THE YOUNG OFFENDERS ACT:

PROPOSALS FOR AMENDMENT

CONSULTATION DOCUMENT

Department of Justice, Canada

July 21, 1989

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INTRODUCTION

The Young Offenders Act was unanimously passed by the House of Commons in the Spring of 1982, received Royal Assent on July 7, 1982, and was proclaimed in force on April 2, 1984. At the time of its enactment, the Young Offenders Act was considered to be innovative and sound legislation, and indeed is still so viewed by most juvenile justice professionals both across Canada and in the international community. Nevertheless, even before it was proclaimed, the Act was the focus of considerable controversy and a variety of real and immediate problems have been encountered during its short life. This is not surprising given that the new law affected virtually every sector in the juvenile justice system and required substantial reorganization of all provincial/territorial juvenile justice systems, sizeable capital expenditures and significant procedural and administrative changes.

In the fall of 1985, in response to difficulties that had been encountered, the federal government commenced a review. Following a nationwide process of consultation, proposals for amendment were put forward in Bill C-106 which was quickly passed by the House of Commons in June, 1986. While these amendments did not alter the fundamental principles of the Act, they did introduce important and necessary improvements which included modification to the provisions which prohibit publication of a youth's identity to allow publication where a court so orders and numerous amendments to the records provisions. It was recognized at the time of Bill C-106 that the proposals for change would respond to only those issues which it was reasonable to address in a short timeframe. Issues which were seen to require greater experience under the Act, more comprehensive data, and/or further consultation with a wide range of relevant professionals were postponed to be addressed over the longer term.

Since that time five major policy areas have been identified for further study and examination with a view to possible amendment. These are:

- the minimum age of criminal responsibility;
- the two-tiered custody system and process for review;
- the evidence provisions;
- provisions for transfer to adult court combined with the sufficiency of the current maximum penalty available under the Act; and
- provisions dealing with assessment and treatment of young offenders with special needs.

The present document includes a discussion of all of the above areas with the exception of minimum age, which remains under study.

Recently, Ministers Responsible for Juvenile Justice met in Charlottetown, Prince Edward Island, (June 8-9, 1989). At that time, the federal Minister of Justice indicated his plans to seek the views of other individuals and associations with expertise and interest in this area. Accordingly, over the next months the Minister of Justice will be seeking input regarding these issues and options from a wide range of professionals including correctional officials, members of non-governmental organizations concerned with juvenile justice, researchers, academics, police, the judiciary, lawyers, and advocacy groups.

It is hoped that this process will ensure that the most effective solutions are found in the interests of Canadian society and of young offenders and their rehabilitation.

CHAPTER 1: THE APPROPRIATE LEGISLATIVE RESPONSE TO MURDER ALLEGEDLY COMMITTED BY A YOUNG PERSON

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I. INTRODUCTION

The Young Offenders Act provides two distinct responses to the alleged commission of the offence of murder by a youth. The first allows the youth to be tried in youth court and, if convicted, sentenced to a maximum of three years in secure custody with earlier release to be determined by the youth court. The second allows for an application to be brought before the youth court seeking the transfer of a youth's case to adult court. Where such a transfer is ordered, the trial of the case is heard in adult court and the youth, if convicted, is subject to the same sentences as an adult. In the case of first degree murder, the Criminal Code prescribes a mandatory sentence of life imprisonment without eligibility for parole for twenty-five years. In the case of second degree murder, there is a mandatory sentence of life imprisonment without parole eligibility for a minimum of ten years.

While a number of jurisdictions and sectors of the public have expressed concerns with these transfer provisions, there does not appear to be a commonly held view as to the primary problem. Below is an introductory overview of the disparate views concerning the present law for youth charged with murder. A more specific breakdown of jurisdictional concerns will follow.

The stark alternative between a three year disposition and life imprisonment does not, in the opinion of several jurisdictions, provide sufficient flexibility to appropriately respond to the wide range of circumstances in which young persons commit murder. The three year disposition appears, depending on the circumstances of the offence and/or the offender, totally inadequate: to express societal condemnation of the taking of life; to provide sufficient time to address the needs of a young person in a given case; to protect the public; and/or to foster respect for and confidence in the administration of Canada's youth justice system.

It is also argued, however, that mandatory life imprisonment without parole eligibility for twenty-five years is an unattractive alternative for all but the most exceptional case. This view is advanced on a number of grounds: such a sentence fails to recognize that most young persons should not be held accountable in the same manner and to the same extent as adults because of their level of maturity; life sentences with lengthy parole ineligibility periods do not serve the interest of public protection beyond the period of incapacitation and are adverse to the goal of rehabilitation.

II. SUMMARY OF CONCERNS

Below is a list of the concerns expressed with respect to young persons charged with murder:

- the extreme disparity between the maximum disposition of three years under the Young Offenders Act and the mandatory minimum sentence of life imprisonment provides no middle ground with the result that courts are faced with two stark choices, one of which may not be appropriate, and the other which may, given the youth's age, be considered "draconian and unfair";

- the three year disposition may not provide sufficient time for the necessary treatment of a given youth, taking into account post-custodial supervision, thereby failing to respond to the needs of the youth and of the public for protection;

- the maximum disposition of three years appears totally inadequate to express society's condemnation of the taking of a life, thereby diminishing public respect for and confidence in the administration of juvenile justice;

- the interpretation given by appellate courts in some jurisdictions does not give paramountcy to the principle of the interests of society as was originally intended;

- the difficulty encountered in transferring youths to adult court, combined with the maximum three year sentence for youths, fails to ensure public and institutional safety;

- the absence of programs for young offenders in federal penitentiaries, along with the belief that young persons are particularly vulnerable in such facilities to victimization, are believed to have prejudiced a number of transfer applications; and

- section 16(2), which requires the court to take into account a number of factors, can be problematic as the Act does not provide sufficient guidance as to how the court is to weigh and consider the various factors with the result that, in the experience of one jurisdiction, there does not appear to be a factual case in which the courts would transfer.

III. HISTORY OF TRANSFER PROVISIONS

A. The Juvenile Delinquents Act

Under the Juvenile Delinquents Act (J.D.A.), initially proclaimed in 1908 and in force until April 1, 1984, a juvenile offender could be transferred to adult court, at the discretion of a juvenile court judge, if (s.9):

- the charge was an indictable offence;
- the juvenile was over fourteen years old; and
- the court found that "the good of the child and the interest of the community" demand transfer.

While a juvenile offender needed to be at least fourteen years of age to be eligible for transfer, there was not a restriction that the offence be committed prior to the fourteenth birthday. A youth could also be returned to court and transferred after adjudication. Although rarely done, a juvenile court judge could initiate a transfer hearing at his own discretion. There was not, as presently provided for in the Young Offenders Act, a statutory requirement that the judge give reasons, a statutory list of considerations, a mandatory pre-disposition report, a statutory right of review, or a right to court-appointed counsel. It should be noted, however, that many of these became a matter of common practice.

The seemingly incompatible interests found in the test for transfer under the J.D.A. were the subject of much jurisprudence. A good example of how this test was interpreted is found in the often quoted passage from Mr. Justice MacKinnon in R. v. Mero (1976), 13 O.R. (2d) 215, 30 C.C.C. (2d) 497, 70 D.L.R. (3d) 551 (C.A.):

> "...to direct that such a child be proceeded against by indictment in the adult court can only be ordered where the court is of the opinion that both the good of the child and the interest of the community demand it. The Shorter Oxford English Dictionary defines 'demand' as: 'to ask for peremptorily, imperiously or urgently', and the noun is therein defined as: 'an urgent requirement'. By this language Parliament has emphasized, it seems to me, that such an order should only be made where the crime is of a most serious nature and the criminal or other record of the child supports no other recourse or solution..."

It cannot be said that there was a "national approach" to

transfer under the J.D.A. Case law and practices varied to some degree across jurisdictions. As with today, Manitoba and Quebec reported the most frequent use of transfers under the J.D.A., but this would, in good part, be accounted for by (relative to other jurisdictions) the higher maximum age (under 18 years) available at the time in those two provinces.

B. The Process of Reform

The process of reform of Canadian juvenile justice legislation formally began in 1961 with the appointment of an Advisory Committee on Juvenile Delinquency by the Department of Justice, which was followed in the next twenty years by a variety of committee reports and draft bills. These reports and proposals entertained a variety of matters pertaining to transfer, including: eligible offences (e.g. indictable or summary), age eligibility, statutory considerations, the nature of the transfer test, and so on. Consistent throughout, however, were the themes that an individualized approach should be taken, that the seriousness of the offence is not sufficient justification alone for transfer, and that there should be some degree of balancing of the public interest with the youth's (rehabilitative) needs and circumstances.

The 1976 report on Young Persons in Conflict with the Law recommended an age minimum of sixteen years of age for transfer on the basis that the maturity and development of young persons between the ages of fourteen to sixteen are not sufficient to warrant their being dealt with in adult court.

The Young Offenders Act, introduced into Parliament in 1981 (Bill C-61), replaced the J.D.A. transfer provisions with: a minimum age of 14 years (at the time of commission of an offence); eligible charges being limited to indictable offences, except those specified in s.553 of the Criminal Code; transfer prior to adjudication only; removal of the judge's capacity to initiate transfer; affording both the Attorney General and the young person the opportunity to make application; a statutory list of considerations; mandatory pre-disposition reports; a right of the young person to be heard and to be represented by counsel; and a statutory right of review (appeal). Most notably, the transfer test was changed from the J.D.A. test to:

> "...if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, that the young person should be proceeded against in ordinary court..."

It is interesting to note that at First Reading, Bill C-61 provided for a slightly different test:

> "...if the court is of the opinion, having regard to the needs of the young person and the interests of society, that the young person should be proceeded against in ordinary court..."

It is clear that the interest of society and the needs of the young person were clearly given equal weight at First Reading. The test was intentionally changed at Third Reading to its present form, and explicit proposals to have the original wording restored and to have "the protection of society" as the sole test were voted down by the Justice and Legal Affairs Committee.

In the debates of the Committee, the transfer provisions were repeatedly cited by the then Solicitor General, Robert Kaplan, as a response to concerns about the increased maximum age and how mature, serious young offenders would be dealt with. As to the general purpose of the transfer provisions, Kaplan stated:

> "The transfer provision to adult court... provides the system with a safety valve mechanism for such difficult cases as the mature criminal who is under eighteen or the offender who has committed an extremely serious offence."

As to the intended interpretation of the test, Judge O. Archambault, Director of Policy for Young Offenders, and considered an architect of the Act, stated to the Justice and Legal Affairs Committee:

> "...the rewording of the principle is very significant, because what it means is that in criminal law the bottom line is public protection, but the application of that principle must be tempered with the recognition of the rights and needs and special circumstances of young persons...".

IV. THE CURRENT LAW

A. Legislative Provisions

A summary of the relevant provisions in the Young Offenders Act, the Criminal Code, and other relevant statutes is set out below.

The Young Offenders Act

An application to have a youth's case transferred to adult court can only be brought where the youth is fourteen years of age or over at the time of the alleged commission of the

offence and the youth is charged with an indictable offence. The test to be applied by the youth court is whether, "in the interest of society and having regard to the needs of the young person", the young person should be proceeded against in ordinary court. Interpretation of this test has varied and is dealt with in greater detail in Section IV. B.

In applying the above-noted test, the court must consider the following criteria as set out in subsection 16(2) and a pre-disposition report (subsection 16(3)):

- the seriousness of the alleged offence and the circumstances in which it was allegedly committed;
- the age, maturity, character and background of the young person and any prior record;
- the adequacy of the Young Offenders Act, and the Criminal Code were the youth to be transferred;
- the availability of treatment or correctional resources;
- any representations made to the court by or on behalf of the young person or the Attorney General; and
- any other factors the court considers relevant.

The Act provides for a two-stage review of the decision of the youth court. Accordingly, a decision by the youth court to transfer a youth's case or to refuse an application for transfer, where the youth court is not a superior court, is on application by the Attorney General or the youth, subject to review by the superior court which may confirm or reverse the youth court's decision (subsection 16(9)). A decision by a superior court may, with leave of the court of appeal, be reviewed by the court of appeal. This court may confirm or reverse the decision of the superior court (subsection 16(10)).

The effect of a transfer order is that the Young Offenders Act ceases to have effect and the young person is taken before the adult court and dealt with according to the laws applicable to adults. The only exception is that the ban on publication of the youth's identity shall, on application of the youth, be retained until the trial is ended in adult court (section 17).

Several circumstances could result in a youth who is charged with murder being dealt with in youth court:

- where a youth is not eligible for transfer by virtue of not meeting the age criterion of fourteen years;

- where no application for transfer is brought;
- where there is a finding of unfit to stand trial; and
- where an application for transfer is denied.

In all instances, except situations of unfitness to stand trial, the youth would be subject to a maximum sentence of three years secure custody. With the exception of temporary release provisions, the sentence can only be reduced by the youth court pursuant to the criteria in section 28. These criteria provide for mandatory annual review of custodial dispositions. They also allow a youth court judge to confirm the original disposition, order the young person to open custody from secure, or release the young person on probation for a period not to exceed the remainder of the period for which the youth had originally been committed to custody.

The provisions in the Act with respect to detention and custody require that young persons dealt with pursuant to the Young Offenders Act be incarcerated separate and apart from adult accused inmates (subsections 7(2) and 24.2(4)). An exception is made in the case of detention where a court is satisfied that a given youth "cannot, having regard to his own safety, or the safety of others, be detained in a place of detention for young persons; or no place of detention for young persons is available within a reasonable distance" (subsection 7(2)).

The Young Offenders Act also provides for the transfer of a youth who has been sentenced by the youth court to an adult facility at any time after the youth has reached the age of eighteen years (section 24.5). The intent of this provision is to ensure that older youth be appropriately placed for the sake of young offenders in the juvenile facility and of the offender whose needs and program demands may be better met by the adult provincial correctional system. Such a transfer requires an application of the provincial director to the youth court which may, after affording the young person an opportunity to be heard, so authorize it. The test to be applied by the court is whether the transfer to adult facilities is "in the best interests of the young person or in the public interest..." Should the youth be placed in adult correctional facilities, the provisions of the Young Offenders Act would continue to apply.

The Criminal Code

Where a youth is transferred to adult court and convicted on charges of first or second degree murder, the mandatory sentence is life imprisonment without parole eligibility for twenty-five years in the case of first degree, and a minimum

of 10 years in the case of second degree murder or whatever number of years in excess of ten years that has been specified by the court pursuant to s. 744 of the Criminal Code.

Section 733 of the Criminal Code allows for a transferred youth to serve his sentence in a youth facility until his twentieth birthday where the provincial director of the youth facility consents.

The Criminal Code does provide for judicial review of a sentence after the person has served at least fifteen years of his sentence for first degree murder, or for second degree murder where there is no eligibility for parole until the person has served more than fifteen years (section 745). The purpose of the application is to seek a reduction in the number of years of imprisonment without eligibility for parole. The application is made to the appropriate Chief Justice of the province who then designates a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application. The criteria include the character of the applicant, his conduct while serving his sentence, and the nature of the offence for which he was convicted.

Finally, the Criminal Code prohibits temporary absence or day parole until the final three years of sentence. Thus, under the current law, a transferred youth who is sentenced to life imprisonment without parole eligibility for a specified number of years is subject to the following restrictions until all but the last three years of the sentence have been served (in the case of first degree murder, twenty-two years): no absence without escort; no absence with escort for humanitarian and rehabilitative reasons unless authorized by the National Parole Board; and no day parole.

B. The Courts' Interpretation of the Law

The purpose of this section is to examine the judicial response to certain issues arising in the context of applications to transfer where the charge is first or second degree murder. Three fundamental issues are highlighted in the decisions reviewed:

- the weight that a court is to give in balancing the interest of society and the needs of the young person in accordance with s.16(1) and the declaration of principles (s.3);

- the disparity in sentence for a young person convicted of murder in the adult court as opposed to the maximum disposition in the youth court; and

- the impact of available services as it affects the

court's decision on a section 16 application.

Although the Supreme Court of Canada has heard argument on a case involving s.16 out of the Alberta Court of Appeal, it has not rendered a decision.[1]

The Test

Section 16(1) provides in part:

> "the youth court may...if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court, order that the young person be so proceeded against in accordance with the law ordinarily applicable to an adult charged with the offence". [Emphasis added].

The test "in the interest of society and having regard to the needs of the young person" has not met with uniform interpretation by the respective appellate courts.

Although the test prescribed by s.16(1) is worded differently than the test which prevailed for transfer applications under s.9 of the Juvenile Delinquents Act, some courts have had difficulty in discerning from the language any difference in interpretation, notwithstanding what may have been Parliament's intent.[2]

In Ontario, Saskatchewan and Quebec, the Courts of Appeal have generally held that the interest of society or the needs of the young person are not to be given greater importance one over the other but are instead to be weighed against each other having regard to the matters directed to be considered under section 16 (i.e. section 16(2)).[3] The Quebec Court of Appeal decision of R. v. Nathalie B. (1987), 35 C.C.C. (3d) 515 (Alta. C.A.) illustrates the emphasis of these courts on the needs of the youth. The Court of Appeal upheld the

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1 R. v. J.E.L. (Unreported, Alta. C.A., released Dec. 16, 1987; leave to appeal to the Supreme Court of Canada granted April 28, 1988.)

2 R. v. N.B. (1985), 21 C.C.C. (3d) 374 (Que. C.A.)
Contra: R. v. C.J.M. (1985), 49 C.R. (3d) 226 at 229 (Man. C.A.)
R.V. L.A.M. (1986), 33 C.C.C. (3d) 364 at 369 (B.C. C.A.)

3 R. v. M.A.Z. (1987), 35 C.C.C. (3d) 144 (Ont. C.A.); R. v. N.B. (1985), 21 C.C.C. (3d) 374 (Que. C.A.)

decision of the youth court not to transfer a young person, almost eighteen years old at the time of the alleged commission, who was charged with first degree murder. The absence of a record, criminal or otherwise, to show tendencies toward violence, the benefits of the youth correctional system, and the belief that a minimum adult sentence was not required to protect society were the primary grounds.

The Ontario Court of Appeal decision of R. v. Mark A. Z. reversed the decision of the Youth Court and the High Court which would have transferred the youth. The following factors appeared to militate against transfer: the youth had no prior record; he was fifteen years old; it was a case of intra-familial violence; and the evidence indicated that the youth was apparently treatable within the three year period. MacKinnon, A.C.J.O. stated:

> "In light of s.3, I do not think that the interest of society or the needs and interests of the young person are to be given greater importance one over the other. They ought to be weighed against each other having regard to the matters directed to be considered in subs. 16(2). In this case, I have sought to do that and I have concluded that the interest of society does not mandate that the appellant should be proceeded against in the adult court. I am not persuaded on the facts of this case, that any interest of society would be served by proceeding against the youth in the adult court."[4]

In contrast, the British Columbia, Alberta, and Manitoba Courts of Appeal are generally of the opinion that when considering the test, the emphasis is to be placed on the interest of society.[5] The decision of the British Columbia Court of Appeal in the case of R. v. L.A.M. reflects this emphasis. Carrothers, J.A. stated that the test in subsection 16(1), as compared to the test in the Juvenile Delinquents Act, "demonstrates a clear shift of emphasis in favour of the interest of society."[6]

Difficulty has also been experienced by the courts in

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4 Regina v. Mark A. Z. (1987), 35 C.C.C. (3d) 144 (Ont. C.A.)

5 R. v. L.A.M. (1986), 33 C.C.C. (3d) 364 at 369 (B.C.C.A.);
R. v. C.J.M. (1985), 49 C.R. (3d) 226 (Man. C.A.)
See also: R. v. E.E.H. et al., (1987), 35 C.C.C. (3d) 67 at 73 per Wakeling J.A. (Sask. C.A.)

