. court time, counsel, attendance of the provincial director, preparation of reports, transportation of offender to court);

- in those jurisdictions where there is a wide range of facilities within a level, the recourse mechanism may be rendered moot as there may in fact be greater differences within a level than there are between the two levels; and

- in jurisdictions experiencing court delay problems, adjudicative matters will likely take precedence over reviews.

Option 3 - Recourse to an administrative board or tribunal which would assume the functions of the youth court in determining level of placement.

Suggested Advantages

- there would be a greater measure of procedural uniformity than that offered by Option 1;
- if it is accepted that placement decisions should be made by the provincial director, it would be consistent for an administrative tribunal to review the decision of the provincial director;
- it would likely provide a more expedient process than a court review (Option 2), at least in larger centres;
- depending on the structure adopted, it would likely be less costly than resort to a court (Option 2); and
- it is arguable that an administrative tribunal, due to its ability to develop expertise regarding specific facilities and programs, would be in a better position to weigh the merits of the young person's and the provincial director's positions.

Suggested Disadvantages

- administrative considerations may be given undue influence;
- the process may not, depending on the structure, be subject to public scrutiny and visibility;
- in smaller jurisdictions, it is suggested that such a structure could be more costly than the court structure; and
- in smaller jurisdictions, it is argued that an administrative tribunal, comprised as it would be of part-time members and meeting infrequently, would be less likely than a court to develop the necessary expertise.

B.3 REVIEW CRITERIA AND RELEASE FROM CUSTODY

B.3a Length of Temporary Release for Medical/ Treatment/Rehabilitative Purposes

Option: To Increase the Period to 30 Days Renewable

B.3b Length of Temporary Release for Re-integrative Purposes

Option 1: Status Quo (15 Days)
Option 2: 30 Days

B.3c Criteria for Review

Option 1: Status Quo
Option 2: Amend the Grounds for Review

B.3d The Appropriate Review Process for Early Release

Option 1: Expedite the S.29 Administratively-Initiated Review Process by Removing Requirement for a Hearing Where No Application to Review Recommendation

Option 2: Expedite the S.29 Administratively-Initiated Review Process by Removing Involvement of a Judge Where No Application to Review Recommendation

B.3e Appropriate Form of Release Following Custody

Option 1: Status Quo (Probation)
Option 2: Probation/Conditional Release

B.3a Length of Temporary Release for Medical/Treatment/Rehabilitative Purposes

NOTE: The issues in B.3a and B.3b regarding temporary release introduce a distinction between temporary release for medical/treatment/rehabilitative reasons and temporary release for the purpose of re-integration. No change, however, is proposed with respect to escorted or unescorted absences or to the current 15-day period for temporary release for humanitarian or compassionate purposes.

The option to the current restriction of 15 days, which has been considered unacceptably short and restrictive, is presented with a view to addressing the following objectives:

- to facilitate the matching of programs to young persons throughout the length of the disposition; and
- to ensure judicial control over length of stay in custody.

Option

To allow the provincial director of a province to authorize for medical/treatment/rehabilitative reasons temporary release to a hospital or residential treatment facility for a period of up to 30 days. The release could be renewed, where recommended by a person qualified pursuant to section 13. This would allow a young offender to serve that part of the disposition in a facility or program where the medical/treatment/rehabilitative service is available.

Suggested Advantages

- enables timely transfers to facilities with medical/treatment/rehabilitative care.
- preserves judicial control over disposition length as a young person on such a temporary release would still be in custody;
- introduces greater control on back-to-back releases;
- is supported by the Resolution (Charlottetown, June 1989) of provincial Attorneys General and the Minister of Justice of the Northwest Territories. That resolution recommended that "treatment of convicted young persons should be facilitated by providing greater flexibility through expanded temporary release provisions". Similarly, this option is supported by Provincial and Territorial Ministers Responsible for Justice who met at Niagara-on-the-Lake on June 14, 1990.

Suggested Disadvantages

- the potential to undermine the intent of the disposition ordered by the court; and

- while the requirement that a renewal of a release for medical/treatment/rehabilitative purposes be only upon the recommendation of a qualified person introduces some degree of control and accountability, the range of interpretation for the terms "treatment" and "rehabilitation" may be too broad for certainty.

B.3b Length of Temporary Release Provisions for Re-Integrative Purposes

The options are presented with a view to meeting the following objectives:

- to keep the use of custody to the minimum level necessary;
- to ensure the provision of a continuum of community dispositions including intensive community supervision and to encourage resort thereto; and
- to ensure judicial control over length of stay with the exception of time-limited temporary absences.

Options

Option 1: Status quo (fifteen days)

Option 2: Temporary Releases of Thirty Days Non-Renewable for the Purpose of Re-integration

Option 1 - Status Quo (fifteen days)

Suggested Advantages

- the current temporary release period allows release for the stated purposes without detracting from the function of review and the role of the court in sentencing; and
- in most cases, fifteen days provides a sufficient length of time to achieve the purposes indicated (e.g. a short visit to the family to ease the transition back to the family).

Suggested Disadvantages

- the 15-day period is seen as too restrictive for absences for re-integrative purposes where the duration of a program quite frequently exceeds 15 days;
- the clause has been subject to varying interpretations with more than one jurisdiction commonly using back-to-back temporary absences while others strictly enforce the 15-day limit; and
- in light of the delays encountered in the review process and the consequent unavailability of early release with respect to short-term dispositions, the temporary release provisions are regarded as a timely alternative mechanism to achieving early release. In these cases, it is argued that the 15-day limit

is too restrictive. For example, it could be appropriate to release a youth who was ordered to three months custody and had been of very good behaviour retaining, of course, the powers of supervision, arrest and revocation.

Option 2 - Temporary Releases of Thirty Days Non-Renewable

Suggested Advantages

- a 30-day period accommodates a variety of programs which seem to run for approximately a month and better reflects the intent of the section;
- would make early release, albeit administratively determined, more available to short-term sentences and therefore, it is argued that young offenders serving these sentences would have the same incentives as youth serving longer terms. The greater incentives offered would facilitate improved program management and young offender participation, and thereby increase the prospects for rehabilitation;
- the extension to 30 days does not detract from the fact that the youth is serving a sentence, and the powers of arrest, suspension and revocation provide an immediate and strong enforcement mechanism to ensure the safety of the public;
- in cases where the benefits of a custodial placement have been achieved, this option would work towards preserving custody and the high costs associated thereto for those who most require it;
- this change would be consistent with the increased responsibility proposed for provincial directors in terms of determination of level; and
- the option, while giving added flexibility to administrators, would clearly prohibit back-to-back temporary absences which have been a concern.

Suggested Disadvantages

- represents, to some degree, an erosion of the principle of judicial control of the sentencing authority of the court;
- unlike the adult provisions, there would be no required minimum stay in custody;
- administrative considerations may, in some cases, have an undue weight, thereby leading to questionable decisions;

- while the same problem could occur with the 15-day limit, there is a greater potential for administrative abuse with the longer period, to the point where the young person could serve a custody disposition which is substantially lower than that ordered by the court, thereby undermining the intent of the court disposition; and

- may be considered a disadvantage in those jurisdictions which use back-to-back temporary releases.

B.3c Criteria for Review

Two options suggest themselves:

Option 1: Status Quo
Option 2: Amend the grounds for review in s. 28(4):

- by adding to the introduction of this subsection, words to the effect of "where, at this stage and in all the circumstances of the young person and the young person's disposition, a court is satisfied that";
- para. (c) would refer to"available and/or appropriate services or programs that were not available and/or appropriate at the time of sentencing;
- by adding a new ground that "the opportunities for rehabilitation would be greater in the community"; and
- by adding a new ground of "prospects of successful reintegration into society would be enhanced by release".

Option 1 - Status Quo

Suggested Advantages

- the current paragraph (d), which states "on such other grounds as the youth court considers appropriate", provides sufficient flexibility to take into account any other relevant factor.

Suggested Disadvantages

- the language is not as directive as is desirable, and may therefore contribute to too narrow an interpretation in terms of the justifying factors for review;
- the current focus in para.28(4)(c) on "new services that were not available at the time of the disposition" is too restrictive in its focus; and
- the change in language from "the court" to "a court", with whatever other drafting changes would be required, would allow for review by a different court than the court which ordered the original disposition.

Option 2 - Amend the Grounds for Review

Suggested Advantages

- the grounds of review should be clear on their face;
- the reference to available/appropriate services rather than "new" removes an unjustifiably restrictive ground;
- the addition respecting all the circumstances of the youth and the youth's disposition clarifies the function of the court which is to consider whether the youth should be released at this stage of the youth's disposition;
- providing opportunities for rehabilitation in the community recognizes that, at a certain point for some young offenders, a community disposition is likely to be more effective for both the youth and the public; and
- the proposal which speaks to prospects of successful re-integration being enhanced articulates the belief that, at a certain point, there is no further benefit to be derived from custody and that release into the community, under whatever supervision the court considers appropriate, is preferable.

Suggested Disadvantages

Unknown

B.3d **The Appropriate Review Process for Early Release**

Option 1: Expedite the s.29 process by establishing that, where no application for review is made by the young person, parents, or the Attorney General, the youth's release is to be determined forthwith on the expiration of the 10-day notice period by written authority of a judge without a hearing.

Option 2: Expedite the s.29 process by removing the involvement of a judge where there is no objection made by the young person, parents, or Attorney General to the release of the young person.