6 R. v. L.A.M. (1986), 33 C.C.C. (3d) 364 at 369-370

interpreting what is meant by the phrase "interest of society". Is it something distinct from the needs of the young person or does it encompass such considerations? Does it mean the same as protection of society as that expression is used in s.3 or does it mean something different?[7] Certain cases are of interest for their interpretation of the phrase "interest of society". In these judgments, it is recognized that there is a shift in emphasis in the test for transfer from the Juvenile Delinquents Act to the Young Offenders Act with the latter placing greater emphasis on the objective of "interest of society." This term however has been interpreted broadly to encompass rehabilitation as well as protection. This interpretation is reflected in the decision of A.C.J. White in the case of R. v. B.R.C.:

> "If one equates the 'interest of society' with the protection of society... then perhaps the issue becomes simpler. Locking someone up to protect (using its narrow meaning) society is clear and effective. There is only a secondary concern about the needs of the young person... What for example would the court do if the protection of society clearly demanded a lock up, while the needs of the young person spoke heavily for long term medical treatment which could be effective. Surely again, the larger interest of society is that long term treatment be given rather than that the youth be locked up. Even if I were to accept that the words "the interest of society" are equated exactly with protection of society, then I am faced with decisions such as R. v. Wilmont which state that the prime objective of sentencing is the protection of society by means of prevention, deterrence and reform of the individual, with a just proportion between the crime and the sentence. The protection of society, therefore, also demands consideration for reform of the individual. I accept that one criterion may be emphasized ahead of another."[8]

The shift in wording from the test in the J.D.A. to that in the Young Offenders Act would suggest Parliament's intent to give greater emphasis to the interest of society than to the needs of the young persons where these two objectives are not reconcilable. The differences of opinion among the appellate courts, however, as to how to interpret the section establish the need for clarification in this regard which may be

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7 R. v. Wy, released April 20, 1988, unreported (B.C.C.A.); R. v. M.A.Z., (1987) 35 C.C.C. (3d) 144 (Ont. C.A.); R. v. J.R.D., released August 31, 1988, unreported at p. 33 (Que. C.A.)

8 1984 YOS 84-034 (Alta. Prov. Ct. - Fam. Div.)

forthcoming from the Supreme Court of Canada.

The Disparity Issue

Where a court is called upon to render a decision under section 16 involving a charge of murder, it is faced with the dilemma that should the young person be convicted as charged in the ordinary court, the youth would face a life sentence with parole ineligibility ranging from ten to twenty-five years. If convicted of the same charge in the youth court, the maximum allowable disposition is three years. The manner in which the respective courts of this country have dealt with the disparity issue, particularly respecting first degree murder, can be seen as one of the most significant factors dictating the court's ultimate decision on section 16 applications.

The late Associate Chief Justice MacKinnon of Ontario made the following comments about the disparity issue:

> "However, as I noted earlier there has been an unarticulated concern lurking in the background which was faced, in reply, by counsel for the appellant. Put bluntly, three years for murder appears totally inadequate to express society's revulsion for and repudiation of this most heinous of crimes. The mandatory sentence on conviction for first degree murder (with which offence the appellant is charged) under the Criminal Code is twenty-five years before being eligible for parole. On conviction for second degree murder, the minimum mandatory sentence is ten years before being eligible for parole, but Parliament has legislated that three years can be appropriate in the case of young offenders. Mr. Moldaver made the perceptive observation in the course of his reply that this appellant should not be punished for the shortcomings of the Act. He agreed that if the Act contained a five or six or seven year maximum sentence for this most serious of crimes, not only would it not necessarily appear as a very lenient sentence for that particular offence, but it would give more time for any necessary treatment in certain cases and firmer expert opinions as to the future. This is obviously an area for consideration and possible amendment by those responsible for the Act."[9]

To a similar effect are the comments of Mr. Justice Huband of the Manitoba Court of Appeal where he states:

> "On an application to transfer a young person from youth

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[9] R. v. M.A.Z. (1987) 35 C.C.C. (3d) 144 at 162 (Ont. C.A.)

court to adult court for trial, the court should assume that the Crown will prove the charge it has laid against the accused beyond reasonable doubt. Where, as here, the charge is first degree murder, it should be assumed that the young person will spend a minimum of twenty-five years in a federal penitentiary if he is tried in adult court, or a maximum of three years in custody if he is tried in youth court. There is a terrible disparity in these two results which Parliament has created. In my opinion, it is a matter which ought to be addressed by our Parliamentarians at an early date. In this case, and in the parallel case of Regina v. F.D.M., neither of the choices is appropriate, yet the courts are left with no discretion to arrive at an intermediate position between the two extremes."[10]

Chief Justice Laycraft of Alberta has also commented on the impossible task which the disparity issue creates for a court entertaining a section 16 application:

> "Where, however, Parliament requires a court to choose in a first degree murder case between applying the Young Offenders Act or the Criminal Code, it poses an almost impossible task. So arbitrary is the dividing line between the choices that being older by a single day may make the difference. In this case, had the events occurred three and one half weeks later, S.H.M. would, without more, have been liable to the full adult penalty for first degree murder. One wonders why a gradation between these two drastic extremes was not possible, either by a graded scale or by subsequent, periodic judicial review or by some other means.
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> ... The 'interest of society' to which the section refers includes the protection of society, itself, from the offender as well as the enforcement of the standard of penalty which Parliament has seen fit to fix for first degree murder. That crime attracts the most serious sanction in our criminal law. The sanction sets forth the reaction of Canadian society to the crime, as seen by the enactment of its elected representatives. By contrast, the three year maximum penalty prescribed by the Young Offenders Act may be inadequate response."[11]

Forced to choose between one of two extremes, the courts have

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10 R. v. R.M.C. (1987),33 C.C.C. (3d) 136 at 139 (Man. C.A.)

11 R.v. S.H.M. (1987), 35 C.C.C. (3d) 515 at 525 (Alta C.A.)

been placed in an unnecessarily difficult situation when deciding on a transfer application involving a charge of murder. It is submitted that the effect of the disparity has rendered it extremely difficult for the courts to adequately balance the interests (that of society and of the young person) as mandated by section 16, particularly in cases of first degree murder.

The Availability of Services

Pursuant to the provisions of section 16(2)(d), one of the factors the court is directed to take into consideration is the "availability of treatment or correctional resources". This has led to the tendering of extensive evidence on the comparative services available to a young person were he to be sentenced to a young offender facility or to a penitentiary.

Several appellate courts have noted that a penitentiary sentence can have a crippling effect on the young person's prospects for rehabilitation. The absence and/or the limited number of any special services (i.e. psychiatric, educational, etc.) designed to accommodate young persons who are sentenced to a penitentiary term has only exacerbated the problem which confronts a court in deciding whether to transfer a young person with the prospect of the person being given a penitentiary term.

It is often the case that a court will hear evidence about the significant physical danger faced by a young person placed in a penitentiary population.[12] The impact of this evidence can carry great weight in a court's decision whether to transfer.

As noted by one court:

> "...if at all possible, in my view, exposure such as that referred to by the witness should be avoided. Accepting what he said, it would be a rare case in which it would be in the interests of either the public or the accused to impose such a sentence."[13]

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12 R. v. M.A.Z. (1987), 35 C.C.C. (3d) 144 (Ont. C.A.).
R. v. Wayne S. et al., released January 24, 1989 unreported (Ont. C.A.)
R. v. S.H.M. (1987), 35 C.C.C. (3d) 515 (Alta C.A.)

13 R. v. Wayne S. et al, released January 24, 1989, unreported (Ont. C.A.)
R. v. R.M.C. (1987), 33 C.C.C. (3d) 136 at 139 (Man. C.A.)

Juxtaposed to the stark realities of the penitentiary setting, the court often hears evidence concerning the extensive programs available within a young offender facility. The comparison in some jurisdictions amounts to "no contest".[14] It should be noted that resources are not at issue in all transfer cases, for example where the young offender has reached the age of eighteen or nineteen by the time the transfer hearing is held. It should also be noted that there are cases which indicate that the adult resources are not detrimental and, in some cases, preferable.

Where a court is determining whether or not to transfer a given case, the central issue should be sentence length rather than concerns over the physical safety, containment and/or the availability of appropriate resources in either the juvenile or the adult federal penitentiary system.

Conclusion

The appellate court decisions reviewed establish that transfer applications involving charges of murder have proved problematic principally because of the uncertainty associated with the proper interpretation of the applicable test to apply, the issue of disparity and the concerns about the suitability of a penitentiary setting for transferred young persons.

V. CANADIAN EXPERIENCE - YOUTH CHARGED WITH MURDER

A. Available Data

The Working Group examined the available statistics on the use of transfer. Realizing that these statistics would provide only limited information on the volume and nature of the cases actually transferred, and no information at all on those cases where an application for transfer was submitted but denied by the youth court, the Working Group requested that a file study be done, focussing on the processing of cases of young persons initially charged with first or second degree murder.

The preliminary results of this file study, undertaken in Quebec, Ontario, Manitoba and British Columbia, are presented

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[14] R. v. M.A.Z. (1987), 35 C.C.C. (3d) 144 (Ont. C.A.) R. v. J.R.D., released August 31, 1988, unreported (Que. C.A.)

in the Appendix to this chapter.

Since the true significance of the results of this research would be difficult to assess without taking into account its particular limitations, and further since Appendix A is already a summary of its findings, no attempt will be made here at further simplifying this information.

B. Clinical and Correctional Perspectives

The Juvenile Justice System

What follows is a brief overview of the perspectives of clinicians and correctional professionals who have responsibilities for youth involved in violent crime. The time-frame of this study has only permitted consultations with clinical and correctional staff in the four jurisdictions participating on the Working Group. The comments below are intended therefore as preliminary observations only.

With respect to the information made available to a court which is considering a transfer application, there appears to be considerable variation between jurisdictions. One jurisdiction, for example, approaches the situation of a youth charged with murder and the issue of whether or not there should be a transfer of the case to adult court by putting together a multi-disciplinary team of professionals which includes those who would be responsible for the youth's care should he or she remain in the youth system. This team does an assessment which has the following components: medical, psychological, psychiatric, and criminological as well as a pre-disposition report, and is drawn in part on detailed observations of the youth while in detention. In this jurisdiction, the experience has been that where the recommendation to the court is that the youth is amenable for treatment or rehabilitation within the time available to the youth system, the court denies the transfer application. Conversely, where the recommendation is that a youth be transferred, the recommendation carries great weight.

For a youth convicted of murder who is considered a good candidate for the youth system, it was generally submitted that the three-year period encourages a structured, individualized plan of care to be commenced immediately so that the most beneficial use of time and resources can be made. While a longer sentence appears necessary given the gravity of the offence, it may, in fact, be counter-productive to the successful rehabilitation of the youth and, therefore, adverse to the best interests of the public.

Clinical and correctional professionals consulted for the purpose of the present study were virtually unanimous in their

view that dispositions in excess of three years for youth retained in the youth system would be problematic for a number of reasons including the difficulty of motivating a youth for a three year period and the fact that three years for a youth is such a long time. More specifically, clinicians indicated the adverse effects of institutionalization on youth generally which it is submitted should be considered when deciding upon appropriate disposition length:

- institutionalization can promote immaturity because it prevents development;

- it can inhibit decision-making and problem solving;

- due to separation from family and community, institutionalized adolescents develop their own sub-culture which is different from the normal adolescent community. This difference poses another hurdle which impedes successful reintegration and which must be overcome;

- an institutionalized youth may often suffer a major educational lag notwithstanding the efforts to ensure educational programming. This is so because a youth's frame of reference is the institutional classroom and, accordingly, some youth settle for a lower standard for themselves and the institution itself sets a lower standard; and

- youths are prevented by virtue of their incarceration from socializing in the manner that normal adolescents do, including the development of appropriate relationships.

In short, it was generally thought that a three year period or some comparable period, as distinct from lengthy adult terms, reflects the malleability of most adolescents, given well-structured and individualized programs, to modify their behaviour and attitudes.

It was nevertheless recognized that the three year disposition may not provide sufficient time for the necessary treatment or containment of certain exceptional youth. A longer period would take into account those cases in which it is difficult to determine if effective treatment can be realized in the three year period. While a three year sentence was generally considered to be sufficient, it was recognized that for those cases which required that the bulk of the three year period be spent in custody, some form of supervision following the period of incarceration was essential. There was strong support for a regime which would allow considerable flexibility and permit the timely return of a youth to a more

structured environment when necessary in the interests of the youth and the community.

Notwithstanding the conviction of clinical and correctional professionals that the youth justice system is the most appropriate system for the vast majority of young offenders, it was readily acknowledged that research with respect to the effectiveness of interventions in the juvenile system for troubled youth is seriously wanting.

The Federal Correctional System

The purpose of the following information is to provide a general overview of the numbers of youthful offenders in federal penitentiaries, and the policies and procedures applicable to them. (Note: The policies are summarized from the Directives of the Commissioner of Correctional Services Canada).

From 1984 when the Young Offenders Act was proclaimed in force to 1987, the age profiles of young persons in custody were as follows:

FEDERAL INMATE POPULATION
AGE PROFILE

FISCAL YEAR	16	17	18	19	20-24
1984	5	44	126	280	3126
1985	6	13	92	254	2964
1986	0	9	47	181	2803
1987	0	2	34	151	2654

The median age of the federal inmate population falls within the 25-29 year category with the age profiles of youthful inmates as a percentage of the total inmate population being as follows:

FEDERAL INMATE POPULATION
AGE PROFILE AS A % OF TOTAL INMATE POPULATION

FISCAL YEAR	16	17	18	19	20-24	25-29	30-34	35-39
1982	0.04	0.38	1.33	2.97	27.83	24.54	17.21	11.30
1983	0.03	0.38	1.33	2.70	26.79	24.91	17.34	11.59
1984	0.04	0.36	1.04	2.31	25.83	25.09	18.05	12.14
1985	0.05	0.11	0.75	2.06	24.01	25.34	18.73	12.42
1986	0.00	0.07	0.39	1.49	23.13	25.66	18.92	12.50
1987	0.00	0.02	0.28	1.24	21.77	26.16	19.02	12.76

YEAR	40-49	50-59	60-64	65+	TOTAL
1982	9.85	3.59	0.60	0.37	100
1983	10.08	3.73	0.71	0.42	100
1984	10.31	3.74	0.64	0.44	100
1985	11.33	3.99	0.77	0.45	100
1986	12.70	3.85	0.78	0.49	100
1987	13.46	4.10	0.71	0.49	100

With respect to the reception and orientation of offenders, the process requires that each inmate, amongst other matters:

- undergo a full assessment of his or her program and security needs, which may include medical, psychological, psychiatric, vocational, and educational assessments; and
- be placed in an appropriate institution as soon as possible after waiver of the right to appeal or expiration of the appeal period;
- have his/her placement decisions take into account factors such as:
  - the security needs of the offender;
  - the program needs of the offender;
  - the province and location of sentencing; and
  - the family and community relationships of the offender;
- normally be placed at the lowest security level required to protect the public;
- be afforded the opportunity to appeal the placement decision;
- normally be transferred to a more appropriate facility when such becomes available should initial placement not

meet his or her needs to the greatest extent possible.

Based on the file study of young offenders charged with murder and convicted of murder or a lesser offence in British Columbia, Manitoba and Ontario, information on the security levels and placement of a total of 31 persons reveals the following: three were placed in protected custody; four were placed in a treatment centre; and two required placement in protective custody and a treatment centre.

With respect to access to psychological services, such services must be available at all operational units and shall include; assessment, counselling, therapy and crisis intervention.

With respect to mental health service, the medical examination on admission must include an assessment of the mental health of each offender. The consent of the offender is normally required for any treatment provided. By Commissioner's Directive, mental health services and programs for offenders shall include:

- provision for continuity of care for those suffering from psychiatric, emotional, or behaviourial problems at standards of professional quality consistent with those for the Canadian public;
- individual assessment and diagnostic services;
- programs for those suffering from acute, sub-acute or chronic mental illness;
- identification of special categories of offenders; and
- provisions to ensure that an offender who is acutely mentally ill and in urgent need of treatment is moved to an appropriate facility without delay.

The Correctional Service of Canada often has to balance the program needs of offenders with their security needs, and/or the need to place the offender near his or her home. The program needs of an offender may not be met in all respects when, for instance, the security or location needs are more important for the individual offender. Individual program planning in a period of fiscal restraint must be carefully planned in that the individual needs of the offenders must be considered vis-à-vis the link to their criminal behaviour, their risk of re-offending and the imminence of release in order to establish priorities for the general delivery of programs and for the individual offender. Save for employment, programs are not compulsory, and although offenders are counselled to make the fullest use of their

positive potential and incentives are provided to encourage them to do so, the individual inmate is free to choose whether he or she wishes to participate. Therefore, while program and treatment services are made available, the assumption cannot be made that all offenders will participate.

VI. INTERNATIONAL PERSPECTIVES/EXPERIENCE

A. Legislative Measures in Other Countries for Responding to Youth Charged with Murder

The objectives of examining the approach taken by other countries to youth charged with murder were to benefit from any models in place in other countries which would lend themselves to Canada's approach to juvenile justice, and to provide a frame of reference within which Canada's current provisions and any possible changes thereto could be assessed.

Included below are the summaries of the approaches taken by the United States and several western democratic and Commonwealth Nations which have a comparable approach to that taken by Canada in response to young people involved in criminal activity.

The United States

An examination of the approaches adopted by individual American states indicates a broad range of options.[15] Given the numerous options and combinations thereof, what follows is a summary intended to highlight the general categories of approaches:

- forty-nine states and the District of Columbia utilize some form of judicial transfer (waiver) mechanism for at least some offences;
- many states employ more than one type of transfer procedure to deal with different segments of the young offender population;
- some states specify that there must be a transfer hearing where certain offences are alleged;
- the decision of whether to transfer a youth involved with serious crime may be made in one of four ways: by legislation, the discretion of the prosecutor, the

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15 Feld, Barry C., "The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes" in The Journal of Criminal Law and Criminology, Vol. 78, No. 3, pp. 471-533.

decision of the youth court or the decision of the ordinary adult court;

- the basis upon which the transfer decision is made varies considerably:

  - six states (Connecticut, Maine, Montana, New Jersey, Vermont and West Virginia) have restricted eligibility for transfer to a narrow range of very serious offences against the person such as armed robbery, kidnapping and murder;

  - at least ten states identify certain categories of offences (e.g. those which call for capital punishment or life imprisonment) for which the youth is presently before the court which have special transfer consequences. California, for example, places the burden of proving suitability for juvenile court treatment on the youth rather than requiring the prosecutor to establish the nonamenability or dangerousness of the youth;

  - nine other states possess more detailed offence criteria (Connecticut, Florida, Georgia, Minnesota, New Jersey, Hawaii, South Carolina, Virginia, and West Virginia). In these states, the grounds for transfer are identified prior offences in combination with a serious present offence. In short, the intent of such provisions is to identify those youth whose past records and present offence warrant incapacitation. The exact criteria for transfer varies from state to state in this group, but a number of examples are illustrative of the intent to selectively incapacitate. In Minnesota, first degree murder is presumed to be an adult offence for which transfer should occur. The Florida legislation is targeted at youths who have been involved in repeat violent offending;

  - a number of states by their legislation exclude specified offences from the jurisdiction of the youth court;

  - other states allow for concurrent jurisdiction by the youth and adult courts. In Arkansas, Nebraska, and Wyoming, there is concurrent jurisdiction and the prosecutor's charging decision determines the forum. The four remaining concurrent jurisdiction states (Colorado, Georgia, Utah, and Florida) permit concurrent jurisdiction only for offences which call for capital punishment or life imprisonment, or which constitute the most serious offences in their

code;

- eighteen states have exclusive adult court jurisdiction for certain offences, fourteen of these jurisdictions excluding on the grounds of serious present offence alone. In Maryland and Mississippi, convictions for the offences excluded from the juvenile court jurisdiction either result in capital punishment or life imprisonment. The legislation of a number of other states excludes the most serious offences in their codes, these being murder, criminal sexual conduct, kidnapping and armed robbery. In Illinois since 1982, the juvenile court has no jurisdiction to deal with any young person, fifteen years of age or over who is charged with murder, armed robbery or rape. A number of states have similar exclusionary provisions.