Option 1 - Expedite the S.29 Administratively-Initiated Review Process by Removing Requirement for a Hearing:

Suggested Advantages:

- the court would retain exclusive control over mitigation of the original disposition by retaining the capacity to "make no direction";
- the court would continue to have the option of requesting a personal appearance of the young person if considered necessary;
- the early release process would be less protracted, thereby facilitating more timely releases and more timely access to alternative resources, and increasing the likelihood of those youths who are serving shorter sentences obtaining an early release. This greater flexibility and timeliness would, it is argued, better satisfy the principle of minimal interference with freedom, gradually reduced levels of intervention (reintegration into the community), meeting the special needs of young persons, and the long-term interests of the community;
- by eliminating the need for a hearing where all parties consent to the early release, there would be savings in court time and costs; and
- there would likely be reduced custodial costs.

Suggested Disadvantages:

- releasing the young person without a court hearing removes this significant decision from a public forum (which has been required in several jurisdictions even where the release is not contested), although this disadvantage practically arises only for less worrisome cases ;

- given that the young person and the parents are unlikely to object to the early release and the crown the most likely, the crown becomes the final arbiter with two concerns flowing therefrom -
  - the crown may be reluctant to assume this role and therefore request more reviews; and
  - there may be an actual/perceived conflict in role between the prosecutorial and the releasing functions;
- a court appearance may be helpful in reinforcing to the young person that the court retains control over the disposition and is keeping a watchful eye over the young person; and
- even for non-contested cases, there may be some which on the surface may seem self-evident, but are not in fact so. In such cases the court is not provided the opportunity to hear representations and fully weigh the merits of the application

Option 2 - Expedite the S.29 Administratively-Initiated Review Process by Removing the Involvement of a Judge Where There Is No Application to Review the Recommendation

Suggested Advantages

- the early release process would be less protracted than Option 1, thereby facilitating more timely releases, more timely access to alternative resources, and increasing the likelihood of youth who are serving shorter sentences obtaining an early release. This greater flexibility and timeliness would, it is argued, better satisfy the principle of minimal interference with freedom and gradually reduced levels of intervention (reintegration into the community), and better meet the special needs of young persons and the long-term interests of the community;
- savings in court time and costs by eliminating the need for judicial involvement where all parties consent to the early release;
- likelihood of reduced custodial costs; and
- the process would still have checks and balances insofar as the young person, parent, and Crown would receive notice and have the opportunity to request a review. The Crown's role would continue to be one which would ensure the principle of protection of society and respect for the court's intent in sentencing.

Suggested Disadvantages

- releasing the young person without a court appearance removes this significant decision from a public forum, although this disadvantage would likely only arise in less worrisome cases;

- a court appearance is, it is argued, helpful to reinforce to the young person that the court retains control over the disposition and is keeping a watchful eye over the young person;

- some cases, which on the surface may seem self-evident, may not in fact be so. In such cases the court is not given the opportunity to hear representations and fully weigh the merits of the application; and

- the loss of judicial involvement where there is no application removes the court as the final decision-making body.

B.3e <u>The Appropriate Form of Release Following Custody</u>

The options below should be considered in light of the following objectives:

° to keep the use of custody to the minimum level necessary;

° to facilitate the matching of programs to young persons throughout the length of the disposition; and

° to ensure judicial control over length of disposition.

Option 1: Release from Custody on Probation for Balance of Disposition (Status Quo)

Option 2: Probation or Conditional Release from Custody for Balance of Disposition

NOTE RE OPTION 1 AND 2:

It is suggested that the authority to provide for court-based, absolute termination of a disposition upon release from custody could be built into either Option 1 or Option 2 under specified grounds (for example,in the best interests of the young person and the public). This would allow an appropriate response to those cases where community supervision is unnecessary after early release from custody (for example, a youth who has served a short dispositional term and is returning to a positive family situation and community support). Further, where community supervision is not required in a given case, there would be appropriate reductions in costs.

<u>Option 1 - Release from Custody on Probation for Balance of Disposition (Status Quo)</u>

<u>Suggested Advantages</u>

° permits some re-integration assistance; and

° respects the original duration of disposition ordered by the court even if the nature of the disposition is altered.

<u>Suggested Disadvantages</u>

° community supervision may be of limited effectiveness given practical impediments to enforcing breaches of probation (e.g. necessity of proof of wilful failure; long delay until trial);

- release on probation, with no vehicle for returning the youth to custody without a new conviction, may have limited credibility with some youth courts. Such courts may, therefore, be reluctant to release some young persons. This results in long stays in custody and little transitional support when the youth returns to society; and

- does not enable a provincial director to provide short-term crisis custodial care where circumstances deteriorate and such intervention is required to prevent future criminal activity.

Option 2 - Probation or Conditional Release from Custody for Balance of Disposition.

This option would provide, in addition to the option of probation for release from custody, a form of conditional release where the young person is obliged to meet certain conditions. Failure to meet conditions could result in administrative suspension of release and, following return to custody, a youth court hearing to determine whether release ought to be continued or revoked. This release mechanism is somewhat analogous to parole except that the youth court retains decision-making authority, rather than an administrative tribunal.

Bill C-58, An Act to Amend the Young Offenders Act and the Criminal Code, proposes this form of release and relevant sections are set out in Appendix C to this document to provide a model. Further study and consultation would be required, however, to determine the most suitable model of conditional supervision for offences other than murder.

Suggested Advantages

- in addition to the merits of probation, this option would possess more credibility with courts, would encourage resort to the review process and would likely result in more frequent use of early release;

- enforcement sanctions would be expected to result in improved control of the behaviour of released youth and thereby enhance the protection of the community; and

- allows for short-term custodial crisis care where release plans deteriorate.

- This option was endorsed unanimously by Provincial and Territorial Ministers responsible for juvenile justice at a Meeting of Ministers at Niagara-on-the-Lake on June 14, 1990.

Suggested Disadvantages

- the apprehension powers of the provincial director may not be warranted for lesser offences;
- the complexity of the conditional supervision process could be seen as aggravating an already complex release process; and
- without appropriate education, there may be confusion about the differences and respective advantages of probation and conditional supervision.

APPENDIX A

A REVIEW OF AVAILABLE YOA CUSTODY DATA

A REVIEW OF AVAILABLE YOA CUSTODY DATA

Introduction

The purpose of this section is to review available data relating to the use of dispositional custody under the *Young Offenders Act (YOA)*, specifically:

- comparisons of the use of custody/training schools under the *YOA* versus the *Juvenile Delinquents Act (JDA)* in the three provinces where appropriate comparative data are available;
- an examination of trends in the proportion of youth court cases resulting in a committal to custody among constant age groups since proclamation in 1984;
- an examination of trends in the average daily population in custody since proclamation in 1984;
- a comparison of the use of open custody prior to and after the "protection of society" dispositional criterion - sub-section 24(1) *YOA* - was made applicable to open custody by amendments to the *Act* in 1986;
- a review of changes in average custodial disposition length since proclamation in 1984;
- broadly, the types of offences resulting in committals to custody; and,
- comparisons of the use of custody under the *Criminal code* versus the *YOA* for the uniform maximum age (UMA) population (i.e., 16 and/or 17 year olds) in the two provinces where appropriate comparative data are available.

Data Sources and Limitations

Data sources include provincial average daily custodial population statistics reported to the Canadian Centre for Justice Statistics, as well as for some provinces (British Columbia and Ontario), provincial court/correctional statistics on committals/admissions to youth custody centres.

A further and principal source of data is the Youth Court Survey, compiled by the Canadian Centre for Justice Statistics, which is comprised of youth court data reported from nine provinces and the two territories.

The Survey is intended to be a census of *Criminal Code* and other Federal Statute charges heard in youth courts, but it is believed that some youth courts may have under-reported

data to the Survey and not all jurisdictions can verify the accuracy of the data reported. Consequently, these data must be interpreted as only indicators rather than as definitive measures. For this reason, the reported volumes of youth court cases resulting in a committal to custody in each jurisdiction are not analyzed; rather, the proportion of cases committed to custody are examined. (This will be explained in more detail later.)

Another major weakness of the Youth Court Survey is the exclusion of Ontario court data; Ontario does not report data to the Survey. Separate court data compiled by Ontario are, however, available and included in the analysis. Due to differences in data definitions, these Ontario court data cannot be directly compared to Youth Court Survey data; it is, however, still appropriate to observe and compare changes in trend.

Prince Edward Island and the two territories are omitted from the analysis because the small numbers of youths committed to custody in these jurisdictions results in the data being easily skewed by relatively small changes in volume.

Since the issue at hand is *YOA* dispositional policy, only dispositional custody data are included in the analysis, i.e., remand data are excluded.

Due to the significant effects of the change in the uniform maximum age, age-specific data are examined, where available.

It should be noted that it is <u>not</u> usually prudent nor fair to directly compare the apparent rates of use of custody in one jurisdiction to another. To illustrate why this is the case, differences among jurisdictions in the proportion of cases committed to custody are derived from the actual volume of cases dealt with by the youth courts, but these volumes (and case characteristics) can be affected by procedural differences among provinces in, for example, charging the pre-court screening practices, as well as the availability of alternative measures.

Further, the operational definitions of open and secure custody -and the extent of use of "probation orders to reside" in programs that can be similar to open custody - can vary considerably across jurisdictions, rendering cross-jurisdictional comparisons meaningless in some cases. It is, therefore, much more appropriate to limit the analysis to changes in trends <u>within</u> particular jurisdictions over time, rather than compare across jurisdictions.

Another, and a most important consideration is that the data only point to changes in trend in the use of custody <u>associated</u> with the *YOA*; the data do <u>not</u> empirically establish a cause and effect relationship between the use of custody and the *YOA* itself nor any particular aspect of the *YOA* (eg., open and secure custody). In this regard, the data generally (but not exclusively) suggest an apparent increasing incidence of committals to custody under the *YOA* in several provinces, accompanied by an apparent decrease in the average length of custodial dispositions. While these changes <u>could</u> be attributable to the *Act* (or particular aspects of it), it is also possible that other factors quite independent of the *Act*, may be influencing these trends, eg., changes in community and/or judicial attitudes, the availability of services, etc.

Finally, the analysis examines three different measures of custody "use" - the incidence of committals to custody, average custodial sentence length, and average daily population in custody. As the analysis will indicate, the trends are different depending upon which measure (or unit of analysis) is examined. How one interprets the data presented - and whether one places a greater or lesser emphasis on the incidence of committals, average sentence length, or average daily population - will very much depend upon one's focus of concern, which can include: costs, management of a custodial system, the frequency with which young offenders are deprived of their liberty, the length of the deprivation of liberty, etc. For example, is it "better" or "worse" to have one in every ten offenders committed to custody for six months each, or to have two of every ten offenders committed to custody for three months each (resulting in no difference in the average daily custodial population)? This is for the reader to judge.

JDA/YOA Comparisons

Reliable data which can compare the rate of committals to custody under the *YOA* with training school or institutional committals under the *JDA* are not available for most provinces because of: changed systems of service delivery; changed operational definitions and legal means of facilitating institutional placements; and, particularly, the absence of age - year data which permits one to separate out increases in volume solely attributable to the effects of the UMA.

There are, however, comparative data available for British Columbia, Manitoba, and Ontario (12-15 year olds).

Table 1 presents correctional data on the volume of sentenced admissions to youth custody centres from 1983-84, the last *JDA* year, to 1989-90 in British Columbia. As these data represent only admissions of youths under 17 years old throughout all years - the maximum age in effect in British Columbia under the *JDA* - the effects of the UMA are removed. Table 1 indicates that the volume of admissions to custody in British Columbia increased markedly from the last *JDA* year to 1986-87, diminished slightly after 1986 and then increased again in 1989-90. The volume of admissions in 1989-90 was 83% greater than the last *JDA* year. After proclamation of the *Act* in 1984-85 there were increases in both open and secure custody but greater increases in secure custody (108%) than open custody (76%). It should be noted that under the *JDA*, British Columbia had already established a system of (administratively determined) levels of open and secure custody and that definite (rather than indeterminate) sentencing was the practice. As well, other data from this jurisdiction indicate that (again controlling for the effects of the UMA), while committals to youth custody were increasing during this period of time, committals of adults to provincial correctional centres were diminishing.[1]

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[1] Source: British Columbia Ministry of Solicitor General, Corrections Branch.

JDA/YOA data are also available for Manitoba, where the UMA had no effect because the maximum age in that province was already established as under 18 years under the *JDA*. The average daily population of youth in dispositional custody in Manitoba (Table 2) in 1983-84, the last *JDA* year, was 90, but by 1986-87 this had risen to an average of 223, an increase of 147%. The average population, however, diminished after 1986-87, particularly as a result of declines in open custody, to a total of 179 in 1989-90, which represents a 99.3% increase over the last *JDA* year. Additional data from an early study in Manitoba reports that 87 young offenders were committed to custody from the Winnipeg youth court in 1983 under the *JDA*, but in 1985 this had risen to 219 young offenders, an increase of 156%.[2]

The apparent increased use of custody in Manitoba seems almost entirely attributable to a greater use of open custody. Manitoba officials advise, however, that these data must be cautiously interpreted because changes in the rates of use of custody have been affected by changes in policy and practice (from the *JDA*) in the interface between the child welfare and youth justice systems, and in the use of probation residential placements, i.e., the increases in custody are, in part, attributable to a change in the legal and operational definition of custody from the *JDA* to the *YOA* and to internal systemic changes vis-à-vis the use of residential/custodial resources. An additional consideration in the interpretation of these data is that the volume of youths transferred to adult court in Manitoba has decreased under the *YOA*, i.e., these cases may have been committed to youth custody instead of being transferred to adult court.

It should be noted that the general trends in both British Columbia and Manitoba correctional data for the *YOA* are corroborated by the Youth Court Survey data, to be discussed later.

Since Ontario has established a two-tiered youth court system, comparable data are available on *JDA* and *YOA* dispositions for young offenders under the age of 16 years, as presented in Table 3. It should be noted that fair comparisons cannot be made between committals under the *JDA* to the care of Children's Aid Societies and committals under the *YOA* to open custody, given the varying legal and administrative mechanisms available under both the *JDA* and *YOA* to facilitate group and foster home placements. Fair comparisons can, however, be made between committals to training schools under the *JDA* and committals to secure custody under the *YOA*. In this regard, Table 3 indicates that these committals increased by 68% from the last *JDA* year to 1988-89.

Table 4 presents some additional - and seemingly conflicting data - for Ontario respecting the average daily population of training schools/secure custody centres from 1982-83 to 1989-90. This table indicates that the average daily population declined markedly from

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[2] C.A. Latimer (1986), "Winnipeg Youth Courts and the Young Offenders Act", Manitoba Department of Attorney General.

Table 5 indicates that in the six year *YOA* period - putting aside the very modest increases in Quebec and Saskatchewan - six of eight provinces experienced marked increases (ranging from 50% to 109%) in the proportions of young offenders committed to custody. (Adding the Ontario data from Table 3, then this is the case in seven of nine provinces.)

Tables 6 and 7 present the same type of data for the same period of time, except they separate the data into proportions of cases committed to secure and open custody respectively. Table 6 indicates that five of eight provinces experienced marked increases (34% or more) in the proportions of cases committed to secure custody in the six year period, while three provinces (Nova Scotia, New Brunswick and Saskatchewan) experienced decreases. As well, Table 3 indicates that committals to secure custody in Ontario increased by 43% between 1984-85 and 1988-89.

With respect to open custody, Table 7 indicates that six of eight provinces experienced marked increases - ranging from 87% to 227% - in the proportion of cases committed to open custody between 1984-85 and 1989-90. Saskatchewan experienced a more modest (29%) increase, while Quebec decreased. Table 3 indicates that between 1984-85 and 1988-89 Ontario experienced a 106% increase in committals to open custody.
(It should be noted that the data for Quebec in Tables 6 and 7 - which indicate a marked increase in secure custody and a concomitant decrease in open custody -is somewhat anomalous. Quebec underwent a marked reversal in the relative use of open versus secure custody from the first to second *YOA* years; from 1985-86 to 1989-90, however, the pattern of use in Quebec of each type of custody has, in fact, been fairly stable.)

Sentence Length

As indefinite sentences were the norm under the *JDA*, comparisons of *JDA* and *YOA* average sentence lengths are not available, except for British Columbia where definite sentencing was the universal practice under the *JDA*. British Columbia data indicate that the average custodial sentence length in the last *JDA* year was 120 days compared to 84 days in 1989-90, a 30% decrease.[4]

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[4] Source: British Columbia Ministry of Solicitor General, Corrections Branch. These are aggregate sentences.

310 in 1982-83 (*JDA*) to 169 in 1988-89, before rising to 218 in 1989-90, the latter representing a 30% decrease when compared to the last known *JDA* year.

At first blush, these Ontario data are seemingly inconsistent, but this is not necessarily the case. While there are no comparable statistics available, it is commonly accepted in Ontario that lengths of stay in secure custody under the *YOA* are substantially less than the lengths of stay in training schools under the *JDA*. It may be the case then that the apparent increases in the number of individuals committed to custody have been more than offset by sharply diminished lengths of stay.[3] (This phenomenon, which is not peculiar to Ontario, will be discussed in greater detail later.)

As comparable *JDA/YOA* data are not available for other provinces, one can only say that changes in these provinces (if any) associated with the *YOA* are unknown; it cannot be assumed that other provinces have or have not experienced changes similar to the above-noted three provinces.

Trends Under the YOA

Table 5, which presents data derived from the Youth Court Survey, presents the proportions of youth court cases with guilty findings resulting in a custodial disposition (open or secure) in eight provinces. To control for the effects of the UMA, which was implemented in 1985-86, and to facilitate an examination of longer term trends, age-constant populations are presented. Therefore, only the jurisdictional age applicable in 1984-85 is included in the data throughout all years, i.e., 12 to 17 year olds (inclusive) in Manitoba and Quebec, 12 to 16 year olds in Newfoundland and British Columbia, and 12 to 15 year olds in the remaining provinces.

This table, in combination with the Ontario court data presented in Table 3, therefore, permits an analysis of trends in committals to custody among age-constant populations for the six year period between proclamation of the *Act* in 1984-85 and 1989-90 in nine provinces.

With respect to the Ontario data, Table 3 indicates that between 1984-85 and 1988-89 total committals to custody increased by 76%.

The data presented in Table 5 require some explanation to assist the layman in interpretation. The data presented here represents the proportions of cases resulting in a custodial committal. At first blush, an increase in proportions from, for example, 10% to 20% of cases may seem to be only 10%. This is incorrect - the proportion actually doubled, i.e., it increased by 100%. This relative change in proportions from 1984-85 to 1989-90 is presented in the right hand column of Table 5.