England and Wales

The general rule is that a person under the age of seventeen should be tried summarily and normally by a juvenile court where the maximum youth sentence is 12 months in custody. However, section 24(1)(a) of the Municipal Court Act 1980 and section 53(2) of the Children and Young Persons Act 1933 contain provisions which give the court power to deem an offence "grave" and commit the young person to crown court.

All homicides are tried in crown court regardless of the offender's age as long as he/she has attained the age of twelve. For other "grave" offences, if the youth is over fourteen and if the offence charged carries a possible sentence of fourteen years or more, then he/she can be waived to crown court.[16] Further, case law indicates that the juvenile court has discretion to deem an offence "grave" if the circumstances are particularly brutal and aggravated.[17]

In crown court the charge will be tried as an indictable offence and, upon conviction, the court can sentence the juvenile to detainment for any period not exceeding the maximum imprisonment an offender over twenty-one would receive.

In the case of the twelve and thirteen year olds who are tried

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16 Examples of offences carrying sentences of 14 years or over include arson, aggravated burglary, unlawful sexual intercourse with a girl under thirteen years and wounding with intent to do grievous bodily harm.

17 R.v. Fairhurst, [1987] Crim. L.R. at 60

for "grave" offences (excluding homicide which is tried in crown court) in the lower juvenile court, they are set over for sentencing in the crown court. The incidence of twelve and thirteen year olds being tried for homicide is very rare. In 1987, there were no reported cases.

The maximum sentence that a youth is liable for is an indeterminate sentence. Most young persons under eighteen who have been convicted of homicides have received an indeterminate sentence. There is no set rule regarding review of the sentence, but generally it is reviewed after 2 to 3 years.

In all cases other than homicide, a prisoner is eligible to apply for parole after serving one-third of his/her sentence. For homicide the court determines the length of time before eligibility.

West Germany

Criminal behaviour of young people is assessed under criminal law, but in most cases the sanctions are different. The Juvenile Court Act applies to all juveniles aged fourteen to eighteen and to those eighteen to twenty-one who professionals have classified as "typically juvenile".

Sanctions under the Act do not normally include fines or imprisonment; instead, educational or disciplinary measures are ordered. In the case of serious crime such as murder, the youth may be punished by incarceration in a prison for juveniles for a maximum term of ten years. He/she will be eligible for parole after serving two-thirds of his/her sentence. Generally, cases involving juveniles are heard by juvenile court which is a special branch of the criminal court. The seriousness of the offence will determine how many professionals and lay judges are on the panel.

For young people seventeen or older, there is a mechanism to raise them to the adult system if their crime is very serious and it is determined by various professionals and experts that he/she was clearly cognizant of his/her act and the consequences of the act. If these experts deem he/she was, the young person will be tried in adult criminal court.

Sweden

There are two age categories in Sweden: fifteen to seventeen years inclusive; and eighteen to twenty years inclusive. No child under the age of fifteen can be held criminally responsible. A child under the age of fifteen cannot be prosecuted for any criminal offence, including murder.

Since World War II, there has been a policy to divert persons under the age of eighteen from the criminal justice system by granting them remission of prosecution and having the youth dealt with by the social welfare agencies.

A person under eighteen can only be sentenced to imprisonment under very exceptional circumstances which would include a conviction for murder. While the basic sentence for murder for an adult is life imprisonment, a person under twenty-one cannot be sentenced to life. Instead the maximum sentence a person under twenty-one can receive is twelve years, unless the crime is committed with another crime in which case the maximum is fifteen years.

A youth can be sentenced to serve his/her time in either a separate section unit in an adult prison or to a special institution for youth. There are no different standards for different crimes. Young people under eighteen are handled in the juvenile court system and there is no provision for raising the offender to the adult system.

Finland

Like Sweden, a youth in Finland is criminally responsible at age 15 and until that time is dealt with by the welfare boards. Those over 15 are tried in adult court as there is no juvenile court system. The 15-20 year olds are subject to a different set of sanctions than adults. If the offence carries a maximum punishment of 6 months or less, it will be concluded without a sentence being ordered. For major offences the young person is liable for the full range of adult sanctions except in the case of murder. For a young person over 15 but under 18 years he/she would be liable for two to twelve years in a correctional institution rather than receiving the life sentence an adult would receive.

B. International Covenants

What follows is a brief summary of international considerations which any reform should reflect.

On November 29, 1985, the General Assembly adopted resolution 40/33 on the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). These Rules were intended to serve as a model for Member States in the treatment and handling of young persons in conflict with the law, within the framework of a juvenile justice system. They assume that juveniles can be dealt with for an offence in a manner which is different from an adult (Article 2.2), according to basic procedural safeguards such as the presumption of innocence, the right to remain silent, the right to the presence of a parent, etc. (Article 7). While

these Rules do not contain, as such, dispositions relating particularly to the problem of youth charged with murder, some of the Articles outline guiding principles in adjudication and disposition. For example, Article 17 states principles to the following effect:

- that the reaction taken shall always be in proportion not only to the circumstances and the needs of the juvenile as well as to the needs of the society;
- that restrictions on the personal liberty of the juvenile shall be limited to the possible minimum;
- that 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
- that the well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

It shall be noted that a number of countries have undertaken a thorough review to bring justice administration into conformity and close alignment with the Rules with the result that many countries are following the orientation and philosophical approach of the Rules.[18]

VII. OPTIONS AND ANALYSIS

The issue of the most appropriate response to youths charged with murder was approached by the following questions being asked:

- What should the test for transfer be?
- What dispositions should be available under the Young

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18 Implementation of General Assembly resolutions 40/33 and 40/35 and resolutions 19, 20 and 21 of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, including draft standards for the prevention of juvenile delinquency, and on the protection of juveniles deprived of their liberty (E/AC.57/1988/11, June 9, 1988) and to the Report of the Interregional Preparatory Meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on Topic IV: "Prevention of Delinquency, Juvenile Justice and the Protection of the Young; Policy Approaches and Directions" (A/CONF.144/IPM.3, May 11, 1988).

Offenders Act?

- What is the appropriate sentence for a youth convicted of murder in adult court?

A. WHAT SHOULD THE TEST FOR TRANSFER BE?

The following options suggest themselves:

Option 1: The current test which requires a finding that transfer is "in the interest of society, having regard to the needs of the youth..." (status quo).

Option 2: That the test give paramount consideration to the "interest of society".

Option 3: That the test for transfer be modified to reflect the paramountcy of the principle of "protection of the public".

Option 4: That the considerations set out in subsection 16(2) be modified to reflect society's special interest in protection and denunciation of the offence of murder.

OPTION 1

The current test which requires a finding that transfer is "in the interest of society, having regard to the needs of the youth..." (status quo).

SUGGESTED ADVANTAGES:

- it recognizes individual differences, circumstances of the offence, and all of the other variables such as age and prior record;

- it reflects certain of the Act's principles, specifically:

  - The principle which holds that while young persons should bear responsibility for their contraventions, "they should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults ... ".

    Accordingly, actual maturity can be taken into account in determining appropriate sentence and the principle of mitigated accountability is applied on a case-by-case basis for youth charged with murder.

  - The principle that 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.

A distinct juvenile justice system is premised on the belief that adolescents as a class have needs by virtue of their adolescence, which distinguish them from adults. Further, the Young Offenders Act directs that these needs, implicitly those related to the offending behaviour, should determine the nature of the "guidance and assistance" the youth should receive. This option allows certain youth charged with murder to be dealt with in the juvenile justice system which is mandated to respond to the needs of youth in a manner which allows for this guidance and assistance.

- The principle that 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.

  This right would seem to demand that this determination be made on a case-by-case basis. Such an approach provides the opportunity to demonstrate that a regime other than the prescribed minimum sentence regime of the Criminal Code for a specific individual is more consistent with both the objective of protecting society, and responding to the special needs of the youth which are pertinent to his offending behaviour and therefore relevant to his rehabilitation. Conversely, it allows for a case to be made that transfer is appropriate.

  It reflects the reality that protection of the public need not, in all cases be met by lengthy incarceral terms. There is a real possibility of adverse consequences for youth who have been incarcerated for lengthy terms.

- This test recognizes the malleability of most adolescents, given well-structured and individualized programs, to modify their behaviour and attitudes.

SUGGESTED DISADVANTAGES:

- the test has been interpreted in a variety of ways with the result that the law appears to be interpreted quite differently depending on the jurisdiction; and

- the interpretation given by appellate courts in some jurisdictions does not give paramountcy to the principle of "interest of society" as was originally intended.

OPTION 2

That the test give paramount consideration to the "interest of society".

NOTE: Two cases are presently under reserve by the Supreme Court of Canada (heard on April 27, 1989) concerning the proper interpretation to be given to the test to determine whether or not a transfer of a given youth's case should be ordered. The original intent of the wording was that paramount consideration be given to the "interest of society." This phrase was intentionally chosen over the phrase "protection of the public" on the basis that it encompassed the notions of short and long-term protection of the public and thereby included the objective of rehabilitation. Given the uncertainty regarding the interpretation of the present test, this option is set out separately. Should the judgement of the Supreme Court support the interpretation set out above, options 1 and 2 would be merged and would have the same advantages and disadvantages.

OPTION 3

That the test for transfer be modified to reflect the paramountcy of the principle of "protection of the public".

SUGGESTED ADVANTAGES:

- it would provide greater certainty as to the intent of Parliament in cases of murder;
- it reflects the gravity of the offence;
- it leaves open the flexibility to deal with a young offender's case in the juvenile system; and
- it would increase the likelihood of successful transfer.

SUGGESTED DISADVANTAGES:

- the appropriate interpretation to be applied to the test for transfer is a matter now under reserve by the Supreme Court of Canada. It may therefore be preferable to defer any changes to the test until the judgment of the Court is available; and
- it would apply to all potential transfer cases, not just

murder, and would increase the likelihood of transfer in these other cases.

OPTION 4

That the considerations set out in subsection 16(2) be modified to reflect society's special interest in protection and denunciation of the offence of murder.

SUGGESTED ADVANTAGES:

- it would provide greater certainty as to the intent of Parliament in cases of murder;
- it reflects the gravity of the offence;
- it leaves open the flexibility to deal with a young offender's case in the juvenile system; and
- it would increase the likelihood of successful transfer.

SUGGESTED DISADVANTAGES:

- the appropriate interpretation to be applied to the test for transfer is a matter now under reserve by the Supreme Court of Canada. It may, therefore, be preferable to defer any changes to the test until the judgment of the Court is available;
- if the principle of denunciation is given too much weight, it may operate adversely to the goal of rehabilitation;
- it is arguable whether a separate criterion of denunciation should be emphasized; and
- an emphasis on denunciation would appear to limit the ability of the court to consider the circumstances of the accused since murder shall always be denounced in the strongest terms.

B. WHAT DISPOSITIONS (SENTENCES) SHOULD BE AVAILABLE UNDER THE YOUNG OFFENDERS ACT FOR YOUTH CONVICTED OF MURDER WHO ARE NOT TRANSFERRED TO ADULT COURT?

The following options suggest themselves:

Option 1: Maximum of three years custody (status quo).

Option 2: Five years less-a-day custody.

Option 3: A maximum of three years custody to be followed by

a two-year period of probation.

Option 4: A five-year maximum custodial disposition with a presumption of conditional release after three years.

OPTION 1

Maximum of three years custody (status quo).

SUGGESTED ADVANTAGES:

- in a given case, the sentence may appropriately take into account the circumstances of the offence, the absence of a prior record, the special needs of the youth, the actual maturity of the youth, and the evidence with respect to the youth's amenability for treatment;

- for a youth convicted of murder who is considered a good candidate for the youth system, it allows a structured, individualized plan of care to be commenced immediately so that the most beneficial use of time and resources can be made. While a longer sentence appears necessary given the gravity of the offence, it may, in fact, be counter-productive to the successful rehabilitation of the youth and, therefore, adverse to the best interests of the public;

- clinical and correctional professionals consulted for the purpose of the present study were virtually unanimous in their view that dispositions in excess of three years for youth retained in the youth system would be problematic for a number of reasons including the difficulty of motivating a youth for a three year period, the fact that three years for a youth is such a long time;

- this option protects against the adverse effects of institutionalization on youth generally;

  - institutionalization can promote immaturity because it prevents development;

  - it can inhibit decision-making and problem solving;

  - due to separation from family and community, institutionalized adolescents develop their own sub-culture which is different from the normal adolescent community. This difference poses another hurdle which impedes successful reintegration and which must be overcome:

  - an institutionalized youth may often suffer a major educational lag notwithstanding the efforts to ensure educational programming. This is so because a youth's frame of reference is the institutional classroom and, accordingly, some youth settle for a lower standard for themselves and the institution itself sets a lower standard;

  - youths are prevented by virtue of their incarceration from socializing in the manner that normal adolescents do, including the development of appropriate relationships;

- a three year period or some comparable period, as distinct from lengthy adult terms, reflects the malleability of most adolescents, given well-structured and individualized programs, to modify their behaviour and attitudes.

SUGGESTED DISADVANTAGES:

- the maximum disposition of three years appears totally inadequate to express society's condemnation of the taking of a life, thereby diminishing public respect for and confidence in the administration of juvenile justice;

- the three year disposition may not provide sufficient time for the necessary treatment or containment of the youth; and

- a longer period would take into account those cases in which it is difficult to determine if effective treatment can be realized in the three year period.

OPTION 2

Five years less-a-day custody.

That a youth who is convicted of murder by the youth court be eligible to a maximum disposition of five years less-a-day custody.

NOTE: This would likely require some changes to the current section 24.5 to ensure greater ease of movement.

SUGGESTED ADVANTAGES:

- it represents a potential 66% increase in disposition length, thereby permitting the system a significantly longer time to respond to a youth for whom transfer to adult court is not appropriate;

- while this option on its own may not be sufficient to ensure that youths who require a longer disposition than five years are in fact transferred, this option does offer a solution for the following cases:

  - twelve and thirteen year-olds who are charged with murder where section 16(1) restrictions in the Act, concerning age, along with other factors, preclude access to the longer sentences available by virtue of transfer to ordinary court;

  - for those young persons whose age, particular needs, lack of previous involvement with the criminal law, and future prospects for rehabilitation suggest that the juvenile justice system is the most appropriate;

- it allows youth who remain within the juvenile justice system the benefits and safeguards of that system which include the right to be detained separate and apart from adult inmates, the right to mandatory review once a year; and the right to non-publication of the youth's identity;

- it provides a longer period of time to address the needs of certain youth whose circumstances suggest amenability to treatment;

- it provides greater disposition flexibility as the longer period allows for a significant percentage of the disposition to be served in custody, moving from secure to open, then followed by gradual day release programs, and finally by community supervision;

- the option, by resorting to existing Young Offenders Act provisions which permit transfer of a youth who has reached eighteen years to a provincial correctional facility [section 24.5], allows for the benefits of the juvenile justice system in terms of guarantees of separate and apart detention while also acknowledging that the increased disposition length and age of the offender may warrant transfer to adult facilities for the latter portion of the disposition;

- given the current proposals to amend the mental disorder provisions of the Criminal Code, and consequently the Young Offenders Act, to limit the disposition available to person found unfit or not responsible on account of mental disorder to the maximum disposition otherwise applicable to the offender, it is arguable that to achieve the objective of treatment and rehabilitation this longer disposition length is appropriate for those cases where transfer is not possible or has not been ordered; and

- an increased disposition pursuant to the Young Offenders Act may allow the youth system to retain those cases where age, circumstances of the offence and offender, absence of prior record, and rehabilitative potential all suggest that the youth justice system should be resorted to instead of the adult.

SUGGESTED DISADVANTAGES:

- this option, on its own, may not satisfy some of the public concerns that the disposition fit the crime in the context of just proportionality (i.e. 5 years may be perceived as not long enough);

- it may raise the standard of disposition for all offences, thereby exacerbating the problem of the increased number of youths receiving custodial terms;

- it may be viewed as offering an inadequate period of time for treatment or containment and thereby failing to provide adequately for the protection of the public;

- the extension of dispositions under the Young Offenders Act would impose cost implications on the provinces and territories;

- clinical and correctional professionals consulted with for the purpose of the present study were virtually unanimous in their view that dispositions in excess of three years for youth retained in the youth system would be problematic for a number of reasons including the difficulty of motivating a youth for a three year period, the fact that three years for a youth is such a long time, etc.;

- more specifically, clinicians indicated the adverse effects of institutionalization on youth generally which it is submitted should be considered when deciding upon appropriate disposition length:

  - institutionalization can promote immaturity because it prevents development;

  - it can inhibit decision-making and problem solving;

  - due to separation from family and community, institutionalized adolescents develop their own sub-culture which is different from the normal adolescent community. This difference poses another hurdle which impedes successful reintegration and which must be overcome;

- an institutionalized youth may often suffer a major educational lag notwithstanding the efforts to ensure educational programming. This is so because a youth's frame of reference is the institutional classroom and, accordingly, some youth settle for a lower standard for themselves and the institution itself sets a lower standard;

- youths are prevented by virtue of their incarceration from socializing in the manner that normal adolescents do, including the development of appropriate relationships.

- It is suggested that this option would increase the volume of very serious offenders in youth custody, which may have a detrimental effect on other less serious offenders and may represent a drain on limited resources.

- The "less-a-day" aspect of this option may be perceived as an inappropriate means to avoid the Charter requirement for a jury.

OPTION 3

A maximum of three years custody to be followed by a two-year period of probation.

SUGGESTED ADVANTAGES:

- it has many of the suggested advantages of Option 1;

- by limiting the length of custody to three years, it addresses the concerns that a five year less a day maximum custodial disposition may raise the standard of disposition for all offences and thereby exacerbate the problem of the increased number of youths receiving custodial terms; and

- it would enable youths committed to three years to serve their full term in custody and still have a period of community transition.

SUGGESTED DISADVANTAGES:

- it has all of the suggested disadvantages of Option 2 except that it would not appear to contribute to increased dispositions for all classes of young offenders who are dealt with in the juvenile justice system;

- fixing the period of custody initially at three years may not offer the same flexibility as Option 2. While three

years of custody followed by a maximum two year probationary term could be made the norm, judges and administrators may prefer in a given case to continue the custodial program for longer;

- such an additional period of time may be useful, where there are treatment needs and there is, in fact, access to the necessary resources;

- probation does not allow for the return of the young offender to the custodial facility where necessary unless the youth breaches a probation order. The breach mechanism does not possess the flexibility to return a young person to custody until the trial has occurred. This does not allow a timely response to the youth's behaviour; and

- this option, on its own, may not satisfy some of the public concerns that the disposition fit the crime in the context of just proportionality (i.e. 5 years may be perceived as not long enough).

OPTION 4

A five-year maximum custodial disposition with a presumption of conditional release after three years.

This option would allow a youth who is convicted of murder to be sentenced to a five-year maximum custodial disposition with a rebuttable presumption in favour of conditional release. If conditionally released, the community order could be administratively reviewed.

SUGGESTED ADVANTAGES:

- it has most of the advantages of Options 2 and 3;

- it possesses the flexibility to release the youth from custody as is appropriate in a given case with the necessary conditions and degree of supervision and also to return the youth to a more structured setting where it appears necessary for the youth's behaviour to stabilize; and

- it provides for mandatory follow-up beyond the term of custody which is viewed as essential for youth who have been incarcerated for significant periods of time.

NOTE: This would likely require some changes to the current section 24.5 to ensure greater ease of movement.

SUGGESTED DISADVANTAGES:

- this option, on its own, may not satisfy some of the public concerns that the disposition fit the crime in the context of just proportionality (i.e. 5 years may be perceived as not long enough);
- it may raise the standard of dispositions for all offences, thereby exacerbating the problem of the increased number of youths receiving custodial terms;
- it may be viewed as offering an inadequate period of time for treatment or containment and thereby failing to provide adequately for the protection of the public; and
- the "less-a-day" aspect of this option may be perceived as an inappropriate means to avoid the Charter requirement for a jury.