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[3] An alternate explanation, of course, is that one or the other sets of data is inaccurate.

Table 8 presents average (median) sentence lengths[5] to secure custody and open custody for eight provinces reporting to the Youth Court Survey for the *YOA* period 1984-85 to 1988-89. This table indicates that there has been a general trend toward shorter sentence lengths in secure custody in five of eight provinces, with no consistent trend in the remaining three (Atlantic) provinces. With respect to open custody, there has been a general trend toward shorter sentences in seven of eight provinces (all but Saskatchewan). In most provinces where average sentence length has decreased, the change is substantial, i.e., a decrease of one-third or more.[6]

The average sentence length derived from court data for Ontario youths under 16 is not available, but the distribution of aggregate sentence lengths of admissions to the Ministry of Community and Social Services custodial facilities is available for the period 1985-86 to 1987-88. These data also indicate a trend toward shorter sentence lengths: in 1985-86 50% of custodial sentences to open custody were for less than three months, but by 1987-88 these short sentences comprised 63%; for secure custody in the same period of time the corresponding figures were 57% and 63%.[7]

Average Daily Populations

Table 9 describes the average daily populations of young offenders in dispositional custody, by province, from 1985-86 to 1989-90.[8]

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[5] These are average sentence lengths arising from a case, not aggregate (i.e., including, for example, consecutive sentences) sentences imposed on one young offender. "Median" is a measure of central tendency referring to the mid-point in a distribution, i.e., in this case, one-half of sentences would be longer than the median and the other half shorter than the median.

[6] It should be noted that these data include sentences imposed on the UMA population from 1985-86 onward and therefore are dissimilar from the previous tables which remove the UMA population from the analysis. It is possible that the trend in average sentence lengths for the UMA and non-UMA populations may differ. Note, however, that the trend in both Quebec and Manitoba, which were not affected by the UMA, has also been one of decreased average sentence length.

[7] Source: Ontario Ministry of Community and Social Services.

[8] Source: Canadian Centre for Justice Statistics, Young Offender Custodial Key Indicator Report. Data for 1985-86 in jurisdictions affected by the UMA are omitted because the low volumes arising in this first transition year can foster misleading impressions.

These data are of somewhat limited utility in demonstrating long term trends because: 1984-85 data (i.e., the base *YOA* year) are not available; the data commence with 1985-86 which was a transitional year in the implementation of the UMA; and, most importantly, the data for most jurisdictions include young offenders of all ages and therefore do not permit one to separate out the effects of the UMA.

There are, however, four jurisdictions where the data are not confounded by the new UMA population influx in 1985-86: Quebec and Manitoba, which were unaffected by UMA, and Ontario and Nova Scotia, which have established separate custodial systems for young offenders under 16 years old. In this regard, the Nova Scotia and Quebec data indicate a decrease of 28% and 14% respectively in the average custodial population between 1985-86 and 1989-90, whereas the Ontario under 16 population has fluctuated somewhat but in 1989-90 was at a comparable level to 1985-86. The Manitoba data - indicating substantial increases - have been discussed earlier. In short, a consistent pattern is not evident among these four provinces.

For the remaining jurisdictions, the three year period from 1987-88 to 1989-90 can be examined as it can be safely assumed that the transitional effects of the UMA had (more of less) dissipated by 1987-88. In this regard, three jurisdictions - Saskatchewan, Alberta and British Columbia - have experienced modest decreases in the average daily population, while the decrease in Newfoundland has been more considerable (36%). Three jurisdictions - Nova Scotia (16-17 year olds), Ontario (16-17 year olds) and New Brunswick - have experienced increases. In short, there, again, has been no consistent trend across these jurisdictions.

It can be said, however, that in general terms there has been a reasonable stability in the average daily population in custody in the three year period from 1987-88 to 1989-90.

Explaining Discrepancies

At first blush, there appear to be a number of inconsistencies in the data described above. As examples: the analysis of committals to custody originating from Ontario (under 16) courts suggests marked increases since 1985-86 but parallel increases have not been reflected in the Ontario (under 16) average daily population; the proportion of cases committed to (open and secure) custody in Quebec has been stable yet the average daily population in custody has decreased; and the Nova Scotia (under 16) proportions of cases committed to custody has increased, yet the average daily population decreased.

These data are not, however, as inconsistent as they initially appear. Average daily populations are determined by the volume of persons admitted to custody multiplied by the custodial time served by these individuals, the latter of which is determined by sentence length (and also temporary release and court review practices). Bearing this in mind, then

the decreases in the average daily population (largely open custody/Table 9) in Nova Scotia arising in the face of apparent increases in committals to custody (Table 5) can very likely be largely attributed to sharp decreases in average open custody sentence length (Table 8). Similarly, the decline in the average daily population in Quebec (Table 9) in the face of a relative stability of committals to custody (Table 5) is likely largely attributable to decreased average sentence lengths (Table 8) in that province. As well, the increased committals to custody from Ontario (under 16) courts have likely been offset to some degree by decreased average sentence lengths in that province.

This explanation brings to light the very important consideration in the interpretation of these data noted as the outset of this paper, and which bears re-iterating. How one interprets the data - and whether one places greater or lesser emphasis on committals to custody or average sentence length or average daily populations - will very much depend upon one's focus of concern which can, for example, include: costs, management of a custodial system, the frequency with which young offenders are deprived of their liberty, the length of time of deprivation of liberty, etc.

Types of Offences and Offenders

Table 10, derived from the Youth Court Survey, describes dispositions to secure and open custody by most serious offence type in 1987-88.[9] This table indicates that property offences accounted for the largest proportion of dispositions to secure and open custody, 57% and 63% respectively. Violent offences accounted for a relatively small proportion of dispositions to secure and open custody, 15% and 12% respectively.

The data in Table 10 only refer, however, to the most serious offence which precipitated a disposition to custody, but does not address the history of offences, obviously an important consideration of the youth court. In this regard, an analysis of Youth Court Survey data for 1988-89 indicates that 70% of young offenders ordered to serve secure custody and two-thirds of those ordered to serve open custody as the most serious disposition were recidivist offenders.[10] As well, recidivists were about three times more likely than first-time offenders to be ordered to serve secure or open custody dispositions as the most serious disposition.

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[9] This is a summary table including all jurisdictions, except Ontario, Prince Edward Island and the Northwest Territories, for which data are not available. Where more than one offence of different types results in a custodial disposition, the more serious offence category (as ordered in the table) is coded.

[10] Statistics Canada, Canadian Centre for Justice Statistics (June 1990) Juristat, "Recidivists in Youth Court: An Examination of Repeat Young Offenders Convicted in 1988-89". These data exclude Ontario, Nova Scotia and the Northwest Territories.

A first conviction, however, received the longest average term of secure or open custody when compared with dispositions for successive convictions.

Changes in Sentencing Considerations

Sub-section 24(1) *YOA* states:

> **"The Youth court shall not commit a young person to custody...unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person."**

Prior to September, 1986, this sentencing consideration only applied to committals to secure custody, but amendments at that time extended it to apply to open custody committals as well. The express objective of this amendment was - in response to the concerns of some provinces about the open custody provisions "widening the net of custody" - to limit the frequency of committals to open custody.

One means of (broadly) assessing the effects of this amendment is by comparing the rates of committals to open custody (controlling for the UMA) prior to the amendment - i.e., 1984-85 and 1985-86 - with the rates after the amendment, i.e., 1987-88 and onward. A re-examination of Table 7, which presents the proportions of cases committed to open custody for eight provinces, and Table 3 for Ontario (under 16) courts, facilitates this comparison. These tables indicate that eight of nine provinces - Quebec being the exception - experienced marked increases in the proportion of cases committed to open custody after 1985-86. The Quebec proportions of committals from 1985-86 onward remained relatively stable (but increased somewhat in 1989-90). No province experienced a decrease in the use of open custody after 1985-86. Shifts in the relative use of open versus secure custody cannot, to any meaningful degree, explain the apparent increases in open custody in these several provinces, except for Saskatchewan where the increased proportion of cases committed to open custody is associated with parallel decreases in secure custody.

A somewhat different picture emerges, however, when one examines pre and post amendment data (i.e., 1985-86 versus 1987-88 and onward) respecting average daily custodial populations (Table 9) in the four jurisdictions (Ontario and Nova Scotia under 16, Quebec and Manitoba) where there are data which are unconfounded by the UMA. In this regard, the Nova Scotia and Quebec average populations decreased considerably (23% and 17%) between 1985-86 and 1989-90, while Manitoba decreased slightly (5%) and Ontario increased slightly (7%). These apparent discrepancies between committals and average daily population in Nova Scotia and Quebec would (again) appear to be explained by marked decreases in average open custody sentence length in these two provinces (see Table 8).

It should be noted that the "protection of society" amendment in 1986 was accompanied by another amendment which created the section 26 offence of breach of a community disposition (replacing the former section 33 review provisions). The extent to which this new offence may be associated with open custody use, or may have offset any potentially inhibiting affects of the protection of society criteria, is not readily ascertainable.

The Uniform Maximum Age Population

In eight provinces and the two territories the change in the uniform maximum age in 1985 brought 16 and/or 17 year olds, formerly dealt with as adults under the *Criminal Code*, under the jurisdiction of the *YOA*. Data comparing the use of jail under the *Criminal Code* versus custody under the *YOA* for this population are available for two provinces.

In British Columbia, an analysis has indicated that the average daily population of 17 year olds in custody under the *YOA* is 44% higher than the comparable jail population in 1983-84.[11] It is unclear, however, whether this change in British Columbia is attributable to an increased frequency of committals of 17 year olds to custody, to longer sentences and/or to (given that remission and parole are not available to young offenders) lengthier time served. (In this latter regard, British Columbia data indicate young offenders serve 80-90% of the original custodial sentence imposed,[12] whereas as adults and with remission they would serve less than 67% of the original jail sentence imposed.)

Table 11 presents a comparison of admissions to adult jail (1984-85) under the *Criminal Code* and to youth custody under the *YOA*, as well as sentence lengths, of 16 and 17 year olds in Ontario. This table indicates, comparing 1984-85 to 1988-89, virtually no change (1% increase) in admissions, but a 54% increase in sentence length. It should be noted that in terms of the length of custodial time served the differences between the *Criminal Code* and *YOA* are very likely greater, given the inapplicability of remission to *YOA* custodial dispositions. It should be further noted, however, that the UMA population committed to jail under the *Criminal Code* in Ontario was very largely administratively classified to functionally secure jail facilities; under the *YOA* in 1988-89, 36% of this population was committed to open custody facilities. (Note: This, however, is not the case in British Columbia where under the *Criminal Code* 17 year olds were very frequently administratively classified to functionally open facilities.)

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[11] R.R. Corrado and A. Markwart (1988), "The Prices of Rights and Responsibilities: An Examination of the Impacts of the Young Offenders Act in British Columbia", Canadian Journal of Family Law (Volume 7, November 1: 93-116).

[12] Canadian Centre for Justice Statistics (1989), "A Description of the Application of Dispositions under the Young Offenders Act in British Columbia", Statistics Canada, Ottawa.

Apparent increases in the average daily population and/or sentence length for 16 and/or 17 year olds should not be surprising. When dealt with under the *Criminal Code* these persons often would appear before the court as "first" (adult) offenders and thereby would be more likely to attract a mitigated sentence, whereas under the *YOA* many would appear before the youth court as recidivist young offenders and therefore be more likely to attract a custodial disposition.

It should be noted that these data are limited to only two jurisdictions and the treatment of the UMA population in other jurisdictions is not known; it cannot be assumed that the above-noted effects in British Columbia and Ontario are representative of all jurisdictions which were affected by a change in maximum age.

Summary of Observations

In summary, the data presented above support the following observations:

- In the three provinces where there are comparable data available which permit separating out the effects of the UMA and comparisons of the use of custody/training schools under the *JDA* and *YOA*:

  (i) British Columbia experienced marked increases (greater than 80%) in committals to custody, but also a marked decrease (30%) in average custodial sentence length.

  (ii) Manitoba experienced a doubling (or more) in average daily custodial population, particularly associated with open custody, but these apparent increases also appear to be associated, to an unknown extent, to internal systemic changes in the use of custodial/residential resources and to an apparent decrease in transfers to adult court.

  (iii) Ontario (under 16) experienced a marked (68%) increase in court committals to secure custody (versus *JDA* training schools) but also a marked (30%) decrease in average daily population, a change likely attributable to reduced lengths of stay in custody under the *YOA*.

- Among the non-UMA population, there have been marked increases in the proportions of youth court cases committed to custody in six of eight provinces since the *Act* was proclaimed in 1984-85; similar increases are also evident in the volume of Ontario young offenders committed to custody by Ontario (under 16) courts.

- With the respect to the above-noted changes, there have been greater increases, and more consistently so across provinces, in the proportions of cases committed to open custody than there has been in secure custody, although the reliance on secure custody (excluding Quebec) has also apparently increased in several provinces.

- An increase in the proportions or volume of youth court cases being committed to custody does not necessarily translate into corresponding increases in average daily populations in custody; this is likely attributable, in large part, to shorter sentence lengths.

- Generally speaking, average daily custodial populations have been relatively stable in the 1987-88 to 1989-90 period.

- There has been a general trend toward shorter custodial sentence lengths under the *YOA*, particularly with open custody sentences.

- The 1986 amendment which made the "protection of society" sentencing consideration applicable to open custody has not been associated with decreased proportions of youth court cases committed to custody or with a decrease in court committals/ admissions (British Columbia and Ontario) to custody, but in two of four jurisdictions where there are average daily population data unconfounded by the UMA, the population did decrease considerably after the amendment, a phenomenon likely attributable to substantially decreased open custody sentence lengths in these two jurisdictions (Quebec and Manitoba).

- The most common precipitating offences leading to a committal to custody are property offences; less than 15% of young offenders are committed to custody for violent offences, but 70% of those committed to custody are recidivists.

- Comparable pre and post *YOA* data available in two provinces - Ontario and British Columbia - indicate that the youth population brought under the jurisdiction of the *YOA* (i.e., 16 and/or 17 year olds) by the change in the uniform maximum age are either committed to youth custody for longer periods or there is greater average daily population in custody under the *YOA* when compared to their former treatment as adults under the *Criminal Code*.

It should be re-iterated that the above data do not establish a cause and affect relationship between the *YOA*, nor any particular aspect of the *YOA*, and any changes in the use of custody; the data only establish an association. Also, while it may be said, generally speaking, that there have been similar trends in several provinces, there are differences among these provinces in the degree of change, particularly by type of custody. These variations among provinces suggest that factors beyond simple change in the law may also be at play.

TABLE 1

Admissions[1] to Sentenced Custody of Young Offenders Under 17 Years, British Columbia, 1983-84 to 1989-90

Year	Open	Secure	Total
1983-84 (JDA)	--	--	355
1984-85 (YOA)	188	158	346
1985-86	250	265	515
1986-87	329	326	655
1987-88	312	302	614
1988-89	335	272	607
1989-90	322	328	650

1) An admission is one young person sentenced to open or secure custody, regardless of the number of (concurrent of consecutive) dispositions imposed initially or that may arise during the period of custody. Remand admissions, transfers between levels of custody, returns from temporary releases, or a new custodial disposition arising from separate charges are not counted as a new admission, i.e., there is no duplication in the count of admissions. The same young person will only be counted as a new admission if his/her custodial disposition has expired and there is a re-admission on new charges at a later date in the same year. Age is age at admission, not age at the time of the offence. Because of this there were, in fact, some 17 year olds admitted to custody in 1983-84, but these are excluded from the analysis.

Source: British Columbia Ministry of Solicitor General

TABLE 2

Average Daily Population of Young Offenders In Dispositional Custody, in Manitoba, 1983-84 to 1989-90

Year	Open	Secure	Total
1983-84	--	--	90
1984-85	17.5	82.9	100.4
1985-86	97.7	88.5	186.2
1986-87	126.9	95.7	222.6
1987-88	119.3	88.4	207.7
1988-89	112.0	78.7	190.7
1989-90	92.7	86.7	179.4

Sources: Manitoba Department of Community Services and Canadian Centre for Justice Statistics

TABLE 3

Dispositions of Offenders (Ages 12-15) in the Ontario Youth Court, Persons Charged with Federal Offences, 1983-84 to 1988-89

Year	Children's Aid Society	Open Custody	Secure Custody/ Training School	Total
1983-84 (JDA)	334	--	597	931
1984-85 (YOA)	9	775	701	1,476
1985-86	--	1,065	948	2,013
1986-87	--	1,579	1,019	2,597
1987-88	--	1,614	944	2,558
1988-89	--	1,594	1,003	2,597

Source: Ontario Ministry of Attorney General

TABLE 4

Average Population of Ontario Young Offenders (Ages 12-15) in Secure Sentenced Custody, 1982-83 to 1989-90

Year	Average Daily Population
1982-83 (JDA)[1]	310
1983-84 (JDA)	Not available
1984-85 (YOA)	Not available
1985-86[2]	228
1986-87	215
1987-88	195
1988-89	169
1989-90	218

1) Based on average daily populations for the period from October, 1982 to December, 1983.

2) 1985-86 to 1987-88 data are based on average daily populations for the normal fiscal year.

Source: Ontario Ministry of Community and Social Services

TABLE 5

Proportions of Cases With Guilty Findings Committed to (Secure and Open) Custody, Controlling for the Effects of the UMA, By Selected Provinces, Fiscal Years 1984-85 to 1989-90

Province	Proportions of Cases Committed to Custody						
	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90	% Change 1984-85 to 1989-90
Newfoundland (Age 12 to 16)	14.4	18.7	24.2	20.8	21.3	24.1	+ 67%
Nova Scotia (Age 12 to 15)	12.7	13.6	15.9	16.8	22.7	22.7	+ 79%
New Brunswick (Age 12 to 15)	20.8	22.3	21.2	27.5	29.2	31.3	+ 50%
Quebec (Age 12 to 17)	28.9	27.2	29.3	30.9	30.8	32.1	+ 11%
Manitoba (Age 12 to 17)	13.9	20.5	25.1	22.7	27.7	25.2	+ 81%
Saskatchewan (Age 12 to 15)	25.2	26.2	22.7	26.3	24.5	25.7	+ 2%
Alberta (Age 12 to 15)	10.3	13.8	19.5	18.5	18.1	18.9	+ 83%
British Columbia (Age 12 to 16)	11.2	15.9	19.8	22.0	21.6	23.4	+109%

Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Survey

TABLE 6

Proportions of Cases with Guilty Findings Committed to Secure Custody, Controlling for the Effects of the YOA, by Selected Provinces Fiscal Years 1984-85 to 1989-90