C. WHAT IS THE APPROPRIATE SENTENCE FOR A YOUTH CONVICTED OF MURDER IN ADULT COURT?

The following options suggest themselves:

Option 1: Mandatory life imprisonment.

Option 2: Imprisonment up to and including life.

Option 3: Reduced parole ineligibility.

OPTION 1

Mandatory life imprisonment

That a transferred youth who is convicted of murder in ordinary court be sentenced to life imprisonment with no eligibility for parole for twenty-five years in the case of first degree murder, and a minimum period of parole ineligibility of ten years in the case of second degree murder (status quo).

SUGGESTED ADVANTAGES:

- it is arguable that resort to the transfer provisions should, even in cases where the charge is murder, be exceptional and that, accordingly where a transfer is justified, the young person should be subject to the same sentence as an adult to ensure protection of the public;
- it reflects offence-oriented values of the criminal law by according paramount significance to the seriousness

of the offence and, accordingly, allowing for proportional punishment;

- it provides for protection of the public for the period of the incapacitation;
- it reflects societal repudiation of the crime of murder; and
- it provides a uniform response to transferred youth charged with murder.

SUGGESTED DISADVANTAGES:

- while the transfer of a given youth's case to ordinary court is warranted to access the greater sentences available, a mandatory life sentence may not appropriately reflect the fact that the offence was committed by a youth;
- a life sentence may not be warranted or necessary in all cases;
- there is no flexibility for sentencing youth which could be inconsistent with some of the principles of the Young Offenders Act;.
- this inflexibility fails to take into account the developmental changes inherent in adolescence;
- given current provisions for parole eligibility, many transferred young offenders will be released in their thirties or forties. It is questionable whether it is in the interest of society to have subjected a youth to such a harsh sentence; and
- it may be that the dispositions available in the Young Offenders Act are inappropriate, but this may not justify in a given case the imposition of life sentence.

OPTION 2

Imprisonment up to and including life

That an adult court be given the discretion to sentence a transferred youth who is convicted of murder to a sentence of less than life imprisonment with the option remaining open to the court to impose life.

NOTE: The minimum sentence that the courts could impose is a matter yet to be determined.

SUGGESTED ADVANTAGES:

- it would lessen the disparity between the maximum disposition in the Young Offenders Act and the minimum prescribed sentence in the Criminal Code for first degree murder which is life imprisonment without eligibility for parole for twenty-five years; and for second degree murder, which is life imprisonment without eligibility for parole until ten years, at minimum, have been served;

- depending on the manner chosen to limit the discretion of the ordinary court, this option may be criticized for allowing too broad a range of discretion and thereby contributing to potential disparity of sentencing;

- it would address the judicial reluctance (particularly with first degree murder) to transfer which, in some cases, is based on disparity of sentence length and, specifically, the view that while the young offender maximum may be insufficient given the particulars of a case, the Criminal Code sentence for adults is overly harsh; and

- a distinctive sentencing regime for young persons who have been transferred to adult court gives recognition to such factors as age, circumstances of the offence, increased possibility of rehabilitation.

SUGGESTED DISADVANTAGES:

- it reduces the gravity of the offence of murder by providing that a conviction for this offence can be responded to by a sentence other than life imprisonment;

- it creates the disparity which has frequently been criticized by appellate courts.

OPTION 3

Reduced parole ineligibility

That parole ineligibility be altered by:

(A) Removing the legislated minimum parole ineligibility dates for first and second degree murder (25 years and, at minimum, 10 years respectively), and leaving it to the discretion of the court to specify a minimum period before the offender could be eligible for parole: for first degree murder between 10 years (suggested as an example but requires further study) and 25 years; and in the case of second degree murder, between 7 (suggested as an example but requires further study) and 25 years;

or

(B) Fixing in statute, the parole ineligibility dates at some period of time lower than the present parole ineligibility periods for first and second degree murder (e.g. ten and five).

SUGGESTED ADVANTAGES:

- these options are consistent with the principles of the Young Offenders Act as they allow each case where a youth is charged with murder to be determined on its own merits with respect to the decision of transferring the case to adult court, taking into account level of actual maturity as distinct from chronological age, circumstances of the offence, needs of a given youth which are pertinent to his/her offending behaviour and the rehabilitative potential;

- by removing an obstacle to transfer, namely the length of time the person would have to serve before being eligible for parole, the youth court has access to both the dispositions available in the Young Offenders Act and those in the Criminal Code with the comfort that a transferred and convicted young person could be released, in suitable cases, at an earlier date;

- these allow incarceration for life where necessary;

- these allow for long-term correctional supervision upon release, the terms and conditions of which can be determined on a case-by-case basis but release is, in any event, conditional and there is, therefore, a "hook" should it be required;

- these respond to public concerns that the sentence reflect the severity of the crime; amd

- these maintain the distinction between first and second degree murder.

SUGGESTED DISADVANTAGES:

- certain public sectors may fail to comprehend the merits of these options, i.e. that in addressing the issue of sentence disparity, the original intent of transfer as a safety valve would be largely realized. In short, public dissatisfaction may remain as this option may not be perceived as altering the status quo sufficiently;

- the concerns of certain sectors of the public with adult early release mechanisms will be echoed for these options

at a time when public confidence in the release mechanism is not high;

- for those who believe adoption of the present adult sentence provisions for youth who murder is appropriate, these options is subject to the criticism that they would inappropriately reduce the mandatory period of incarceration; and

- these options may be resorted to too readily for youth who could otherwise be strong candidates for staying in the youth system.

- option 3B does not offer individualized sentencing; and

- where the circumstances of the offence are heinous and the prospects of rehabilitation are low, it is more desirable that the court determine the minimum parole eligibility dates.

D. ANCILLARY ISSUES

1. Mandatory Assessments

That Section 16 be amended to require the court to consider a section 13 assessment in the case of a transfer application.

SUGGESTED ADVANTAGES:

- it is imperative that the youth court have a thorough assessment of youth's need for and amenability to rehabilitation programs; and

- this practice is common in many jurisdictions but should be universally applied. Given the ramifications of a decision to transfer, this information is essential to give effect to the principles of protection of the public and of special needs.

SUGGESTED DISADVANTAGES:

- this option raises resource concerns and has implications in more isolated regions where access to an assessment service would necessitate considerable travel and possible delay. and

- it may be construed as violating the integrity of the person.

2. Placement of transferred youth

That Section 733 of the Criminal Code (which presently allows for a youth, whose case has been transferred to ordinary court, to serve his sentence in a youth facility until no later than his twentieth birthday with the consent of the provincial director) be amended to provide:

- **that the adult court may, having heard representations from the provincial director, direct that all or part of the youth's sentence up until the age of eighteen be served in a juvenile facility;**

- **that, after the age of eighteen and until the age of twenty, this court authorization for placement in a juvenile facility be continued only with the consent of the provincial director; and**

- **that the Act provide for a power of review by the court upon the request of the provincial director.**

SUGGESTED ADVANTAGES:

- it recognizes that some youths, even though transferred, may, because of their special needs and immaturity, be more appropriately dealt with in young offender facilities, at least until such time as they are sufficiently mature to have their sentence administered in the adult correctional system;

- it would mitigate concerns about some youth, who might formerly have been considered inappropriate for the adult correctional system, being sentenced to that system;

- by vesting authority for the decision with the court, a judge hearing a transfer application will be comforted by the knowledge that, if the youth is transferred and sentenced in adult court, the issue of the needs of the young person and suitability of correctional placement will be decided by an impartial judge in an open court, with the young person being afforded the opportunity for representation, rather than by a non-public decision process by the provincial director that may be unnecessarily influenced by administrative considerations;

- it would, insofar as it effectively offers a blended (adult/youth) sentencing alternative, offer a middle ground to the present black and white considerations of

the adequacy of the youth system versus the adequacy of the adult system;

- it may, insofar as it offers this middle ground and continued consideration of the young person's needs (once transferred), result in an increased number of successful transfer applications;

- it would enable transferred youths the opportunity to participate in special programs attuned to their own maturity level and to be held in facilities closer to their home communities (insofar as they are provincially administered) rather than being held in federal facilities which do not have such special programs or, if developed, would be further removed from the youth's home community;

- while a judicial determination, it recognizes the necessity of the court receiving input from the provincial director, both at sentence and, if necessary, upon review, to ensure that an offender would not be inappropriately placed in a youth facility and thereby be a risk to the safety of others or the good order of the juvenile facility; and

- the potential lack of incentive for transferred youths to co-operate in the juvenile facility could be dealt with by the opportunity for the provincial director to have the court order reviewed.

SUGGESTED DISADVANTAGES:

- although the provincial director would have input at sentencing and the opportunity for review, the judiciary may, in some cases, not be as sensitive to the operational and resource limitations of juvenile facilities as juvenile correctional authorities might like, i.e. there may be "inappropriate" decisions made by the judiciary at sentence and correctional authorities may have difficulty convincing the judiciary to alter the decision upon review;

- it would have to be made applicable, not to just youths transferred for murder, but to all transferred youths, and in the view of some, this may be considered a disadvantage;

- there would, with increased numbers of more serious and sophisticated transferred offenders being retained in the youth system, likely be a greater drain upon the existing resources of juvenile facilities and a "contamination" of other less serious and less sophisticated juvenile

residents;

- transferred youths serving the initial part of a lengthy penitentiary sentence (e.g. life) and with "nothing to lose" might have little incentive to co-operate with juvenile correctional authorities;

- there would be little incentive for federal penitentiary authorities to develop appropriate specialized programs for transferred youths; and

- any benefits achieved by the initial placement in the youth system may be undermined by subsequent placement in the adult system.

3. Retention of records of youth convicted of murder

That the provision in subsection 45(2) requiring the record of a youth who is not transferred to adult court to be destroyed, in the case of a murder conviction, five years after the completion of the disposition, be amended to allow for its permanent retention for criminal justice purposes only.

NOTE: Should this option meet with support, it may require a change to s. 45.1 permitting the court to set aside the non-disclosure provisions.

SUGGESTED ADVANTAGES:

- this amendment would enable information requirements related to the administration of justice to be properly met while at the same time respecting the benefits to the young person's successful re-integration and non-publication; and

- it would complement the amendments made in 1986 to the Young Offenders Act which resulted in all records kept by courts, police and governments or private agencies involved in the assessment or administration of young offender dispositions being subject to non-disclosure instead of destruction provisions. This option would provide centralized and controlled access to the records in the central repository maintained by the Royal Canadian Mounted Police specified. Should information beyond the fact of a previous conviction be desirable, then an application could be made to the court for access pursuant to section 45.1.

SUGGESTED DISADVANTAGE:

- it may be viewed as an infringement of safeguards and protection presently enjoyed by young persons.

APPENDIX

YOUTH CHARGED WITH MURDER IN CANADA

The purpose of this appendix is to present the results of a file study of cases of young persons accused of murder. First, however, it may be worthwhile providing a synopsis of available statistical data pertaining to the extent of violent crime dealt with by the youth courts and to the frequency and characteristics of cases transferred to adult courts.

I. Statistical Overview

The following data are derived from the Youth Court Survey (YCS) conducted by the Canadian Centre for Justice Statistics. Unfortunately, the YCS and its data suffer from a number of shortcomings. For example:

- Ontario has declined to participate in the YCS;
- Data from the Northwest Territories is unavailable for 1986-87 and 1988-89;
- The extent of under-reporting to the YCS (by those jurisdictions that are participating to the survey) is unknown.

The reader is therefore cautioned against drawing any "national" conclusions from the data, or using the data as a precise measure of the volumes of persons, cases or charges dealt with by youth courts. However, the data may still be regarded as providing reasonable indicators or descriptors of the nature and processing of charges, cases and persons brought before the youth courts in the participating jurisdictions.

YCS data is only available for the four-year period from 1984-85 to 1987-88. Unless otherwise specified, the data described below pertain to that four-year period.

THE INCIDENCE OF VIOLENCE

Since the seriousness of the offending behaviour is undoubtedly a factor considered in the decision to order a transfer, it may be worth having a look at the incidence of violence among the charges and cases dealt with by youth courts.

One should keep in mind that "violent offences" are broadly defined by the CCJS as including: murder (first or second degree); manslaughter; attempted murder; aggravated sexual assault; sexual assault with a weapon or causing bodily harm; sexual assault; other

sexual offences; aggravated assault; assault with a weapon or causing bodily harm; discharge firearm with intent; assault; unlawfully causing bodily harm; assaulting peace officers; other assaults; robbery; dangerous use of weapon; possession of weapon; other weapon offences; infanticide; abandoning a child; killing an unborn child in the act of birth; neglect to obtain assistance in childbirth; concealing the body of a child; kidnapping/hostage taking; extortion; and criminal negligence.

In the first four years of the Young Offenders Act:

- The proportions of violent offences brought before youth courts remained relatively stable accounting for 8.2% of the total number of charges in 1984-85, 8.8% in 1985-86, 9.2% in 1986-87, and 9.0% in 1987-88.

- By way of comparison, during the same period of time, property offences accounted for two-thirds to four-fifths of the total number of charges.

- The different types of assaults (except sexual) accounted for about one-half of the violent offences, robbery roughly for one-fifth to one-eighth, and sexual assaults for one-tenth.

- First or second degree murder charges accounted for one-fortieth of one percent (0.025%) of the total number of charges.

- Manitoba reported the highest number of murder charges (more than double the next province), followed by Quebec, Alberta and British Columbia, Saskatchewan, New Brunswick, Nova Scotia, Yukon and the Northwest Territories.

THE USE OF TRANSFER TO ADULT COURT

The YCS data on the use of transfer, for the period of 1984-85 to 1987-88, can de summarized as follows:

- Despite the expectation that the frequency of transfers would increase with the implementation of the uniform maximum age in April, 1985, transfers have progressively decreased both in actual volume and as a proportion of the total number of charges from 603 (1.01%) in 1984-85 to 471 (0.55%) in 1985-86, and to 324 for both 1986-87 (0.34%) and 1987-88 (0.32%).

- The same patterns are evident when cases (rather than charges) are used as the unit of count.

- Over the four-year Young Offenders Act period, only 0.50% of the total charges were transferred, compared to 1.84% of juvenile charges brought before the courts under the Juvenile Delinquents Act in the three-year period of 1981 to 1983.

This relative decrease in transfers under the new legislation, when compared to the 1981 to 1983 period, is consistent across all reporting jurisdictions except British Columbia, Alberta, and Nova Scotia. However, had the maximum age not been raised in 1985, the use of transfers would have markedly declined in Alberta and remained roughly the same in British Columbia; with respect to Nova Scotia, only one case would have been transferred.

- Relatively speaking, under the Young Offenders Act, Manitoba makes the greatest use of transfers (1.05% of all charges), followed by Quebec (0.68%), Newfoundland (0.53%), Alberta (0.52%), Nova Scotia (0.45%), British Columbia (0.19%), Yukon (0.16%), Saskatchewan (0.04%), New Brunswick (0.03%); and Prince Edward Island and the Northwest Territories (both 0.00%).

- For a variety of reasons, the volume and nature of charges and cases appearing before youth courts vary across jurisdictions. Hence, the average annual rate of cases transferred per 1,000 young persons between the ages of twelve and seventeen (inclusive) may provide a better (relative) indicator of the likelihood of being transferred. These rate comparisons indicate that, for the period of 1985-86 to 1987-88, Manitoba had the highest rate (0.33), followed by Yukon (0.29), Alberta (0.23), Nova Scotia (0.13), Newfoundland (0.08), Quebec (0.05), British Columbia (0.03), Saskatchewan (0.02), New Brunswick (0.01); and Prince Edward Island and the Northwest Territories (both 0.00).

- There has been a progressive decline in the volume of cases transferred involving young persons under sixteen years, from thirty-seven in 1984-85 to only four in 1987-88.

- Although one might expect that transfers to adult courts would almost invariably involve a serious, violent offence, this is not the case: more than two-thirds (67.7%) of the cases transferred from 1984-85 to 1987-88 did not involve any current violent offence.

- Of the 32.2% of transferred cases involving at least one charge for a violent offence, a majority had either robbery or some type of assault as the most serious charge.

The non-participation of Ontario in the YCS of course presents serious limitations to the possibility of generalizing the conclusions, if any, that may be drawn from the above data. However, separate data provided by the Ministry of the Attorney General of Ontario would, despite not being entirely comparable to the above, indicate the following.

- The number of charges ("case" data unavailable) transferred to adult courts in Ontario increased dramatically from 16 in 1984-85 to 771 in the first year of the uniform maximum age (1985-86), before dropping to 230 in 1986-87 and increasing to 317 in 1987-88.

- Since 1985-86, only 16% of the charges transferred in Ontario have involved young persons aged less than 16. This is however a larger proportion than those reported by the other jurisdictions through the YCS.

- Actually, it is interesting to note that the number of charges transferred involving young persons under 16 has progressively increased in Ontario under the Young Offenders Act from only 16 in 1984-85 to 103 in 1987-88. Moreover, the relatively low Young Offenders Act volume reported in 1984-85 represents an increase over the number of charges transferred under the Juvenile Delinquents Act.

II. Research on the Transfer Experience of Young Persons Accused of Murder

Four jurisdictions provided court, correctional, and police documents collected from the files of young persons charged with first or second degree murder and dealt with under the provisions of the Young Offenders Act. This section summarizes the major findings on the characteristics of the transfer process in British Columbia, Manitoba, Ontario and Quebec.

The information is presented in order to fill some of the gaps in our knowledge of the ways in which young persons accused of murder have been processed by the youth and adult justice systems since the Y.O.A., including the circumstances of the offence and the personal characteristics of the accused. This section provides a preliminary analysis of statistical data on the use of the transfer provisions in four jurisdictions.

The analysis provides an overview of the transfer experience in order to assist the review process, by giving a context to the assessment of the various options for amendments to the Act. The information is intended to supplement, but not to supplant, a policy-making process that takes into consideration many other factors in addition to topics that can be illuminated by statistics on the past functioning of the justice system.

THE DATA AND ITS LIMITATIONS

The file study was designed to collect court processing and personal information on all young persons accused of first or second degree murder in four jurisdictions. The study population

was therefore intended to represent all cases where young persons were initially charged with murder and whose processing by the youth justice system was pursuant to the provisions of the Y.O.A.

The data presented in this section have the following limitations:

- Some jurisdictions found it difficult to identify all cases where the young person was initially charged with murder -- with the result that the totals may underrepresent the actual population.

- In a number of cases, key documents -- for example, s.13 assessments, s.14 reports, and the court's reasons for judgment regarding transfer -- were not available at the time of report preparation. There is, therefore, missing information for a number of important variables.

- The outcome of the adult court proceedings of transferred youth was not always available. Furthermore, in a few cases, the adult court trial is still in process.

- Where possible, jurisdictions provided records of all cases where the transfer decision had already been made. (Cases where the transfer process was ongoing were excluded from the analysis). However, a few cases are presently under appeal, so that the findings may alter somewhat upon conclusion of those appeals.

For these reasons, the analysis must be regarded as preliminary in nature, and any conclusions drawn from the statistics must be viewed as tentative.

THE OUTCOME OF THE TRANSFER DECISION

Approximately one-half of all young persons who were initially accused of first or second degree murder were transferred to adult court when the information from the four jurisdictions is combined. (See Table 1.a). Transfer was not requested in 6 of the 21 British Columbia cases, in 8 of the 37 Ontario cases, and in 10 of the 27 Quebec cases. In 2 of the 8 Ontario cases where no transfer application was made, the accused young person was under 14 years of age at the time of the offence -- hence, there was no possibility of transfer (ss. 16(1) of the Young Offenders Act). The same comment applies to one of the Quebec cases. Table 1.b shows the "success rate" for those cases where the Crown made application to transfer. (The Crown made all applications to transfer in the cases under examination.) Overall, three-fifths of applications to transfer the young person to adult courtwere successful, with the percentage ranging from about 67% in British Columbia and 69% in Ontario, to 87% in Manitoba. Only 24% of the applications were successful in Quebec.