Province	Proportions of Cases Committed to Secure Custody						
	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90	% Change 1984-85 to 1989-90
Newfoundland (Age 12 to 16)	7.9	11.7	14.5	11.5	11.5	11.9+	+ 51%
Nova Scotia (Age 12 to 15)	2.9	1.1	1.7	1.9	4.6	2.3	- 21%
New Brunswick (Age 12 to 15)	15.3	16.0	11.2	14.4	11.1	13.3	- 13%
Quebec (Age 12 to 17)	8.8	16.1	17.6	18.5	19.3	18.8	+114%
Manitoba (Age 12 to 17)	8.5	10.5	10.6	9.4	10.9	11.4	+ 34%
Saskatchewan (Age 12 to 15)	11.3	14.6	9.4	9.9	8.6	7.7	- 32%
Alberta (Age 12 to 15)	4.1	4.3	7.0	6.0	6.2	7.3	+ 78%
British Columbia (Age 12 to 16)	5.0	9.4	9.6	9.6	7.5	8.4	+ 68%

Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Survey

TABLE 7

Proportions of Cases with Guilty Findings Committed to Open Custody, Controlling for the Effects of the UMA, by Selected Provinces, Fiscal Years 1984-85 to 1989-90

Province	Proportions of Cases Committed to Open Custody						
	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90	% Change 1984-85 to 1989-90
Newfoundland (Age 12 to 16)	6.5	7.0	9.7	9.3	9.8	12.2	+ 88%
Nova Scotia (Age 12 to 15)	9.7	12.5	14.2	14.9	18.1	20.4	+110%
New Brunswick (Age 12 to 15)	5.5	6.3	10.0	13.1	18.1	18.0	+227%
Quebec (Age 12 to 17)	20.1	11.1	11.7	12.4	11.5	13.3	- 34%
Manitoba (Age 12 to 17)	5.4	10.0	14.5	13.3	16.8	13.8	+156%
Saskatchewan (Age 12 to 15)	13.9	11.6	13.3	16.4	15.9	18.0	+ 29%
Alberta (Age 12 to 15)	6.2	9.5	12.5	12.5	11.9	11.6	+ 87%
British Columbia (Age 12 to 16)	6.2	6.5	10.7	12.4	14.1	15.0	+137%

Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Survey

TABLE 8

Average (Median) Custodial Sentence (in days) Length by Type of Custody, by Province, Fiscal Year 1984-85 to 1988-89

Province	Secure Custody					Open Custody				
	1984-85	1985-86	1986-87	1987-88	1988-89	1984-85	1985-86	1986-87	1987-88	1988-89
Newfoundland	30	60	60	30	60	120	90	90	60	60
Nova Scotia	90	60	60	90	60	180	90	60	60	60
New Brunswick	90	120	90	60	90	180	180	180	90	90
Quebec	180	180	120	120	90	210	180	180	180	120
Manitoba	300	180	180	120	150	270	180	120	120	120
Saskatchewan	90	120	90	66	60	90	120	90	90	90
Alberta	180	90	90	90	60	180	90	90	90	90
British Columbia	90	60	60	60	51	120	90	90	60	45

Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Survey

TABLE 9

Average Daily Populations of Young Offenders in Dispositional Custody, by Type of Custody and Province, Fiscal Year 1986-87 to 1989-90[1]

	Secure Custody	Open Custody	Total
Newfoundland			
1986-87	61.4	85.0	146.4
1987-88	50.5	80.8	131.3
1988-89	43.4	74.1	117.5
1989-90	42.1	41.8	83.9
Nova Scotia (Under 16 years)			
1985-86	5.7	49.3	55.0
1986-87	7.0	44.8	51.8
1987-88	5.7	40.1	45.8
1988-89	2.0	39.1	41.1
1989-90	1.5	37.9	39.4
Nova Scotia (16-17 years)			
1986-87	43.2	22.7	65.9
1987-88	43.3	31.5	74.8
1988-89	38.4	36.2	74.6
1989-90	45.7	41.6	87.3
New Brunswick[2]			
1986-87	81	56	137
1987-88	88	65	153
1988-89	71	81	152
1989-90	74	105	179
Quebec			
1985-86	257.6	283.0	540.6
1986-87	238.5	264.8	503.3
1987-88	238.2	239.4	477.6
1988-89	226.6	226.5	453.1
1989-90	229.3	234.5	463.8

1) 1985-86 data are included in those jurisdictions where the UMA had no effect, i.e., Quebec, Manitoba, and the two provinces with split jurisdictions (Ontario and Nova Scotia). Otherwise, 1985-86 data are omitted for all jurisdictions affected by the UMA, because the artificially low populations of 16 and/or 17 years old arising in this first transition year can lead to misleading impressions.

2) Figures for New Brunswick are rounded.

TABLE 9 (Concluded)

	Secure Custody	Open Custody	Total
Ontario (Under 16 years)			
1985-86	228.0	258.8	486.8
1986-87	215.1	269.6	484.7
1987-88	194.5	266.4	460.9
1988-89	169.1	261.3	430.3
1989-90	217.7	277.4	495.1
Ontario (16-17 years)			
1986-87	457.2	339.8	797.0
1987-88	518.1	421.3	939.4
1988-89	480.4	416.0	896.4
1989-90	517.9	424.3	942.2
Manitoba			
1985-86	88.5	97.7	186.2
1986-87	95.7	126.9	222.6
1987-88	88.4	119.3	207.7
1988-89	78.7	112.0	190.7
1989-90	86.7	92.7	179.4
Saskatchewan			
1986-87	103.5	120.5	224.0
1987-88	133.3	144.6	277.9
1988-89	130.2	131.8	262.0
1989-90	124.7	126.6	251.3
Alberta			
1986-87	128.0	239.8	367.8
1987-88	131.8	217.0	348.8
1988-89	142.8	210.6	353.4
1989-90	146.1	188.2	334.3
British Columbia			
1986-87	155.6	135.1	290.7
1987-88	141.7	150.3	292.0
1988-89	136.3	140.9	277.2
1989-90	122.1	137.2	259.2

Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Key Indicator Report

TABLE 10

Young Offender Dispositions[1] to Secure and Open Custody, by Most Serious Offence Type, 1987-88, Canada[2]

Offence Type	Secure Custody	Open Custody
Violent Offences	14.7%	12.4%
Property Offences	56.6%	62.5%
Other Criminal Code	17.3%	11.7%
Drug Offences	3.0%	2.7%
YOA Offences	8.4%	10.7%

1) Total dispositions is the unit of measure, i.e., where both a secure and open custody disposition arises from the same case, both are counted.

2) Data for Ontario, Prince Edward Island and the Northwest Territories are not included as they were not reported to the Survey.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Survey

TABLE 11

Ontario (16-17 Year Olds) Sentenced Admissions to Jail/Custody, Under the Criminal Code[1] and YOA, 1984-85 to 1988-89

Year	Admissions[2]			Average Sentence Length[4] (days)
	Secure	Open[3]	Total	
1984-85	--	--	2,503	91.3
1985-86	1,017	N/A	N/A	177.7 (secure only)
1986-87	1,492	N/A	N/A	165.7 (secure only)
1987-88	1,531	949	2,460	132.9 (secure) 140.4 (open)
1988-89	1,612	947	2,535	142.7 (secure) 136.6 (open)

1) Criminal Code and Federal Statute offences only.

2) A large proportion of admissions to open custody are for unknown offences; admissions to open custody for Criminal Code and Federal Statute offences are therefore estimated (pro-rated) from the known distribution.

3) 1985-86 was a transitional year in implementation of the UMA.

4) Admissions do not include provincial offences. However, the average sentence length does include these offences in the calculation.

APPENDIX B

DRAFT MODEL OF LEGISLATIVE CRITERIA FOR THE IMPOSITION OF CUSTODY

DRAFT MODEL OF LEGISLATIVE CRITERIA FOR THE IMPOSITION OF CUSTODY (Option 2)

(NOTE: The draft model is included to provide a framework for the proposed custody criteria and is not intended as a legislative draft.)

Custody as a Last Resort

24(1) The youth court, having regard to the objectives that custody should only be imposed as a measure of last resort and that the responsibility young persons bear for their contraventions, and their special needs, should to the greatest extent possible be satisfied within the community, shall not commit a young person to custody under paragraph 20(1)(k) unless the court determines

(a) a committal to custody is necessary:

(i) to protect the public from crimes of violence; or

(ii) where any other sanction would not sufficiently reflect the seriousness of the offence or the repetitive nature of the young person's history of previous convictions or adequately protect the public or the integrity of the administration of justice; or

(iii) to ensure the young person is held accountable for any wilful failure or refusal to comply with the terms of any other disposition or order of the court that has been imposed on the young person where no other sanction appears adequate to compel compliance or to denounce the non-compliance; and

(b) dispositions or programs not involving custody, or other measures, have previously been tried and are no longer suitable or are presently unsuitable to the circumstances or are unavailable.

Idem

24(2) Subsection(1) does not create a presumption of a disposition not involving custody for the offences of high treason, treason, first degree murder or second degree murder, or serious personal injury offences referred to section 752 Criminal Code.

Reasons Stated

24(3) Where a youth court makes a disposition involving custody, it shall, in addition to the reasons given in accordance with subsection 20(6), state the reasons for its decision not to make a disposition or dispositions not involving custody and the reason shall form part of the record of the proceedings.