Table 1.a

THE OUTCOME OF THE TRANSFER DECISION FOR ALL YOUNG PERSONS INITIALLY CHARGED WITH MURDER: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Transfer decision	British Columbia		Manitoba		Ontario		Quebec	
	%	Number	%	Number	%	Number	%	Number
Transfer not requested	29%	6	-	0	22%	8	37%	10
Application, but transfer denied	24%	5	13%	2	24%	9	48%	13
Transferred	48%	10	87%	13	54%	20	15%	4
Total percent	101%		100%		100%		100%	
Total number of young persons		21		15		37		27

Table 1.b

THE OUTCOME OF THE TRANSFER DECISION WHERE A TRANSFER APPLICATION WAS MADE: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Transfer decision	British Columbia		Manitoba		Ontario		Quebec	
	%	Number	%	Number	%	Number	%	Number
Application, but transfer denied	33%	5	13%	2	31%	9	76%	13
Transferred	67%	10	87%	13	69%	20	24%	4
Total percent	100%		100%		100%		100%	
Total number of young persons		15		15		29		17

THE TYPE OF MURDER OFFENCES

The cases selected for this analysis all had first or second degree murder as the offence initially laid by the police. However, the original charges are not necessarily the same type as the charges disposed of -- i.e., the offences that reach the adjudication and sentencing stages of court decision-making. The data illustrate that, as expected, the "disposed of" charges are often less serious than the original charges.

The Type of Original Offence Versus the "Disposed of" Offence

Table 2 shows the type of charge initially laid, and the charge that reached a conclusion in the youth or ordinary court.

- In British Columbia, about two-thirds of young persons were initially charged with second degree murder. In 6 instances, the young person was convicted of manslaughter, and in 7 cases, second degree murder was the charge upon conviction.

- As in B.C., about two-thirds of young persons were first accused of second degree murder in Manitoba. In this province, they were typically convicted of manslaughter (12 of the 15 cases).

- In Ontario, about 70% of young persons were initially charged with first degree murder. By the end of their processing, however, slightly more than one-half of young persons were adjudicated on the offences of manslaughter, robbery, or infanticide.

- In Quebec, about three-fifths (59%) of young persons were initially charged with first degree murder. In only one of these 16 instances however, the young person was convicted of first degree murder. In most cases, the young person was convicted of second degree murder (63%) or manslaughter (29%).

Table 2

THE TYPE OF MURDER OFFENCE ORIGINALLY CHARGED AND OFFENCE DISPOSED OF, YOUNG PERSONS INITIALLY ACCUSED OF MURDER: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

The most serious offence	Original charge	Charge disposed of
British Columbia		
First degree	6	3
Second degree	12	7
Manslaughter	-	6
Number of young persons	18	16

Note: Two B.C. cases are in process in adult court.

Manitoba		
First degree	4	2
Second degree	11	1
Manslaughter	-	12
Number of young persons	15	15

Note: Both first degree cases (co-accused) and one manslaughter case are under appeal to the Supreme Court of Canada.

Ontario		
First degree	24	7
Second degree	12	9
Manslaughter	-	15
Infanticide	-	1
Robbery	-	2
Number of young persons	36	34

Note: Original and/or disposed of charges are unknown for several Ontario cases.

Table 2 (cont.'d)

The most serious offence	Original charge	Charge disposed of
	Quebec	
First degree	16	1
Second degree	11	15
Manslaughter	-	7
Conspiracy to commit murder	-	1
Number of young persons	27	24

NOTE: Two Quebec cases were not completed. In another case, the Crown is appealing the acquittal of the young person.

- When the information for the four provinces is combined, we find that 52% of young persons were initially charged with first degree murder but, by the conclusion of the process, the most serious offence was first degree in only 15% of the cases.

Differences between the Youth and Adult Courts in "Disposed of" Offences

Table 3 shows the percentage and number of young persons whose cases were concluded in the youth versus the adult court by the offence type, for the four jurisdictions combined.

- Of the 39 cases transferred to adult court, a total of 5 young persons were adjudicated on a first degree murder charge, 9 persons had second degree charges disposed of, and the remaining 25 persons (about two-thirds) had offences of lesser seriousness concluded in the adult court.

- While convictions on first degree murder were rare in both youth courts (16%) and adult courts (13%), young persons dealt with by youth courts were twice as likely to be adjudicated on second degree murder, when compared to those dealt with by adult courts. Conversely, about three-fifths (59%) of young persons dealt with by adult courts were convicted of manslaughter, compared to about one-third (34%) of those dealt with by youth courts.

- Each province, except Quebec, had some young persons who were adjudicated on first degree murder in adult court: there were two cases in each of B.C. and Manitoba, and one in Ontario. Both B.C. and Manitoba cases involved co-accused.

Table 3

THE TYPE OF OFFENCE DISPOSED OF IN YOUTH VERSUS ADULT COURTS: FOUR JURISDICTIONS COMBINED

The final offence type	Youth Court		Adult Court		Total	
	%	Number	%	Number	%	Number
First degree	16%	8	13%	5	15%	13
Second degree	46%	23	23%	9	36%	32
Manslaughter	34%	17	59%	23	45%	40
Other offences (infanticide, robbery)	4%	2	5%	2	4%	4
Total percent	100%		100%		100%	
Total number of young persons		50		39		89

OUTCOMES AND SENTENCES IN THE YOUTH AND ADULT COURTS

With the exception of four young persons who were acquitted (1 in each of Ontario and Quebec) or found not guilty by reason of insanity (2 persons in Ontario), all young offenders for whom there are data were convicted of murder or another offence such as manslaughter, robbery, infanticide, or conspiracy to commit murder.

Sentences and Sentence Lengths

- In British Columbia, 7 of the 9 young offenders dealt with by the youth court received the maximum disposition of three years in secure custody. (See Table 4). Five of the 7 persons dealt with by the adult court were sentenced to life imprisonment for first or second degree murder. The 2 persons convicted of manslaughter received 2 and 5½ years in the penitentiary.

- Both youth who remained in the Manitoba youth court received less than the maximum three years, while 10 of the 13 dealt with in adult court on manslaughter charges received from 2 years less a day provincial time to 24 years in the penitentiary. Three persons were sentenced to life imprisonment for first or second degree murder.

- In Ontario, three females -- the only females charged with murder in Ontario -- received a two year probation order from the youth court; 2 were convicted on manslaughter and 1 on infanticide. However, 9 persons received the maximum three years in secure custody, and 4 persons were sentenced to 30 to 33 months. (Taking pre-trial detention into account, the latter group received 36 months of secure custody). Young offenders convicted in adult court received sentences ranging from 6½ years to life; the majority (11 of the 15 who were convicted) received between 6½ and 15 years; 4 were sentenced to life imprisonment.

- In Quebec, 7 young persons received the maximum disposition of three years in secure custody from the youth court. Four other young persons received a three-year combination of secure custody and open custody or detention for treatment. Another young person was imposed a three year open custody term. Of the three young persons sentenced in adult courts, two had been convicted of manslaughter: one received 7 years penitentiary and the other 8 years penitentiary with two years probation to follow. The third young person was found guilty of second degree murder and received a life sentence with a minimum 10 years without parole.

Table 4

THE OUTCOME/SENTENCES IN THE YOUTH AND ADULT COURTS OF YOUNG PERSONS INITIALLY ACCUSED OF MURDER: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Outcome/Sentence Length	Youth Court	Adult Court	Total
British Columbia			
18 mths. open custody/ 18 mths. probation	1	-	1
1 yr. secure custody/ 24 mths. probation	1	-	1
2 yrs. penitentiary/ 36 mths. probation	-	1	1
3 yrs. secure custody	7	-	7
5½ yrs. penitentiary	-	1	1
Life, 10 yrs.	-	3	3
Life, 25 yrs.	-	2	2
Number of young persons	9	7	16
Manitoba			
23 mths. secure custody/ 12 mths. probation	1	-	1
2 yrs. secure custody	1	-	1
2 yrs. less a day provincial	-	3	3
4 yrs. penitentiary	-	1	1
5 yrs. penitentiary	-	3	3
8 yrs. penitentiary	-	2	2
24 yrs. penitentiary	-	1	1
Life, 10 yrs.	-	1	1
Life, 25 yrs.	-	2	2
Number of young persons	2	13	15

Table 4 (cont'd.)

Outcome/Sentence Length	Youth Court	Adult Court	Total
		Ontario	
Acquitted	-	1	1
Not guilty by reason of insanity	1	1	2
2 yrs. probation	3	-	3
18 mths. secure custody/ 6 mths. open custody	1	-	1
30-33 mths. secure custody	4	-	4
3 yrs. secure custody	9	-	9
6½ yrs. penitentiary	-	1	1
8 yrs. penitentiary	-	1	1
9 yrs. penitentiary	-	4	4
10 yrs. penitentiary	-	3	3
12 yrs. penitentiary	-	1	1
15 yrs. penitentiary	-	1	1
Life, 10 yrs.	-	1	1
Life, 15 yrs.	-	1	1
Life, 22 yrs.	-	1	1
Life, 25 yrs.	-	1	1
Number of young persons	18	17	35

Table 4 (cont'd.)

Outcome/Sentence Length	Youth Court	Adult Court	Total
Quebec			
Acquitted	1	-	1
1 yr. open custody/ 2 yrs. probation	1	-	1
1 month secure custody/ 35 months open custody	1	-	1
8 months secure custody/ 15 months open custody	1	-	1
3 yrs. open custody	1	-	1
7 months secure custody/ 29 months open custody	1	-	1
2 yrs. secure custody	2	-	2
2 yrs. secure custody/ 1 yr. open custody	2	-	2
2 yrs. treatment order/ 1 yr. secure custody	1	-	1
30 months secure custody/ 6 months probation	1	-	1
3 yrs. secure custody	7	-	7
7 yrs. penitentiary	-	1	1
8 yrs. penitentiary/ 2 yrs. probation	-	1	1
Life, 10 yrs.	-	1	1
Number of young persons	19	3	22

OFFENDER AND OFFENCE CHARACTERISTICS

Preliminary information is available on the age of the young person at the time of the offence, age at sentencing, prior offence history, and two characteristics of the offence: the relationship of the victim to the suspect and whether the murder was committed during the course of another criminal act.

Age at Offence

While there was no apparent relationship between the age of the young person at the offence and the transfer decision in British Columbia and Manitoba, there does appear to be a relationship in Ontario; about one-half of those who were transferred were 17 years of age, compared to only 2 of the 17 cases (11%) who remained in the youth court. In Quebec, three of the four young persons transferred to adult courts were 17 years old at the time of the offence. (See Table 5).

Age at Sentencing

The age of the young offender at the time of sentencing has implications for both the provincial and federal correctional authorities, who may be required to deal with persons much older or younger than the rest of the inmate populations, depending on the outcome of the transfer decision. Age at sentencing is available for British Columbia, Ontario, Quebec, and for some transferred cases from Manitoba (Table 6):

- In B.C., 2 of the 9 persons dealt with by the youth court were 18 years of age at sentencing, and 3 of the 7 who were transferred to adult court were 15 to 17 years of age when sentenced there.

- The transferred cases in Manitoba ranged in age from 17 to 19 years, with 3 of the 9 offenders aged 19 at sentencing.

- In Ontario, there is a wider range of ages -- from 12 to 20 years at sentencing. Including the 20 year old who received probation, only 3 of the 14 persons remaining in the youth system were 18 years of age or older at sentencing. About half (7 of 15) of murder offenders transferred to adult court were 15 to 17 years of age at the time of sentencing.

- In Quebec, of the 18 young persons who received a disposition from the youth court, 8 (or 44%) were aged 18 or 19 at disposition. Of the three young persons who received a sentence in adult court two were aged 18 and the other was 19 at sentencing.

Table 5

THE AGE AT OFFENCE AND THE TRANSFER DECISION: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Age at offence	No transfer application	Application, transfer denied	Transferred	
British Columbia				
15 years old	2	-	1	3
16 years old	1	1	3	5
17 years old	3	2	5	10
Number of young persons	6	3	9	18
Manitoba				
15 years old	-	-	3	3
16 years old	-	-	3	3
17 years old	-	2	7	9
Number of young persons	0	2	13	15
Ontario				
12-13 years old	2	-	-	2
14 years old	2	1	-	3
15 years old	1	5	2	8
16 years old	2	2	6	10
17 years old	1	1	9	11
Number of young persons	8	9	17	34
Quebec				
12 years old	1	-	-	1
15 years old	4	1	-	5
16 years old	3	2	1	6
17 years old	2	10	3	15
Number of young persons	10	13	4	27

Table 6

THE AGE AT SENTENCING, YOUTHS DEALT WITH IN THE YOUTH AND ADULT COURTS: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Age at sentencing	Youth Court	Adult Court	Total
	British Columbia		
15 years old	-	1	1
16 years old	4	-	4
17 years old	3	2	5
18 years old	2	3	5
19 years old	-	1	1
Number of young persons	9	7	16
	Manitoba		
17 years old	not available	3	3
18 years old		3	3
19 years old		3	3
Number of young persons		9	9
	Ontario		
12 years old	1	-	1
14 years old	2	-	2
15 years old	2	1	3
16 years old	3	4	7
17 years old	3	2	5
18 years old	2	6	8
19 years old	-	2	2
20 years old	1	-	1
Number of young persons	14	15	29
	Quebec		
15 years old	1	-	1
16 years old	4	-	4
17 years old	5	-	5
18 years old	6	2	8
19 years old	2	1	3
Number of young persons	18	3	21

Prior Offence History

One of the factors the youth court must consider during the transfer hearing is the prior record of the young person. Table 7 shows the prior record of persons for whom this information is available, categorized as no prior convictions for any offence; past offences but no convictions on a violent offence such as assault or robbery; and previous violent offences.

- In each of British Columbia, Manitoba and Ontario, about one-half of those accused of murder had no prior convictions of any type (see the last column on Table 7). In Quebec, the proportion was even higher at 63%.

- In British Columbia, Ontario, and Quebec, the existence of a prior record appeared to be related to the transfer process, with young persons with no prior offences more likely to be dealt with in the youth court than offenders with a prior record. In Quebec, the four young persons who were transferred all had a prior record.

- Looking at the four provinces combined, 14% of the sample had a prior history of violent offences.

Table 7

THE PRIOR OFFENCE HISTORY AND THE TRANSFER DECISION: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Prior offence history	No transfer application	Application, transfer denied	Transferred	Total
British Columbia				
No prior offences	4	3	2	9
Prior offences, but no violent offences	2	-	4	6
Prior violent offences	-	-	3	3
Number of young persons	6	3	9	18
Manitoba				
No prior offences	-	1	6	7
Prior offences, but no violent offences	-	1	4	5
Prior violent offences	-	-	3	3
Number of young persons	0	2	13	15
Ontario				
No prior offences	6	5	2	13
Prior offences, but no violent offences	1	3	6	10
Prior violent offences	-	1	2	3
Number of young persons	7	9	10	26
Quebec				
No prior offences	7	8	-	15
Prior offences, but no violent offences	-	3	3	6
Prior violent offences	-	2	1	3
Number of young persons	7	13	4	24

The Victims-Suspect Relationship

The victims of the young persons convicted of murder or other offences can be classified as: relatives, including parents, siblings, grandparents, and foster relations; friends; casual acquaintances, such as neighbours or drinking companions; and victims with whom there is no known prior relationship (i.e., strangers such as a convenience store clerk). (See Table 8.)

- In Ontario, there appears to be a relationship between victim-suspect relationship and the transfer decision: over one-half of the victims of the offenders who were dealt with by the youth court (i.e., 11 of 19 persons) were related to the offender; by contrast, 2 of the 8 victims where the offender was transferred were related to the offender.

- About one-fifth of the victims of these offences had no known relationship to the offender, when the four provinces are combined.

Murders during Other Criminal Acts

In Quebec, 8 of the 10 cases where the alleged murder was reported to have occurred during the commission of another criminal act were dealt with by the youth court. In the other three jurisdictions, these cases, which may involve robbery, sexual assault or break and enter, were almost invariably transferred to the adult court. In only two such cases (one in B.C. and one in Ontario) did the young person remain in youth court.

Table 8

RELATIONSHIP BETWEEN THE VICTIM AND SUSPECT AND THE TRANSFER DECISION: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Victim-suspect relationship	No transfer application	Application, transfer denied	Transferred	Total
		British Columbia		
Relative	3	-	4	7
Friend	1	-	1	2
Casual acquaintance (e.g. neighbour/ drinking companion)	1	2	5	10
No known relationship	-	1	3	5
Number of victims	5	3	13	24
		Manitoba		
Relative	-	1	2	3
Friend	-	-	-	-
Casual acquaintance (e.g. neighbour/ drinking companion)	-	-	3	3
No known relationship	-	1	4	5
Number of victims	0	2	9	11

Table 8 (cont'd.)

Victim-suspect relationship	No transfer application	Application, transfer denied	Transferred	Total
Ontario				
Relative	5	6	2	13
Friend	2	1	-	3
Casual acquaintance (e.g. neighbour/ drinking companion)	3	2	4	9
No known relationship	-	-	2	2
Number of victims	10	9	8	27
Quebec				
Relative	4	2	-	6
Friend	1	1	2	4
Casual acquaintance (e.g. neighbour/ drinking companion)	3	4	2	9
No known relationship	3	4	-	7
Number of victims	11	11	4	26

Table 9

MURDERS DURING THE COMMISSION OF ANOTHER CRIMINAL ACT AND THE TRANSFER DECISION: BRITISH COLUMBIA, MANITOBA, ONTARIO AND QUEBEC

Was the murder committed during another criminal act?	No transfer application	Application, transfer denied	Transferred	Total
British Columbia				
No	5	2	4	11
Yes	0	1	4	5
Number of murder incidents	5	3	8	16
Manitoba				
No	-	2	6	8
Yes	-	0	3	3
Number of murder incidents	0	2	9	11
Ontario				
No	6	9	5	20
Yes	1	0	3	4
Number of murder incidents	7	9	8	24
Quebec				
No	6	6	1	13
Yes	3	5	2	10
Number of murder incidents	9	11	3	23

SUMMARY

Four jurisdictions provided court, police, and correctional file data on young persons who were initially charged with first or second degree murder and dealt with under the provisions of the Young Offenders Act. Preliminary information on the way young persons were processed by the youth and criminal justice systems in British Columbia, Manitoba, Ontario and Quebec was available for analysis.

About one-half of murder cases in British Columbia and Ontario were transferred to adult court compared to almost 90% in Manitoba (13 of the 15 cases) but only 15% in Quebec (4 of the 27 cases). However, if cases where there was no transfer application by the Crown are excluded from the totals, the percentages of murder cases transferred varied from a low of 24% in Quebec, to 67% in British Columbia, 69% in Ontario, and 87% in Manitoba.

While young persons were most frequently initially charged with second degree murder in British Columbia and Manitoba, in Ontario and Quebec first degree murder constituted the majority of initial charges. Young persons in all four provinces tended to be convicted on offences of lesser seriousness than the initial charge.

The majority of persons convicted in the youth court received the maximum three year disposition. The majority of offenders transferred to adult court were convicted of manslaughter or robbery and received custodial sentences ranging from two years less a day, to 24 years in the penitentiary. The sentences imposed by the ordinary courts can be summarized as follows:

- There were 25 offenders convicted of manslaughter, or other offences of lesser seriousness than murder; they received an average of about 7 1/2 years of custody.

- Eight offenders convicted of second degree murder received life, from 10 to 22 years.

The relationship between the transfer decision and several characteristics of the young person and his/her offence can be briefly described:

- Age did not appear to be a factor in the transfer decision in British Columbia or Manitoba. On the other hand, in Ontario, younger persons tended to remain in the youth court while 17 years old were more likely to be transferred to the ordinary court.

- In British Columbia, Ontario, and Quebec, the prior record of the young person seemed to show a relationship to the decision to transfer, with those young persons with a past conviction more likely to be dealt with in the adult court

than those who were offence-free. Except in Quebec, persons with a history of violence were generally transferred to adult court, but in the population as a whole, they made up only 14% of the young persons initially charged with murder.