APPENDIX C

EXTRACTS FROM BILL-C12

AN ACT TO AMEND THE YOUNG OFFENDERS ACT AND THE CRIMINAL CODE, WHICH PROVIDE FOR CONDITIONAL SUPERVISION

C-12

Third Session, Thirty-fourth Parliament,
40 Elizabeth II, 1991

THE HOUSE OF COMMONS OF CANADA

BILL C-12

An Act to amend the Young Offenders Act and the Criminal Code

First reading, May 29 ,1991

THE MINISTER OF JUSTICE

C-12

Troisième session, trente-quatrième législature,
40 Elizabeth II, 1991

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-12

Loi modifiant la Loi sur les jeunes contrevenants et le Code criminel

Première lecture le 29 mai 1991

LE MINISTRE DE LA JUSTICE

22001

or the Attorney General's agent, the provincial director and the review board, if any has been established or designated.

Review provisions apply

(12) Subsections 16(9) to (11) apply, with such modifications as the circumstances require, in respect of an order made, or the refusal to make an order, under subsection (1).

Where application denied

(13) Where an application under subsection (1) is denied, the court may, with the consent of the young person, the Attorney General and the provincial director, proceed as though the young person had been brought before the court as required under subsection 26.2(1).

Conditional supervision

26.2 (1) The provincial director of the province in which a young person is held in custody pursuant to a disposition made under paragraph 20(1)(*k*.1) or, where applicable, an order made under subsection 26.1(1), shall cause the young person to be brought before the youth court at least one month prior to the expiration of the period of custody and the court shall, after affording the young person an opportunity to be heard, by order, set the conditions of the young person's conditional supervision.

Conditions to be included in order

(2) In setting conditions for the purposes of subsection (1), the youth court shall include in the order the following conditions, namely, that the young person

(*a*) keep the peace and be of good behaviour;

(*b*) appear before the youth court when required by the court to do so;

(*c*) report to the provincial director immediately on release, and thereafter be under the supervision of the provincial director or a person designated by the youth court;

(*d*) inform the provincial director immediately on being arrested or questioned by the police;

(*e*) report to the police, or any named individual, as instructed by the provincial director;

provincial et à la commission d'examen qui a été éventuellement établie ou désignée.

Idem

(12) Les paragraphes 16(9) à (11) s'appliquent, compte tenu des adaptations de circonstance, à l'ordonnance visée au paragraphe (1) ainsi qu'au refus de rendre une telle ordonnance.

Cas de rejet

(13) En cas de rejet de la demande prévue au paragraphe (1), le tribunal peut, avec le consentement de l'adolescent, du procureur général et du directeur provincial, procéder comme si l'adolescent avait été amené devant lui conformément au paragraphe 26.2(1).

Liberté sous condition

26.2 (1) Le directeur de la province où l'adolescent est tenu sous garde en vertu d'une décision visée à l'alinéa 20(1)*k*.1) ou, le cas échéant, d'une ordonnance visée au paragraphe 26.1(1), doit faire amener ce dernier devant le tribunal pour adolescents au moins un mois avant l'expiration de la période de garde de sa peine pour que le tribunal fixe, par ordonnance, après avoir donné à l'adolescent l'occasion de se faire entendre, les conditions dont est assortie la période de liberté sous condition de sa peine.

Conditions obligatoires

(2) Le tribunal doit prévoir dans l'ordonnance visée au paragraphe (1) les conditions suivantes à l'égard de l'adolescent :

a) l'obligation de ne pas troubler l'ordre public et de bien se conduire;

b) l'obligation de comparaître devant le tribunal pour adolescents lorsqu'il en est requis par le tribunal;

c) l'obligation de se rapporter à son directeur provincial dès sa mise en liberté et ensuite de demeurer sous la surveillance de celui-ci ou de la personne désignée par le tribunal;

d) l'obligation d'informer immédiatement son directeur provincial s'il est arrêté ou interrogé par la police;

e) l'obligation de se présenter à la police ou à la personne nommément désignée, tel qu'il est indiqué par son directeur provincial;

(*f*) advise the provincial director of the young person's address of residence on release and after release report immediately to the clerk of the youth court or the provincial director any change
(i) in that address,
(ii) in the young person's normal occupation, including employment, vocational or educational training and volunteer work,
(iii) in the young person's family or financial situation, and
(iv) that may reasonably be expected to affect the young person's ability to comply with the conditions of the order;

(*g*) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the order; and

(*h*) comply with such reasonable instructions as the provincial director considers necessary in respect of any condition of the conditional supervision in order to prevent a breach of that condition or to protect society.

f) l'obligation, dès sa mise en liberté, de communiquer immédiatement à son directeur provincial son adresse résidentielle et d'informer immédiatement celui-ci ou le greffier du tribunal de tout changement :
(i) d'adresse résidentielle,
(ii) d'occupation habituelle, tel qu'un changement d'emploi rémunéré ou bénévole ou un changement de formation,
(iii) dans sa situation familiale ou financière,
(iv) qui, selon ce qui peut être raisonnablement prévu, est susceptible de modifier sa capacité de respecter les modalités de l'ordonnance;

g) l'interdiction d'être en possession d'une arme, au sens de l'article 2 du *Code Criminel*, ou en avoir le contrôle ou la propriété, sauf en conformité avec l'ordonnance;

h) l'observation de toutes instructions raisonnables que le directeur provincial estime nécessaires concernant les conditions de la liberté sous condition pour empêcher la violation de celles-ci ou pour protéger la société.

Other conditions

(3) In setting conditions for the purposes of subsection (1), the youth court may include in the order the following conditions, namely, that the young person

(*a*) on release, travel directly to the young person's place of residence, or to such other place as is noted in the order;

(*b*) make reasonable efforts to obtain and maintain suitable employment;

(*c*) attend school or such other place of learning, training or recreation as is appropriate, if the court is satisfied that a suitable program is available for the young person at such a place;

(*d*) reside with a parent, or such other adult as the court considers appropriate, who is willing to provide for the care and maintenance of the young person;

(*e*) reside in such place as the provincial director may specify;

Autres conditions

(3) Le tribunal peut prévoir dans l'ordonnance visée au paragraphe (1) les conditions suivantes à l'égard de l'adolescent :

a) l'obligation, dès sa mise en liberté, de se rendre directement à sa résidence ou à tout autre lieu dont l'adresse est indiquée dans l'ordonnance;

b) l'obligation de faire les efforts voulus en vue de trouver et de conserver un emploi approprié;

c) la fréquentation de l'école ou de tout établissement d'enseignement, de formation ou de loisirs approprié, si le tribunal estime qu'il y existe, pour l'adolescent, un programme convenable;

d) la résidence chez l'un de ses père ou mère ou chez un autre adulte prêt à assurer son entretien que le tribunal juge idoine;

e) la résidence à l'endroit fixé par le directeur provincial;

(f) remain within the territorial jurisdiction of one or more courts named in the order; and

(g) comply with such other reasonable conditions set out in the order as the court considers desirable, including conditions for securing the good conduct of the young person and for preventing the commission by the young person of other offences.

f) l'obligation de demeurer sur le territoire de la compétence d'une ou plusieurs juridictions mentionnées dans l'ordonnance;

g) l'observation des autres conditions raisonnables prévues à l'ordonnance et que le tribunal estime souhaitables et notamment des conditions visant à assurer sa bonne conduite et à empêcher la récidive.

Temporary conditions

(4) Where a provincial director is required under subsection (1) to cause a young person to be brought before the youth court but cannot do so for reasons beyond the young person's control, the provincial director shall so advise the youth court and the court shall, by order, set such temporary conditions for the young person's conditional supervision as are appropriate in the circumstances.

Conditions temporaires

(4) Si la comparution de l'adolescent s'avère impossible pour des raisons indépendantes de sa volonté, le directeur provincial en informe le tribunal; ce dernier assortit, par ordonnance, la liberté sous condition des conditions temporaires qu'il estime adaptées dans les circonstances.

Conditions to be set at first opportunity

(5) Where an order is made under subsection (4), the provincial director shall bring the young person before the youth court as soon thereafter as the circumstances permit and the court shall then set the conditions of the young person's conditional supervision.

Conditions dans les meilleurs délais

(5) En cas de prononcé de l'ordonnance visée au paragraphe (4), le directeur provincial amène aussitôt que possible l'adolescent devant le tribunal, lequel assortit de conditions sa liberté.

Report

(6) For the purpose of setting conditions under this section, the youth court shall require the provincial director to cause to be prepared, and to submit to the youth court, a report setting out any information that may be of assistance to the court.

Rapport

(6) Le tribunal doit, pour fixer les conditions en vertu du présent article, exiger du directeur provincial qu'il fasse préparer et lui présente un rapport contenant les éléments d'information qui pourraient lui être utiles.

Provisions apply

(7) Subsections 26.1(3) and (5) to (10) apply, with such modifications as the circumstances require, in respect of any proceedings held pursuant to subsection (1).

Dispositions applicables

(7) Les paragraphes 26.1(3) et (5) à (10) s'appliquent, compte tenu des adaptations de circonstance, aux procédures intentées en vertu du paragraphe (1).

Idem

(8) Subsections 16(9) to (11) and 23(3) to (9) apply, with such modifications as the circumstances require, in respect of an order made under subsection (1).

Idem

(8) Les paragraphes 16(9) à (11) et 23(3) à (9) s'appliquent, compte tenu des adaptations de circonstance, à l'ordonnance visée au paragraphe (1).