- The victim-offender relationship was related to the transfer decision in Ontario, where about one-half of victims of the offenders who remained in the youth court were related to the young person compared to one-quarter of those whose cases were transferred.

- Forty-two percent of transferred murder incidents in the three provinces involved other crimes such as sexual assault or robbery. Except in Quebec, murder incidents involving other crimes were almost invariably transferred to ordinary courts.

CHAPTER 2: CUSTODY AND REVIEW PROVISIONS

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I. INTRODUCTION

The appropriateness of a judicially determined level of custody at the time of disposition and at review has come under careful scrutiny. Similarly, the review provisions which place ultimate control with the youth court have been criticized. Broadly speaking, the concerns can be categorized under the following headings: philosophical, administrative, and financial. While some observers have criticized the sentencing practices in certain regions and suggested that inappropriate resort is being made to the custody option, the following information focuses on the issues around choice of custody level and administration of the disposition.

II. SUMMARY OF CONCERNS

What follows is a summary of concerns expressed by those who seek change. Section V. on Options and Analysis will address the suggested advantages and disadvantages of the status quo and proposed changes to it.

1. The two-tier model may be undesirably shaping sentencing patterns:

   - it is arguable that the new, open custody disposition has had the effect of having more youth sent to custody due to the perception that open custody is a "soft" sanction, a surrogate child welfare disposition, and/or a treatment disposition, and due to the absence of offence criteria to limit its use. The philosophical, financial and administrative implications of this are a growing concern;

   - with respect to the age groups affected by the introduction of the uniform maximum age, it appears that sentences imposed under the Criminal Code when this group were considered adults were considerably shorter than custody dispositions under the Young Offenders Act.

2. The lack of clarity in the definitions poses operational concerns:

   - the definition for open custody is 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 Lieutenant Governor in Council of a province..."

The use of examples of facilities without reference to the allowable degree of restraint makes its operationalization unclear. For example, the phrases "child care institution" and "any other like place or facility" are vague;

- the ambiguity in the definitions has led to considerable questions as to what is the point of delineation between open custody and probation, and between open custody and secure custody. In practice, varying levels of security are used. This ambiguity may give rise to the placement of a youth in a given facility being challenged. Yet, if an open custody facility does not have elements of restraint or physical security, it may be unfair for some youth because it expects a level of responsibility which is beyond them. Additionally, the operation of a facility may also be subject to challenge for failure to satisfy the intent of Parliament as defined in the Act. In the latter case, a successful challenge could necessitate changes in both the operation and the physical structure;

- the definition does not reflect the fact that in many jurisdictions, there is a continuum of levels of security;

- as a result of the variety of possible interpretations, custody has been operationalized differently across the country.

3. From a sentencing perspective, the objective of the two levels is unclear:

- the provision for open custody blurs the distinction between the sentencing objectives for probation with an order to reside and open custody on the one hand, and open custody and secure custody on the other;

- it is not clear whether placement is to be primarily based on offence criteria. The offence criteria for secure custody in s. 24.1(3) and (4), in restricting access to secure custody, contribute to the practice that the offence should dictate the level of custody. This practice does not reflect the reality

that some very serious offenders could be very appropriate candidates for lower degrees of security. Conversely, this practice may result in a disservice to certain youth who are ordered to open custody because this environment may not be suitable to their initial needs and circumstances. Such youth may react by absconding or committing disciplinary infractions and thereby escalating the number of incidents which might not have occurred had they been placed in a different environment. In one jurisdiction, experience would suggest that escapes from open custody occur most often in within the first month;

- it is arguable that the term "open custody" obscures the reality that this disposition is custody nonetheless. Further, it is arguable that the term and its definition not only act as an incentive for this disposition to be ordered in the first place, but as a licence to add to its length.

4. Two levels impede effective utilization of resources:

- for treatment and special program purposes, it is sometimes desirable to use one facility in order that the population justifies the program and to avoid duplication of programs and services. The current uncertainty with respect to the legitimacy of mixing young persons from the two different levels for certain purposes inhibits this practice; and

- periodic fluctuations in the open and secure populations can cause great administrative difficulties and inefficiencies. For example, an increase in the secure custody population can create overcrowding and/or a scramble for new beds even though open custody beds may be available.

5. The current provisions regarding custody and review impede effective placement and release:

- with respect to the initial classification and placement of the youth, the capacity to predict human behaviour is limited. This is particularly true with youth and, thus the question of how a youth will act in a custodial setting may be impossible to determine at the time of sentencing. This arguably has led to inappropriate placements in both open and secure custody. Beyond initial

placement, flexibility is required to take into account the changeability of youth;

- in the case of short dispositions (3 months or less), the constraints of the judicial review process militate against implementing the implied theory of moving a youth through gradually reduced levels of intervention;

- it is arguable that the one way nature of transfers from secure to open custody lacks credibility with courts and leads to low review granting rates;

- where there is an inappropriate placement made by a court at the dispositional phase, such placements need not occur in great numbers to be disruptive. For example, in a program with eight to ten youths, one disruptive youth could well compromise the entire program;

- the criteria for administrative transfer from open to secure custody is overly restrictive and fails to address issues where a young person's behaviour may be disruptive and damaging to other youth without putting their safety at risk. While it must be recognized that this problem can be solved in many cases by efforts to engage the young person in constructive activity, such efforts may not succeed for certain youth;

- the process involved in judicial determination of level and release may prevent a youth's timely move from secure custody to open custody. This is so because the conditions which make it right to transfer a youth to a lower level of security at a given point in time may no longer exist when the review is held;

- it is the view of some that the above concerns militate against the interests of young offenders, and thereby the interests of the community.

6. The temporary release provisions in section 35 are problematic in three respects:

- the clause, "to be temporarily released for a period not exceeding fifteen days where...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 reintegrating him into the community," has been subject to varying interpretations. In more than one jurisdiction, back-to-back temporary absences are commonly being used while in other jurisdictions, the fifteen day limit is strictly adhered to;

- the fifteen day period is viewed as too restrictive for some of the stated purposes and accordingly, some youth are being denied access to those programs which are of a longer duration; 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 fifteen day limit is too restrictive. For example, where a youth who is serving a three month sentence is of very good behaviour, it could be appropriate to release the youth into the community, retaining of course the powers of supervision,arrest and revocation.

III. HISTORY OF CUSTODIAL AND REVIEW PROVISIONS

Provision for Judicial Determination of Level of Custody

Under the Young Offenders Act, the youth court judge determines not only that a custodial disposition is required but also, the level of the custody order, either open or secure. This represents a significant change from the practice under the Juvenile Delinquent's Act which left control over custody in the hands of provincial authorities.

The debate over locus of control over custody has a long history:

- in 1965, the Department of Justice Committee on Juvenile Delinquency in Canada indicated that the proper implementation of a juvenile court system required that there be available to the court a flexible system of preventive and rehabilitative measures. The Report did recommend, nevertheless, that the discretion to release the young person be left in the hands of correctional authorities;

- in 1968, at the Federal/Provincial Conference on Juvenile Delinquency, provincial authorities indicated that this

discretion should be left in their hands because the court cannot perform as both a legal body and as the body responsible for the treatment of the young person. It should be noted that at this point in the reform process the decision to abandon the parens patriae philosophy had not yet been taken;

- Bill C-192 (1970) undertook a drastic overhaul of the sentencing provisions. In keeping with its parens patriae philosophy it offered as a disposition, the transfer of the young person to provincial jurisdiction to be disposed of pursuant to provincial child welfare legislation;

- the Federal/Provincial Joint Review (1974) agreed with the sentencing theory driving C-192's proposals for dispositions.

There was, however, debate among committee members as to whether transfer to provincial jurisdiction should be retained. Some members argued that the option of transferring a young person to provincial child welfare legislation should be retained to provide a province with sufficient flexibility to ensure a unified service system. On the other hand, some committee members argued that including a provision for transfer to provincial authority constitutes an abdication of federal responsibility over criminal law. They further stated that the ability to deprive a young person of his liberty should be in the hands of the judiciary and not provincial service administrators;

- In 1975, the Solicitor General's Committee on Young Persons in Conflict with the Law Report asserted that in passing sentence, the judge should proceed with a disposition that would retain the young person under the court's jurisdiction. The Committee also recommended that the judge should order determinate sentences and be responsible for determining the level of custody (open or secure). Written reasons should be provided for that decision in order to acquaint both the young person and provincial authorities with the judge's rationale and also to serve as a record for purposes of review;

- the debate concerning the authority of the provincial director was revived again by Federal Working Group Proposals in 1977. They recommended that while a judge would have the authority to commit the young person to custody, the provincial director would be responsible for determining the level of custody. This would provide

provinces with the flexibility to take into account differences in custodial facilities and available correctional programs;

- these proposals of the Revised Federal Working Group constituted the first attempt at bridging the gap between the courts and provincial service directors; and determines that their functions need not be mutually exclusive and that a significant role for provincial service directors could be accommodated with an accountability model of juvenile justice;

- in a 1979 Briefing Document prepared for the Minister on the Proposed Young Offenders Legislation, a clear position on the jurisdictional argument was presented: the youth court is to maintain exclusive jurisdiction over sentencing with no provision for transfer to provincial authorities which would be inconsistent with the criminal nature of the legislation. Once a judicial sentence is pronounced it is inconsistent that such sentence can be altered by provincial administrators. Judges are vested with the authority to decide the extent to which custodial or other measures should be utilized to ensure the safety of the public;

- at that time, however, it was proposed that the provincial director should have complete freedom in the execution of the disposition including determining the level of custody, the institution best suited to the needs of the young person and the programs in which he or she should be involved;

- following introduction of Bill C-61, at the Committee of Justice and Legal Affairs it was proposed that the level of custody be a judicial determination as opposed to a determination of the provincial director. This proposal was based on the premise that what is at issue is the security of the public from illegal conduct and that protection of the public interest is a judicial responsibility. This would not affect the provincial director's ability to designate the particular facility within that level to which the young person is committed;

- at this time, a decision was made to redefine the law governing juvenile justice as criminal law. This required that the procedures and options concerning sentencing also be consistent with the principles of criminal law. Consequently, reformers had to build a sentencing regime which permitted the court to fulfil its mandate, but which afforded the young person adequate due

process protection. This objective entailed four principle reforms:

- provision that the court would maintain jurisdiction over the sentences it dispenses thereby significantly restricting the powers formally held by provincial service administrators;

- provision that all sentences be of a determinate length and not greater than an adult could receive for the same offence thereby assuring the young person that questions concerning continued restraint on his liberty and other fundamental freedoms would not be left to the whim of administrators or the benevolence of the court;

- provision that where appropriate and the court so decides that no measures are required, an absolute discharge may be granted, thereby removing from the court the power to adjourn the matter indefinitely (sine die) and retain the threat that should measures be required in the future, the court could then pass sentence, long after an adjudication of guilt; and finally;

- the establishment of a sentencing procedure which respects the Charter of Rights and Freedoms.

Provisions for Review

One of the principle shortcomings of the Juvenile Delinquents Act was that it failed to provide an adequate review mechanism for dispositions to ensure that a young person's disposition remained relevant to his needs. The fundamental reason behind this inadequacy was that carriage over a disposition was turned over to provincial administrators who become vested with the responsibility of monitoring as well as administering the disposition. Where a court decided to review the disposition of a young person in custody, if it wished to order his release, the court could only do so upon the recommendation of the provincial administrator (superintendent).

With the decision made to extend the court's jurisdiction over the young person until the completion of the disposition, it became necessary for the court to possess an adequate review mechanism;

- the Department of Justice Committee on Juvenile Delinquency in 1965 recommended that a mandatory review

be instituted for all custodial dispositions after one year, but that the discretion to release the young person be left with provincial administrators;

- the Federal-Provincial Joint Review of 1974 recognized that review of a disposition should not depend on the service administrator's perception of the young person's needs and that there should be the requirement for mandatory periodic reviews of all dispositions and not merely custodial ones. To quote the Joint Review: "A continuous process of review and adjustment should be part of any secure system and should foster the participation of the young person and his family in identifying and planning needed adjustments". The Joint Review recommended that where major changes from the original disposition are required, they cannot be effected administratively but require review by either the court or a designated review body. As to what would be the optimal mechanism for review, the court or a review board, the Joint Review favoured judicial review as being an effective means of involving the court in the process of accountability for the role it plays in the juvenile service system as well as serving as a means to increase and update the judiciary's knowledge of that service system;

- however, the Committee rejected the concept of instituting a review mechanism which would permit provincial authorities to alter a disposition, arguing that only a judge should be vested with the authority to determine the degree and nature of deprivation of liberty;

- although the actual extent of this power was not clarified, the recommendation constituted an awareness on the part of the reformers that an effective review mechanism would require close cooperation and integration between the courts and provincial service administrators;

- the actual extent of the power to be given to provincial administrators in the review process was addressed by the Federal Working Group Proposals in 1977. They recommended that the provincial director be given the authority to initiate the release of a young person from custody, on probation without the necessity for judicial review. However, the court could if it should elect, object to the release, in which case judicial review would be required. It was believed that permitting the provincial directors to exercise such powers of release

is essential to facilitate the process of reintegration of the young person into the community.

In terms of underlying principles, the institution of a formalized review process for dispositions under the Young Offenders Act was predicated on the following principles:

- to permit the courts to effectively exercise their jurisdiction over the duration of a disposition;
- to ensure that a disposition remains relevant to the ongoing and changing needs of the young person;
- to provide a means by which those at the service delivery level can contribute to the goal of ensuring that a disposition is relevant to the young person's needs;
- to provide a means by which juvenile justice can fulfil the principle of protecting the right of a young person to the least possible interference with freedom that is consistent with the protection of society;
- to provide a means of effectively and expediently dealing with situations where a young person is unable or fails to comply with the original disposition;
- to establish a parole mechanism especially designed for juvenile justice without requiring recourse to the adult parole process;
- to provide an incentive for the young person to faithfully comply with the disposition leading to the potential of a favourable review by the provincial director or the courts;
- to foster the participation of the young person and his/her parents in the review process.

IV. CURRENT LAW

The Young Offenders Act differs from the Juvenile Delinquents Act with respect to placements in custody in two notable respects. First, dispositions are time-limited. Second, the disposition is subject to a very high degree of judicial and legislative control, including two levels of custody, controlled movement between levels and restrictive release from custody. This restriction on administrative discretion is also more pronounced than for adult offenders sentenced to terms of imprisonment.

Time-Limited Dispositions

Unlike under the Juvenile Delinquents Act, all youth court dispositions are for specified time-limited periods. The maximum terms in custody are set out in s.20(1)(k), 20(4), 20(4.1) and 20(7):

> 20(1) Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any one of the following dispositions, or any number thereof that are not inconsistent with each other:...
>
> (k) subject to sections 24 to 24.5, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
> (i) two years from the date of committal, or
> (ii) where the young person is found guilty of an offence for which the punishment provided by the Criminal Code or any other Act of Parliament is imprisonment for life, three years from the date of committal;
>
> 20(4) Subject to subsection (4.1), where more than one disposition is made under this section in respect of a young person with respect to different offences, the continuous combined duration of those dispositions shall not exceed three years.
>
> 20(4.1) Where a disposition is made under this section in respect of an offence committed by a young person after the commencement of, but before the completion of, any dispositions made in respect of previous offences committed by the young person,
>
> (a) the duration of the disposition made in respect of the subsequent offence shall be determined in accordance with subsections (3) and (4);
>
> (b) the disposition may be served consecutively to the dispositions made in respect of the previous offences; and
>
> (c) the combined duration of all the dispositions may exceed three years.

> 20(7) No disposition shall be made in respect of a young person under this section that results in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence.

Together these provisions provide the following rules to be applied in determining the maximum duration of custody dispositions:

- custody dispositions generally are not to exceed two years in length from the date of committal;
- custody dispositions can be up to three years in length where the offence is one for which an adult would be subject to imprisonment for life;
- where the maximum duration of imprisonment to which an adult would be subject is less than two years (such as for summary conviction offences), a young person shall not be subject to a longer period than the prescribed adult maximum;
- a young person subject to multiple dispositions for different offences may be subject to a custody term of up to three years; and
- where a young person commits additional offences while already subject to a previous young offenders disposition, each disposition is subject to the rules set out above but the continuous combined disposition may exceed three years.

In addition, s.20(2) provides that a disposition commences on the date it is imposed unless the youth court specified otherwise. This has been held to authorize the imposition of consecutive custodial dispositions [R. v. D.R.M. (1987) 79 N.S.R. (2d) 222 (N.S.C.A.); R. v. D.J.F. Feb. 19, 1988, unreported (Ont. C.A.); R. v. R.G.B. Sept. 13, 1988 (C.C.C.A.); Contra: R. v. W.J.G. (1986) 29 C.C.C. (3d) 430 (P.E.I.C.A.)] and it has also been held to authorize youth court dispositions to be consecutive to adult imprisonment sentences [R. v. Terry V. July 4, 1989, unreported, (S.C.O.)].

The Statutory Test for a Custody Disposition

While the case law is not yet clear across Canada on the principles to be applied in determining whether a custodial disposition is appropriate, the Young Offenders Act does

provide a statutory test to be applied before imposing a custody disposition:

> 24(1) The youth court shall not commit a young person to custody under paragraph 20(1) (k) 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 limitation covers both committals to open as well as secure custody. Prior to Bill C-106, the limitation applied to secure custody only. However, most reported cases on this issue do not refer heavily to this provision. It is not clear if, in practice, it acts to restrict the use of custody.

Two Levels of Custody

While s.20 simply provides for a disposition of a custody committal for a limited duration, s.24.1 sets out two levels within the custody regime. These are described in s.24.1(1) as "open custody" and "secure custody":

> 24.1(1) In this section and sections 24.2, 24.3, 28 and 29, and "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.

There is relatively little case law which might clarify the rather general descriptions in the Act. The cases which do exist generally deal with the adequacy of interim arrangements established by provinces shortly after the Young Offenders Act came into effect.

> "There has been some judicial criticism of the lack of symmetry and clarity in the two custody definitions (Re F. and the Queen (1984) 14 C.C.C. (3d) 161 at 167-68, (Man. Q.B.)); However, on appeal, the court accepted that a facility which had certain security measures could meet the definition of open custody (Re F. and the Queen (1984) 16 C.C.C. (3d) 258 (Man. C.A.))."

Judicial Determination of Custody Level

Subsection 24.1(2) provides:

> 24.1(2) Where the youth court commits a young person to custody under paragraph 20(1) (k), it shall specify in the order of committal whether the custody is to be open custody or secure custody.

Unlike in the adult correctional system (where a range of custody facilities exists similar to the open/secure custody regime), placement in either open or secure custody is for the court to decide not the provincial director.

The role of the provincial director at the sentencing stage is confined to the preparation of a pre-disposition report, if it is not waived by the youth court. It is not clear whether the provincial director is even entitled to make recommendations as to the appropriate custody level in the pre-disposition report (R. v. C.J.M. (1986) 74 N.S.R. (2d) 388; L.G.F. v. R. (1988) W.D.F.L. 2074 (Sask. C.LA.)).

As will be discussed below, once made, the committal to custody cannot be changed from open to secure custody and can only be changed from secure to open, following a review.

Statutory Limitation on Secure Custody

The Young Offenders Act prohibits the use of secure custody as a disposition except for serious offences. Except for the general test in s.24(1), there is no statutory limitation on the use of open custody and certainly no offence-based limitation as exists for secure custody. The offence criteria for secure custody are found in s.24.1(3) and (4):

> 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 132 (prison breach) or subsection 133(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 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, 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 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 132 (prison breach) or subsection 133(1) (escape or being at

> large without excuse) of the Criminal Code or an attempt to commit any such offence.