Suspension of conditional supervision

26.3 Where the provincial director has reasonable grounds to believe that a young person has breached or is about to breach a condition of an order made under subsection 26.2(1), the provincial director may, in writing,

(a) suspend the conditional supervision; and

Suspension de la liberté sous condition

26.3 S'il a des motifs raisonnables de croire qu'un adolescent enfreint, ou est sur le point d'enfreindre, une condition de l'ordonnance rendue en vertu du paragraphe 26.2(1), le directeur provincial peut, par écrit :

a) suspendre la liberté sous condition;

(*b*) order that the young person be remanded to such place of custody as the provincial director considers appropriate until a review is conducted under section 26.5 and, if applicable, section 26.6.

b) ordonner la mise sous garde de l'adolescent au lieu que le directeur estime indiqué jusqu'à ce que soit effectué l'examen visé à l'article 26.5 et, le cas échéant, à l'article 26.6.

Apprehension

26.4 (1) Where the conditional supervision of a young person is suspended under section 26.3, the provincial director may issue a warrant in writing, authorizing the apprehension of the young person and, until the young person is apprehended, the young person is deemed not to be continuing to serve the disposition the young person is then serving.

Arrestation

26.4 (1) Le directeur provincial peut, par mandat écrit, autoriser l'arrestation de l'adolescent dont la liberté sous condition est suspendue conformément à l'article 26.3; l'adolescent est réputé, jusqu'à son arrestation, ne pas purger sa peine.

Warrants

(2) A warrant issued under subsection (1) shall be executed by any peace officer to whom it is given at any place in Canada and has the same force and effect in all parts of Canada as if it had been originally issued or subsequently endorsed by a provincial court judge or other lawful authority having jurisdiction in the place where it is executed.

Mandats d'arrêt

(2) Le mandat délivré en vertu du paragraphe (1) est exécuté par l'agent de la paix destinataire et il peut l'être sur tout le territoire canadien comme s'il avait été initialement décerné ou postérieurement visé par un juge de la cour provinciale ou une autre autorité légitime du ressort où il est exécuté.

Peace officer may arrest

(3) Where a peace officer believes on reasonable grounds that a warrant issued under subsection (1) is in force in respect of a young person, the peace officer may arrest the young person without the warrant at any place in Canada.

Arrestation sans mandat

(3) L'agent de la paix peut arrêter un adolescent sans mandat sur tout le territoire canadien s'il a des motifs raisonnables de croire qu'un mandat d'arrêt délivré en vertu du paragraphe (1) est en vigueur à l'égard de cet adolescent.

Requirement to bring before provincial director

(4) Where a young person is arrested pursuant to subsection (3) and detained, the peace officer making the arrest shall cause the young person to be brought before the provincial director or a person designated by the provincial director

(*a*) where the provincial director or the designated person is available within a period of twenty-four hours after the young person is arrested, without unreasonable delay and in any event within that period; and

(*b*) where the provincial director or the designated person is not available within the period referred to in paragraph (*a*), as soon as possible.

Comparution devant une personne désignée

(4) L'agent de la paix qui a arrêté et détient un adolescent en vertu du paragraphe (3) le fait conduire devant le directeur provincial ou une personne désignée par lui :

a) soit dans les meilleurs délais dans les vingt-quatre heures suivant l'arrestation, si le directeur ou cette personne est disponible pendant cette période;

b) soit le plus tôt possible, dans le cas contraire.

Release or remand in custody

(5) Where a young person is brought, pursuant to subsection (4), before the provincial director or a person designated by

Mise en liberté ou détention

(5) Le directeur ou la personne devant qui l'adolescent est conduit en vertu du paragraphe (4) :

the provincial director, the provincial director or the designated person

(*a*) if not satisfied that there are reasonable grounds to believe that the young person is the young person in respect of whom the warrant referred to in subsection (1) was issued, shall release the young person; or

(*b*) if satisfied that there are reasonable grounds to believe that the young person is the young person in respect of whom the warrant referred to in subsection (1) was issued, may remand the young person in custody to await execution of the warrant, but if no warrant for the young person's arrest is executed within a period of six days after the time the young person is remanded in such custody, the person in whose custody the young person then is shall release the young person.

a) le remet en liberté s'il n'est pas convaincu qu'il existe des motifs raisonnables de croire qu'il est l'adolescent visé par le mandat mentionné au paragraphe (1);

b) dans le cas contraire, peut le mettre sous garde en attendant l'exécution du mandat; si celui-ci n'est pas exécuté dans les six jours suivant la mise sous garde, la personne qui en a alors la garde met l'adolescent en liberté.

Review by provincial director

26.5 Forthwith after the remand to custody of a young person whose conditional supervision has been suspended under section 26.3, or forthwith after being informed of the arrest of such a young person, the provincial director shall review the case and, within forty-eight hours, cancel the suspension of the conditional supervision or refer the case to the youth court for a review under section 26.6.

Examen par le directeur

26.5 Aussitôt après la mise sous garde de l'adolescent dont la liberté sous condition a été suspendue conformément à l'article 26.3 ou aussitôt après avoir été informé de l'arrestation de l'adolescent, le directeur provincial réexamine le cas, et, dans les quarante-huit heures, soit annule la suspension, soit renvoie l'affaire devant le tribunal pour adolescents pour examen au titre de l'article 26.6.

Review by youth court

26.6 (1) Where the case of a young person is referred to the youth court under section 26.5, the provincial director shall, as soon as is practicable, cause the young person to be brought before the youth court, and the youth court shall, after affording the young person an opportunity to be heard,

(*a*) if the court is not satisfied on reasonable grounds that the young person has breached or was about to breach a condition of the conditional supervision, cancel the suspension of the conditional supervision; or

(*b*) if the court is satisfied on reasonable grounds that the young person has breached or was about to breach a condition of the conditional supervision, review the decision of the provincial

Examen par le tribunal

26.6 (1) Dans le cas du renvoi visé à l'article 26.5, le directeur doit dans les meilleurs délais possible faire amener l'adolescent devant le tribunal; celui-ci, après avoir donné à l'adolescent l'occasion de se faire entendre, doit :

a) soit annuler la suspension de la liberté sous condition s'il n'est pas convaincu qu'il existe des motifs raisonnables de croire que l'adolescent en a enfreint, ou était sur le point d'en enfreindre, une condition;

b) soit examiner la décision du directeur provincial de suspendre la liberté sous condition et rendre une décision en vertu du paragraphe (2) s'il est convaincu qu'il existe des motifs raisonnables de croire que l'adolescent a enfreint, ou était sur le point d'enfrein-

director to suspend the conditional supervision and make an order under subsection (2).

dre, une condition de sa liberté sous condition

Order

(2) On completion of a review under subsection (1), the youth court shall order

(a) the cancellation of the suspension of the conditional supervision, and where the court does so, the court may vary the conditions of the conditional supervision or impose new conditions; or

(b) the continuation of the suspension of the conditional supervision for such period of time, not to exceed the remainder of the disposition the young person is then serving, as the court considers appropriate, and where the court does so, the court shall order that the young person remain in custody.

Ordonnance du tribunal

(2) Au terme de son examen, le tribunal pour adolescents doit, par ordonnance :

a) soit annuler la suspension de la liberté sous condition, auquel cas il peut en modifier les conditions ou en imposer de nouvelles;

b) soit maintenir la suspension de la liberté sous condition de l'adolescent pour la période qu'il estime indiquée ne dépassant pas le reliquat de sa peine, auquel cas il doit ordonner son maintien sous garde de l'adolescent.

Reasons

(3) Where a youth court makes an order under subsection (2), it shall state its reasons for the order in the record of the case and shall

(a) provide or cause to be provided a copy of the order, and

(b) on request, provide or cause to be provided a transcript or copy of the reasons for the order

to the young person in respect of whom the order was made, the counsel and parents of the young person, the Attorney General or the Attorney General's agent, the provincial director and the review board, if any has been established or designated.

Motifs

(3) Le tribunal pour adolescents qui rend une ordonnance dans le cadre du paragraphe (2) en consigne les motifs au dossier de l'instance et doit :

a) fournir ou faire fournir une copie de l'ordonnance,

b) sur demande, fournir ou faire fournir une transcription ou copie des motifs de l'ordonnance,

à l'adolescent qui en fait l'objet, à son avocat, à ses père et mère, au procureur général ou à son représentant, au directeur provincial et à la commission d'examen qui a été éventuellement établie ou désignée.

Provisions apply

(4) Subsections 26.1(3) and (5) to (10) and 26.2(6) apply, with such modifications as the circumstances require, in respect of a review under this section.

Application de dispositions

(4) Les paragraphes 26.1(3) et (5) à (10) et 26.2(6) s'appliquent, compte tenu des adaptations de circonstance, à l'examen visé au présent article.

Idem

(5) Subsections 16(9) to (11) apply, with such modifications as the circumstances require, in respect of an order made under subsection (2)."

Idem

(5) Les paragraphes 16(9) à (11) s'appliquent, compte tenu des adaptations de circonstance, à l'ordonnance visée au paragraphe (2).»

8. Paragraph 28(17)(c) of the said Act is repealed and the following substituted therefor:

"(c) release the young person from custody and place the young person on probation in accordance with section 23 for a period not exceeding the remainder

8. L'alinéa 28(17)c) de la même loi est abrogé et remplacé par ce qui suit :

«c) soit libérer l'adolescent et le placer en probation conformément à l'article 23, pour une période ne dépassant pas le terme de la période de garde ou, dans le