Where an offence is a dual procedure offence and the Crown elects to proceed by way of summary conviction, secure custody will not be an available disposition under s.24.1(3)(a) (R. v. D.J.C. (1985) 21 C.C.C. (3d) 246 (P.E.I.S.C. in banco); R. v. Joanne Michelle P., unreported Apr. 24, 1986 (Ont. Dist. Ct.)). Where the Crown merely fails to elect to proceed by way of indictment, it is somewhat less clear whether secure custody is an available disposition; however, it generally appears not to be available especially if the failure to elect is not remedied until after a finding of guilt (R. v. Gary Andrew C. (1986) 16 W.C.B. 400 (Ont. Prov. Ct.)); R. v. Mark O. unreported, May 11, 1984 (Man. Prov. Ct.); R. v. Ricky Wayne S. (unreported, May 27, 1986, (N.S.C.A.)).

Transfer from Open Custody to Secure Custody

Section 24.2(8) provides:

> 24.2(8) Subject to subsection (9), no young person who is committed to open custody may be transferred to a place of 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 under a s.33 review. However, in Bill C-106, 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):

> 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.

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 definition of "prisoner" in the Prisons and Reformatories Act which provides for remission excludes young persons:

> "prisoner" means a person, other than
>
> (a) a child within the meaning of the Juvenile Delinquents Act, chapter J-3 of the Revised Statutes of Canada, 1970, as it read immediately prior to April 2, 1984, with respect to whom no order pursuant to section 9 of the Act has been made, or
>
> (b) a young person within the meaning of the Young Offenders Act with respect to whom no order pursuant to section 16 of the Act has been made, who is confined in a prison pursuant to a sentence for an offence under an Act of Parliament or any regulations made thereunder, as does the definition of "inmate" in the Parole Act:
>
> "inmate" means a person who is under a sentence of imprisonment imposed pursuant to an Act of Parliament or imposed for criminal contempt of court, but does not include
>
> (a) a child within the meaning of the Juvenile Delinquents Act, chapter J-3 of the Revised Statutes of Canada, 1970, as it read immediately prior to April 2, 1984, who is under sentence of imprisonment for an offence known as a delinquency under that Act;

(b) a young person within the meaning of the Young Offenders Act who has been committed to custody under that Act; or

(c) a person in custody solely by reason of a sentence of imprisonment that has been ordered to be served intermittently pursuant to section 737 of the Criminal Code.

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 imposed a probation order to follow at the time of the original disposition).

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 after the disposition (s.28(3));
- with leave of the youth court at any time (s.28(3)).

It is not clear whether only the youth court judge that made the original disposition can hear the review (Christine W. v. R. (1985) 21 C.C.C. (3d), 365; R. v. Shawn Wayne Peter O. (unreported, Ont. Prov. Ct.)) or whether a judge can review all dispositions to which a young person is subject in that judicial district.

Section 28 contains some 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):

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 exists 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 can 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):

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. One province has established a board under s.30.

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.)).

V. OPTIONS AND ANALYSIS

The issues with respect to the appropriateness of judicially determined levels of custody, two legislated levels of custody, and judicially determined levels of review were addressed by asking the following questions:

A. Should the Act distinguish between two levels of custody?

B. If the Act does provide for two levels of custody, how should the two levels of custody be defined?

C. If the Act does provide for two levels of custody, should there be offence criteria for committal to open custody?

D. If two levels of custody are retained, who should determine the level of custody?

E. If two levels of custody are retained and the Provincial Director determines the level, what should the method of recourse be for the accused or crown dissatisfied with the decision?

F. If the distinction in law remains between secure and open custody, how should transfers from secure custody to open custody be authorized?

G. If the distinction in law remains between secure and open custody, how should transfers from an open to a secure custody facility be authorized?

H. What is the nature of early release granted by the youth court?

I. What should the procedures be for court approved early release from custody?

J. What should the duration of temporary absence be?

A. SHOULD THE ACT DISTINGUISH BETWEEN TWO LEVELS OF CUSTODY?

The following options suggest themselves:

Option 1: No Distinction

Option 2: Two Levels (Status Quo)

OPTION 1

No Distinction.

SUGGESTED ADVANTAGES:

- it allows for a broad range of security levels and flexibility of movement amongst them;
- it eliminates the need for review of movement from one level of custody to another, thereby complying with the principle of least possible interference with freedom, reducing delay and effectively utilizing limited resources;

- it resolves all the problems associated with the lack of clarity in the definition;
- it resolves perceived problems associated with judicial determination of level, including determination of security level and adaptability of a youth to facility and programs;
- it allows the result, where applicable, of the post-sentencing intake assessment to be reflected in the placement decision;
- it eases difficulties in facilities and program planning;
- it facilitates appropriate, effective and timely responses to the needs of a given youth;
- one level may reduce the number of custodial dispositions as it more definitively delineates community-based dispositions from incarceral terms;
- for some youth whose behaviour is very disruptive, the availability of more restrictive placements may serve as a positive inducement; and
- "open-custody like" facilities could be continued and, if the offence criteria currently applicable to secure custody are retained and made applicable to custody generally, the custodial population levels could be better controlled.

SUGGESTED DISADVANTAGES:

- placement authority may be used inappropriately by correctional administrators;
- one level of custody may be a disincentive to jurisdictions to provide a range of custodial services;
- there is a concern that placement of a youth may be determined more by issues of resource availability than by necessary level of security and specific needs of a given youth;
- it reduces sentencing options;
- a one-level system may not be able to restrict the use of custody by offence criteria in the same manner as a two-level system; and

- it removes the right of appeal that is available in a statutorily defined sentencing regime.

OPTION 2

Two Levels (Status Quo).

SUGGESTED ADVANTAGES:

- it restricts inappropriate placement by correctional authorities;
- it increases the number of sentencing options available to the court;
- it encourages provision of a broader range of services;
- when coupled with offence criteria, it limits access to the more restrictive secure custody; and
- it conforms to the principles of minimum interference and protection of society.

SUGGESTED DISADVANTAGES:

- from a sentencing perspective, the objectives of the two levels are not clear;
- it inhibits program delivery through sub-dividing the custodial population;
- it does not allow for efficient use of correctional resources;
- it exacerbates the problems inherent in providing facilities for smaller populations (e.g. remote areas, female offenders);
- it may contribute to a widening of the net;
- it prevents proactive intervention for behaviour control, which, if available, could serve to preclude criminal charges; and
- the notion of two levels of custody is unrealistic because it fails to reflect the reality that where there is a continuum of services, there may well be greater differences in terms of deprivation of liberty between some facilities within the same level than between facilities in different levels.

B. IF THE ACT DOES PROVIDE FOR TWO LEVELS OF CUSTODY, HOW SHOULD THE LEVELS BE DEFINED?

Two options suggest themselves:

Option 1: Status Quo

Option 2: Definition by Concept

OPTION 1

Status Quo.

SUGGESTED ADVANTAGES:

- definitions of open and secure custody allow for a great degree of flexibility;
- the definition of secure custody recognizes the reality that security can be achieved by a variety of means and therefore provides provincial administrative flexibility in the establishment of secure facilities; and
- while some of the examples may not be suitable, the use of examples (e.g. group home, wilderness camp) do lend clarity to the intended meaning which is important for the judiciary, administrators and others, such as municipalities.

SUGGESTED DISADVANTAGES:

- the definitions for open and secure custody are not parallel. One problem arising from this is the acceptability of the use of restraint in open custody facilities. A second problem is the vagueness of some of the examples used, such as "child care institution".
- the point of delineation between open and secure custody is unclear with two undesirable results: a particular placement and or the overall operationalization of the definitions in a given jurisdiction may be subjected to challenge; and there is an unwarranted absence of uniformity.

OPTION 2

Definition by Concept.

SUGGESTED ADVANTAGES:

- it allows parallel definitions which should minimize the problems associated with the current absence of delineation between the two definitions; and

- a conceptual approach offers considerable scope for operationalizing custody in a variety of ways.

SUGGESTED DISADVANTAGES:

- regardless of the definitional approach used, there will always be a problem in delineating the distinction; and

C. IF THE ACT DOES PROVIDE FOR TWO LEVELS OF CUSTODY, SHOULD THERE BE OFFENCE CRITERIA FOR COMMITTAL TO OPEN CUSTODY?

Two options suggest themselves:

Option 1: Status Quo

In effect, this would mean that there would be no offence criteria for open custody and eligibility for committal to custody would be governed by the conditions set out in s.24.(1) to the effect that a youth court shall not commit a youth to custody unless the court considers it necessary for the protection of society having regard to the seriousness and circumstances of the offence and to the needs and circumstances of the young person.

Option 2: Offence criteria could be established in a manner similar to or the same as the criteria for secure custody set out in section 24.1(3) and (4).

OPTION 1

Status Quo.

SUGGESTED ADVANTAGE:

- the absence of offence criteria offers considerable latitude to judges to sentence young persons to open custody;

SUGGESTED DISADVANTAGES:

- it does not effectively control admissions to open custody with the possible effect that the net has been widened;
- it permits the use of open custody for traditional child welfare and child protection purposes; and
- it blurs the reality that open custody is custody nevertheless;

OPTION 2

Offence criteria could be established in a manner similar to or the same as the criteria for secure custody set out in section 24.1(3) and (4).

SUGGESTED ADVANTAGES:

- it allows for effective control of admissions to open custody;
- it recognizes the respective roles of the criminal justice system and the child welfare/child protection systems;
- by restricting access to custody for primarily "child welfare/child protection" cases, it would encourage these systems to appropriately respond to the needs of the youth;
- it separates youth whose offences are less serious from those who have been sentenced for more serious offences and/or youth who have lengthy criminal records;
- it encourages a range of community-based sanctions for the majority of cases, including repeat offenders where protection of the public is not at issue;
- by restricting the numbers in custody, resources can be more effectively allocated; and
- depending on the offence criteria chosen, the presence of offence criteria would reinforce the sentencing objective of the disposition being commensurate with the offence; and
- in restricting access to custody, it reflects the fact that open custody is custody nevertheless.

SUGGESTED DISADVANTAGES:

- it removes the flexibility from judges to respond to special circumstances; and
- depending on the offence criteria, it may be too rigid and fail to take into account such factors as prior record.

D. IF TWO LEVELS OF CUSTODY ARE RETAINED, WHO SHOULD DETERMINE THE LEVEL OF CUSTODY AT THE SENTENCING STAGE?

The following options suggest themselves:

Option 1: The youth court (status quo)

Option 2: The provincial director subject to federally legislated criteria and review by the court.

OPTION 1

The youth court (status quo).

SUGGESTED ADVANTAGES:

- it is beneficial to have 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 do not have the same training and experience as provincial directors with respect to decisions concerning custodial placement;
- 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;

- judges determine placement based more on offence considerations than offender considerations with two undesirable results. The open custody environment may not be suitable to the initial needs and circumstances of some youth with the result that such youth may abscond or commit disciplinary infractions and thereby escalate the number of infractions against them. It is also true that some offenders who meet the offence criteria for 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 subject to federally legislated criteria and review by the court.

SUGGESTED ADVANTAGES:

- it allows for a better matching of a given offender to a specific program;

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

- it takes into account the findings of an in-depth intake assessment which is performed after the sentencing by the judge.

SUGGESTED DISADVANTAGES:

- it is less accountable to the public;

- there is less certainty about the young offender's capacity to participate in the placement decision;

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

- it is arguable that the interests of a young offender may take precedence over the interests of the public.

E. IF TWO LEVELS OF CUSTODY ARE RETAINED AND THE PROVINCIAL DIRECTOR DETERMINES THE LEVEL, WHAT SHOULD THE METHOD OF RECOURSE BE FOR THE ACCUSED OR CROWN DISSATISFIED WITH THE DECISION?

Three options suggest themselves:

Option 1: Recourse to the youth court

Option 2: Recourse to an administrative tribunal established pursuant to the Young Offenders Act

Option 3: 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 in either of the two levels. 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 superior court for habeas corpus and/or certiorari.

OPTION 1

Recourse to the youth court.

SUGGESTED ADVANTAGES:

- it provides an opportunity for the young person to have court-appointed counsel;
- it 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; and
- for contested placement, it is desirable that the decision-making body be seen to be independent and unfettered by administrative concerns.

SUGGESTED DISADVANTAGES:

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

OPTION 2

Recourse to an administrative tribunal established pursuant to the Young Offenders Act.

SUGGESTED ADVANTAGES:

- 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;
- depending on the structure adopted, it would likely be less costly than resort to a court;
- it is arguable that an administrative tribunal would be in the best position to weigh the merits of the young person's and the provincial director's positions; and
- while a judge determines the appropriateness of custody on a case by case basis and is unfettered by administrative concerns, practical considerations nevertheless have to be addressed. In this regard, an

administrative tribunal would be well suited to take into account the initial disposition and the respective views of the young person and the provincial director with respect to placement.

SUGGESTED DISADVANTAGES:

- administrative considerations may be given undue influence (e.g. where there is overcrowding in secure custody facilities a youth might be moved to open custody or released on temporary absence based on these considerations);
- there is a perception, and in some cases it is a reality, that administrators will not act as independently as judges are free to do;
- depending on the structure established, it may result in a duplicative process; and
- the process is not subject to public scrutiny and visibility.

OPTION 3

Recourse to provincial administrative mechanisms and the common law.

SUGGESTED ADVANTAGES:

- permits utilization of recourse structures which exist in some jurisdictions;
- reduces duplication of remedy avenues; and
- reduces court time.

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

F. IF THE DISTINCTION IN LAW REMAINS BETWEEN SECURE AND OPEN CUSTODY, HOW SHOULD TRANSFERS FROM SECURE CUSTODY TO OPEN CUSTODY BE AUTHORIZED?

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 with the addition of a provision that would enable the provincial director to authorize a time-limited (30 day) conditional transfer from secure to open custody.

Option 3: The Provincial Director.

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).

SUGGESTED ADVANTAGES:

- it conforms with the existing philosophy that only the court, after having had the opportunity to hear representations in an adversarial proceeding, should have the capacity to mitigate the original secure custody disposition;
- 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 decisions being unduly influenced by administrative concerns in some cases; and
- the court is in the best position to determine what the original intent of the disposition was and to ensure that intent is not compromised.

SUGGESTED DISADVANTAGES:

- the delays inherent in the court decision-making process essentially makes the opportunity for mitigation of the secure custody disposition unavailable in many cases of short sentences;
- delays also mean that the "window of opportunity" for transfer of some youths, where timeliness is a critical factor, would continue to be lost in some cases;

- correctional authorities would continue to be reluctant to make application - and courts would continue to be reluctant to approve transfers - in "marginal" cases (assuming an 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 with the addition of a provision that would enable the provincial director to authorize 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 cases;

- the conditional nature of the administrative transfers would facilitate a trial period in open custody, but 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;

- the 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, it is argued, 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. With short sentences then, the provincial director's decision would, in practice, 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 cases, and the capacity to transfer youth to open custody resources for trial periods;

- the 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 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 would be reluctant to abuse the discretion accorded them.

SUGGESTED DISADVANTAGES:

- the provincial director may, it is argued, be unduly influenced by administrative considerations in authorizing such transfers, this 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.

G. IF THE DISTINCTION IN LAW REMAINS BETWEEN SECURE AND OPEN CUSTODY, 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:

- considerable certainty in terms of custody level at time of sentencing; 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 courts disapprove of "back-to-back" 15 day transfers; 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 results in a concentration of disruptive youths in one facility.

OPTION 2

Transfer by youth court.

SUGGESTED ADVANTAGES:

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

SUGGESTED DISADVANTAGES:

- possibility of increased court appearances; and
- concern over behaviour after initial disposition influencing placement.

OPTION 3

Expand Existing s.24.2(9) Criteria and Duration.

SUGGESTED ADVANTAGES:

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

SUGGESTED DISADVANTAGE:

- 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.

H. WHAT IS THE NATURE OF EARLY RELEASE GRANTED BY THE YOUTH COURT?

The following options suggests themselves:

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

Option 2: Conditional Release from Custody for Balance of Disposition

This option would provide for release from custody in a form of conditional release where the young person is obligated 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.

NOTE: It is suggested that the authority to provide for the absolute termination of a disposition upon release from custody could be built into either Option 1 or Option 2. It 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.

OPTION 1

Release from Custody on Probation for Balance of Disposition (Status Quo).

SUGGESTED ADVANTAGES:

- permits some reintegration assistance; and
- respects the original duration of disposition ordered by the court even if the nature of the disposition is altered.

SUGGESTED DISADVANTAGES:

- community supervision ineffective given practical impediments to enforcing breaches of probation (e.g. necessity of proof of wilful failure; long delay until trial);
- "one-way" release lacks credibility with youth courts and, therefore, courts are reluctant to release 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

Conditional Release from Custody for Balance of Disposition.

SUGGESTED ADVANTAGES:

- release mechanism more credible with courts and, therefore, higher early release rates likely;
- effective enforcement sanctions resulting in improved behaviour of released youth; and
- short-term custodial crisis care possible where release plans deteriorate.

SUGGESTED DISADVANTAGE:

- it is possible that increased community supervision costs may partially offset decreased custodial costs expected to result from higher release rates.

I. WHAT SHOULD THE PROCEDURES BE FOR AUTHORIZATION OF EARLY RELEASE FROM CUSTODY?

The following options suggest themselves:

Option 1: Status Quo, i.e. the present process and procedures provided for in sections 28 and 29.

Option 2: Expedite the processes and procedures in sections 28 and 29 by:

- requiring the court to decide the application "forthwith" on the expiration of the ten day period provided for in s.29(2); and
- establishing that, where no application for review is made by the young person, parents, or the Attorney General, it be made clear that the youth is to be released by written authority of a judge without a hearing. The young person is deemed to be released without need for a court appearance.

Option 3: 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

Status Quo, i.e. the present process and procedures provided for in sections 28 and 29.

SUGGESTED ADVANTAGE:

- the court retains full control over a release application as the young person may be required to appear before the youth court and the court retains the capacity to "make no direction".

SUGGESTED DISADVANTAGES:

- the early release process will continue to be a protracted process, militating against timely releases, timely access to alternative resources, and, in particular, obviating the prospect of early release in cases of short sentences. These constraints, it is argued, militate against 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; and

- costly court resources will continue to have to be used in cases where there is consent to the early release by all parties, in short, where no review is requested by the young person, parent or Crown and the court approves the early release;

OPTION 2

Expedite the processes and procedures in sections 28 and 29 by:

- **requiring the court to decide the application "forthwith" on the expiration of the ten day period provided for in s.29(2); and**

- **establishing that, where no application for review is made by the young person, parents, or the Attorney General, it be made clear that the youth is to be released by written authority of a judge without a hearing. The young person is deemed to be released without need for a court appearance.**

SUGGESTED ADVANTAGES:

- the court would retain exclusive control over mitigation of the original disposition by retaining the capacity to "make no direction";

- 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);

- 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; 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 3

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.

SUGGESTED ADVANTAGES:

- the early release process would be less protracted than both Option 1 and Option 2, thereby facilitating more timely releases, more timely access to alternative resources, and increasing the likelihood of youth 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;

- by eliminating the need for judicial involvement where all parties consent to the early release, savings in court time and costs;

- there will likely be 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 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;

- 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

provided the opportunity to hear representations and fully weight the merits of the application; and

- the loss of judicial involvement where there is application removes the court as the final decision-making body.

J. WHAT SHOULD THE DURATION OF TEMPORARY ABSENCE BE?

The following options suggest themselves:

Option 1: Status quo (fifteen days)

Option 2: Thirty days

NOTE: Given that the issue of temporary absences for the purposes of treatment is dealt with in Chapter 4 of this Consultation Document, the issue addressed below concerns the appropriate duration of temporary absences for the other purposes stated in s. 35(1)(a).

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, the 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 fifteen day period is seen as too restrictive to meet some of the stated purposes of the section including absences for rehabilitative purposes where the duration of a program quite frequently exceeds fifteen 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 fifteen 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 fifteen day limit is too restrictive. For example, it could be very 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

Thirty days.

SUGGESTED ADVANTAGES:

- a thirty day period was chosen to accommodate a variety of programs which seem to run for approximately a month and to reflect the intent of the section;

- it 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 thirty 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; and

- 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.

SUGGESTED DISADVANTAGES

- it represents, to some degree, an erosion of the principle of judicial control of the sentencing authority of the court;

- administrative considerations may, in some cases, have an undue weight, thereby leading to questionable decisions;

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

thereby undermining the intent of the court disposition; and

- clarity would be required to ensure that there could not be back-to-back temporary absences in the interest of ensuring a proper balance between the sentencing function and the role of administrators.

CHAPTER 3: ADMISSIBILITY OF STATEMENTS MADE BY YOUNG PERSONS TO PERSONS IN AUTHORITY

I. ISSUE

Whether the provisions in section 56 regarding admissibility of statements made by young persons to persons in authority should be retained, amended, or repealed in their entirety?

II. BACKGROUND

A. Environment Giving Rise to the Issue

Section 56 creates specific rules which govern the admissibility of statements obtained from a young person by persons in authority. These rules were designed as safeguards and considered consistent with the special guarantee of rights and freedoms and with the young person's right to be informed as to what his rights and freedoms are as per paragraphs 3(1)(e) and 3(1)(g) in the Act's Declaration of Principle. As absolute compliance with the rules is required, a breach results in the automatic exclusion of the statement. The operational effect of s.56 has proven problematic for many jurisdictions which now seek to repeal and/or amend s.56.

B. Extent of Support for Change

The majority of jurisdictions have acknowledged problems with s.56 to varying degrees. Although there is no unanimity as to how to address the problems, there is considerable support for the view that change is required. In this regard, it should be noted that Attorneys General for all of the provinces have unanimously resolved that "Section 56 of the Act should permit the admission into evidence of a voluntary statement given to a person in authority by a young person notwithstanding a breach of the section where the interests of justice require it."

C. The Law Governing the Admissibility of Statements Prior to the Enactment of s.56

Common Law

At common law, a set of generally accepted "guidelines" were developed which were to be considered by the Court in the exercise of its discretion as to whether to admit a statement made by a young person to a person in

authority. Although no definitive set of guidelines was adopted, the guidelines were generally accepted to be:

- that an adult relative accompany the young person to the place of questioning;
- that the young person be given the option as to whether or not he/she wanted the relative to stay in the room during questioning;
- that the questioning be conducted as soon as practicable upon arrival at the place of questioning;
- that the young person be cautioned in a manner which would be understandable, including an explanation of the consequences that may flow from making the statement;
- that where a young person is charged, the offence for which he/she is charged be explained;
- that where the young person is over the age of 14 years, it be explained to the young person that he/she may be tried as an adult.

These guidelines did not operate as conditions precedent to the admissibility of the statement, but were factors which the Court was to consider in light of all of the circumstances, including the age and intelligence of the young person and the circumstances and nature of the offence.

The common law guidelines operated in addition to the traditional requirements the Court had to consider in determining whether the statement was free and voluntary.

Charter

The proclamation of the Charter of Rights and Freedoms in 1982 added further protections for the young person which included the right on arrest or detention to be informed of the reasons therefore and to retain and instruct counsel without delay and to be informed of that right. Jurisprudence has developed concerning the obligation to ensure that the person understands the rights and the consequences of electing to waive his/her right to counsel. A violation of these constitutional protections provides the court with a discretion to

exclude the statement where, in all the circumstances, admission of the statement into evidence would bring the administration of justice into disrepute.

D. Changes Occasioned by S.56

Subject to S.56, the continued application of the common law to the admissibility of statements made by young persons is affirmed. While S.56(2) essentially codifies the common law guidelines, the fundamental difference is that it elevates them to the status of rules of law. Compliance with all rules is therefore a condition precedent to the admissibility of the statement. Consequently, the conditions in S.56(2)(b) must be met even though the Court is satisfied that the statement was voluntary.

In summary, section 56 goes beyond the common law guidelines and the Charter by providing:

- that compliance with the conditions is absolute;
- that a reasonable opportunity to consult a non-counsel adult before the statement is made be provided;
- that a spontaneous statement be proven voluntary as a condition of admissibility;
- that a waiver of the right to consult counsel or an appropriate adult and of the right to make the statement in the presence of this person be in writing; and
- that a Court has the discretion to exclude a statement made to a person who is not in law a person in authority where the court is satisfied that the statement was made under duress.

E. Legislative History behind S.56

What follows is a very brief account of the history leading up to the enactment of the present section 56 provisions. Dating back to the first major study of the Juvenile Delinquents Act, entitled "Juvenile Delinquency in Canada", the following questions were raised:

What is meant by a "voluntary statement" by a young person to the police? Does not the very authority of a

police officer bring a strong element of coercion to any situation in which the person questioned is a child?...Should the law require more than a mere indication that the statement was made voluntarily and require also proof that the statement was made with full knowledge and understanding of the consequences of making it?...explicit in the Judges' Rules (is an assumption) that the person questioned is at least capable of making a mature judgment as to where his best interests lie?

The authors of this study recommended that if a child is to be questioned by the police and particularly if he is to be asked to make a statement, an adult should be present. The authors were of the view, however, that the matter of admissibility of any statement taken in the absence of adult advice should be left to the discretion of the judge. They recommended that the law specifically provide that any statement by a young person, not made in the presence of an adult, be inadmissible in ordinary court. (Pages 112-113).

In the document entitled "Young Persons In Conflict with the Law" (1975), there is little specific information on evidentiary procedures. Generally speaking, the Committee proposed special provisions to ensure that young persons would enjoy the same rights held by adults and, in some circumstances, additional safeguards.

The present section 56 remains virtually unchanged from the proposals contained in Bill C-61. Its intent is to go beyond the general law relating to the admissibility of statements made by accused by establishing certain minimum safeguards which must be met before a youth's statement to a person who is in law, a person in authority, is admissible.

Of the over forty briefs submitted to the Standing Committee on Justice and Legal Affairs, the following organizations commented on section 56: The Canadian Association of Chiefs of Police; Professors Doob, Dozois and Trépanier of the Centres of Criminology at the University of Toronto and the University of Montreal; Justice for Children; British Columbia Civil Liberties Association; and Service de Police de la Communauté Urbaine de Montréal. Both law enforcement bodies opposed the rendering inadmissible of statements taken contrary to subsection 56(2). The remaining organizations endorsed subsection 56(2). They also expressed strong concerns with respect to the ability of a young person

to waive rights without legal advice owing to the grave consequences of such a waiver and the opening a waiver provides for the exercise of police pressure to persuade a young person to waive his/her right.

III. STATEMENT OF PROBLEMS, OPTIONS AND ANALYSIS

The problems identified in respect of s. 56, along with proposed options and analysis thereof, have been grouped below under three main headings:

A. Subsection 56(2);

B. Subsection 56(4); and

C. Miscellaneous.

A. SUBSECTION 56(2)

Summary of problems regarding subs. 56(2):

- The requirement for absolute compliance with the provisions in subs. 56(2) does not allow for the exercise of judicial discretion, leading to the following problems:

  i) the provisions do not reflect the varying levels of maturity (for example, familiarity with Court process) and development of young persons before the Court (police must ensure that the warning is the correct one given the age of the accused);

  ii) the provisions allow for technical defences which result in the exclusion of statement evidence which was voluntarily given and which would satisfy the requirements of the common law and the Charter [R. v. J. (1988), 40 C.C.C. (3d) 97]. By way of further example, a youth may lie about his age, professing to be an adult and producing identification to that effect, with the result that police do not comply with the provisions in S.56;

  iii) the absolute compliance requirement exacerbates the difficulties experienced with obtaining the presence of a parent or other adult;

iv) persons who may be found to be persons in authority (e.g. teachers) may be unaware of the S. 56 requirements with the result that a statement would be inadmissible notwithstanding that voluntariness was established;

v) judges are ruling inadmissible second statements which meet the requirements of S.56 as they are considered tainted by non-compliance with the S.56 requirements in respect of the first statement; and

vi) codification of the requirement to ensure that the language used is appropriate to the youth's age and understanding has complicated the trial process.

- The subsection lacks clarity with respect to the point at which the requirements of subs. 56(2) must be met. It has been interpreted to apply to statements given by a young person as a victim, witness, suspect or accused. This interpretation becomes problematic where the complainant, suspect or witness has given a statement but not in accordance with the provisions of S. 56 and then is later charged with an offence where the actus reus of the offence is the statement by the youth.

Three options suggest themselves:

Option 1: Repeal of subsection 56(2);

Option 2: Amend subsection 56(2); and

Option 3: Status Quo.

OPTION 1

Repeal of subsection 56(2).

The effect of this option would be to rely on the rules at common law with respect to voluntariness, the guidelines established in the common law under the previous legislation with respect to statements by youths, the evidentiary provisions in the Charter, and the jurisprudence which would evolve under an amended Young Offenders Act. The provision in the Young Offenders Act which allows for the substitution

of another appropriate adult for the parent or relative would be lost.

SUGGESTED ADVANTAGES:

- it is arguable that the absoluteness of the provisions in S.56 cannot be justified by the principles of the Young Offenders Act which call for a balancing of the rights and needs of a young person with the accountability that a youth must accept for his/her illegal acts and of the protections that society must be afforded;

- this option would appropriately allow the present rules on voluntariness along with the protections afforded by the jurisprudence with respect to statements made by young persons and by the Charter to govern;

- this option would permit the varying levels of maturity and development of youth to be taken into account;

- this option would permit a judge to exercise his/her discretion to ensure that the administration of justice is not brought into disrepute and to ensure that concerns for the victim and the community may be respectfully considered while still applying established guidelines to ensure the voluntariness of the statement;

- it would permit admissibility of evidence where technical deficiencies in the gathering of evidence would otherwise result in its exclusion, in spite of voluntariness having been established;

- it would bring youth law more into line with the law governing admissibility of statements by adults; and

- it would recognize the traditional role of judicial discretion.

SUGGESTED DISADVANTAGES:

- reliance on the common law does not provide the same clarity and certainty as does codification;

- reliance on the common law deprives law enforcement officers of a clear statement of intent and practice which must be met;

- the absence of codification may prejudice the cases of older youth, particularly those whose chronological age suggests a maturity and understanding that does not in fact exist; and
- reliance on the common law as it pertains to guidelines to be applied by judges in determining whether to admit a statement made by a youth may contribute to considerable disparity in the application of the law to young persons.

OPTION 2

Amend subsection 56(2)

This option envisages that S.56(2) be amended to:

- provide for judicial discretion to admit evidence once voluntariness has been established on standards comparable to those contained in the Charter; and

- clarify to whom the provisions apply. (i.e. is it applicable to "accused young persons, young persons on arrest or detention, etc.).

Its effect would be to build in discretion to permit a youth court judge, having established the voluntariness of a statement, to determine whether to admit the statement taking into account all the circumstances of the case, the guidelines established in the Young Offenders Act with respect to statements by young persons, and the Charter. Further, the proposed amendment would seek to rectify the problems presently experienced with respect to the point in time at which the law governing admissibility applies.

SUGGESTED ADVANTAGES:

- it provides a clearly accessible statement of the law;

- it provides a clear statement of intent regarding acceptable methods of obtaining evidence from an accused as opposed to leaving it to the common law which is continually evolving;

- it acknowledges the differences in rates of maturity and level of development of young persons, allowing these distinctions to be taken into account in determining whether a statement in all the circumstances, should be admissible, having established voluntariness;

- it would permit admissibility of evidence where technical deficiencies in the gathering of evidence would otherwise result in its exclusion, in spite of voluntariness having been established;

- it would not be perceived as a diminution of rights as it would offer a balance between the principles of rights and safeguards on the one hand with responsibility for one's actions and protection of the public on the other;

- it would prevent the exclusion of evidence, the result of which may be to bring the administration of justice into disrepute;

- it would bring youth law more into line with the law governing admissibility of statements by adults and would be consistent with a number of other countries; and

- it would recognize the traditional role of judicial discretion.

SUGGESTED DISADVANTAGES:

- the addition of discretion by way of amendment will produce much the same result as would the repeal of s. 56 - i.e. reversion to the common law and the Charter - and accordingly, it is arguable that the benefits of including discretionary guidelines in the Act are few. The guidelines are better left to the common law and the Charter;

- notwithstanding the fact that this option would permit the exercise of judicial discretion, it is feared that, by virtue of the guidelines being codified, they will take on the character of conditions precedent more than guidelines;

- the inclusion of discretion contributes to disparity in the application of the law. This disparity is exacerbated by the fact that the decisions are reached, most often at the provincial court level and, are therefore, not binding; in reality, few cases of young persons are taken to appeal; and, if taken to appeal, an appellate court would be loath to interfere with the exercise of discretion by the trial judge. By comparison, entrenched standards which must be adhered

to contribute significantly to a more uniform application of the law; and

- the exercise of discretion would be premised on identified grounds. It has been suggested that these grounds could parallel those contained in the Charter. Alternatively, wording such as that recommended by the Law Reform Commission (Questioning Suspects - Working Paper 32, p. 61) may be of assistance. Its recommendation provides that a statement taken in contravention of its proposed rules would not be admissible "unless it is established that the contravention is merely a defect of form or a trifling irregularity of procedure." Further work is required on this point. The concern in any event is that the certainty of the requirements, both for the purposes of law enforcement and for prosecution, would be lessened.

OPTION 3

Status Quo.

As stated elsewhere, the present provisions set requirements which must be adhered to for a statement made by a young person to be admissible in evidence.

SUGGESTED ADVANTAGES:

- it provides a consolidated, readily accessible statement of the procedures which must be adhered to before statements made by young persons to persons in authority will be admissible as evidence;

- it, in large part, codifies the desired standards developed prior to the enactment of the Young Offenders Act. The requirement for absolute compliance, however, extends protections enjoyed by some youth under the Juveniles Delinquents Act uniformly to all young persons;

- it is consistent with the principle which recognizes that young persons should have special guarantees of their rights, including those stated in the Charter; and

- this option reflects the long held recognition that confessions of children and adolescents should not be treated in the same manner as adult confessions owing to the susceptibility of youth to influence by persons in

authority, and their vulnerability which could well result in police warnings not being fully understood and appreciated.

SUGGESTED DISADVANTAGES:

- it is believed that the principles of protection of the public and of responsibility for one's actions are not respected by the requirements for absolute compliance where voluntariness has been met;
- the requirements for absolute compliance are viewed as unnecessary for some young persons whose maturity and experience do not require the same safeguards as are considered desirable for more vulnerable youth; and
- this option does not address the problems identified in respect of subsection 56(2) and 56(4).

B. SUBSECTION 56(4) - WAIVERS

Subsection 56(4) presently provides for written waivers only of the right to consult and the right to make any statement in the presence of the person consulted.

SUMMARY OF PROBLEMS REGARDING 56(4)

Problems with subsection 56(4) include the following:

- there is uncertainty as to the acceptable form of a written waiver with the result that the following problems have been experienced:
  - caselaw varies as to whether the waiver must follow the exact wording of the statute or be in common language appropriate to the age and understanding of the youth; and
  - as the wording in the Young Offenders Act states a waiver "in writing," the question has arisen as to whether a printed form is acceptable as compared to a handwritten waiver;
- the requirement for a written waiver results in the following problems:
  - inadmissibility of statement evidence notwithstanding that the statement was given

voluntarily and that the young person had provided an oral waiver;

- non-acceptance of a video-taped waiver notwithstanding the growing acceptance of this means of electronically recording statements; and

- the imposition of practical problems for persons (for example, parents, teachers, telephone companies, insurance fraud investigators, store security personnel) who may be found to be persons in authority and who have met all the requirements in subsection 56(2) except they don't have in their possession a waiver form that would be acceptable in court.

Three options suggest themselves:

Option 1: repeal

Option 2: amendment

Option 3: status quo - retention of subsection 56(4).

OPTION 1

Repeal.

The effect of Option 1 would be that the common law would apply.

SUGGESTED ADVANTAGE:

- it is believed that the problems with respect to the form of a waiver and the requirements for a written waiver would be resolved.

SUGGESTED DISADVANTAGES:

- the protections attached to a written waiver would be lost;

- given the high standard to be met before an oral waiver by a young person would be acceptable, the benefits to law enforcement are questionable.

OPTION 2

Amendment.

The effect of an amendment would be to specify a more clearly acceptable form for a waiver and to allow for an oral waiver.

SUGGESTED ADVANTAGES:

- acceptance of an oral waiver will allow for the admission of statement evidence where young persons apparently wish to waive rights but refuse to sign anything;
- it is arguable that protection of the youth's interest will still be met by other requirements that the statement be voluntary and that the young person be cautioned pursuant to subsection 56(2)(b);
- an oral waiver would recognize the reality of illiteracy and some learning disabilities. In such cases, it is suggested that a written waiver provides no extra guarantee that the youth understands the seriousness of a waiver; and
- the inclusion of a standard to determine the acceptance of a written form would help to reduce the uncertainty with respect to the acceptable form of a written waiver.

SUGGESTED DISADVANTAGES:

- the requirement of a written waiver is viewed as a protection because the act of signing a document is considered a means of impressing upon the youth the implications of a waiver;
- owing to the high standard which must be met before admitting an oral waiver, it is questioned whether such a provision would further the interests of law enforcement; and
- there is little chance that specification of a standard to be applied to a written waiver form will be successful.

OPTION 3

Status Quo - retention of subsection 56(4)

SUGGESTED ADVANTAGES:

- given that the young person is waiving the right to consult with counsel/other adult and to make any statement in the presence of the person consulted, any measure to impress upon the young person the significance of the right he is waiving is desirable. In this regard, the commitment of a signature gives to the waiver a seriousness which the youth does not likely attach to the spoken word; and

- owing to the difficulty of proving an oral waiver for adults, the current practice of written waivers should be continued.

SUGGESTED DISADVANTAGES:

- failure to provide for an oral waiver is viewed as unduly restrictive and out-of-line with adult prosecutions; and

- the problems with respect to the drafting of an acceptable form would remain.

C. MISCELLANEOUS PROBLEMS

The following problems with section 56 which fall outside of subsections 56(2) and 56(4) are noted below.

Subsection 56(3)

Owing to the technical defences fostered by sections 56(2) and (4), there seems to be a tendency for some Crown Counsel to argue that any statement made by a youth is a "spontaneous statement". This frustrates the intent of the sections and causes confusion.

Other

Applicability Upon Transfer

It is submitted by one jurisdiction that if section 56 is retained, the Act should specify that S. 56 not be applicable upon a transfer.

Where Statement Made by an Adult

In the situation where the accused is eighteen years or over but the offence was allegedly committed by this person before he attained 18 years, it has been recommended that S.56 not be applicable.

CHAPTER 4: ASSESSMENTS AND DISPOSITIONS FOR YOUTH WITH SPECIAL NEEDS

TABLE OF CONTENTS

I. INTRODUCTION

A broad range of issues concerning the assessment and dispositional responses available for youth with special needs has been examined by a Federal-Provincial-Territorial Working Group over the past several years. Many of these issues were resolved to the satisfaction of jurisdictions by non-legislative means such as changes in practice. The most difficult issue concerns the role of and access to treatment in the juvenile justice system. This issue is the focus of this chapter. Additional issues which are explored concern the standards for placement where an in-patient assessment is required and the appropriateness of the terms used in section 13(1) to justify an assessment.

The issues associated with treatment orders and consent thereto have been raised primarily by mental health practitioners, many of whom are of the view that over-emphasis on the youth's rights is resulting in severely disturbed youth not receiving the treatment they require. While cognizant of youths' rights, these professionals are of the view that the youths' rights will be adequately protected through the requirements for a section 13 assessment prepared by a medical doctor or psychologist, a dispositional hearing with the presence of defense counsel, and the requirement for consent of parents and the treatment facility. Some members of the judiciary also support this view. Additionally, correctional personnel are concerned with the absence of a definition of treatment which has led to some youths declining to involve themselves in programs which correctional staff do not feel fall within the umbrella of "treatment", but rather qualify as routine correctional programming.

It should be noted that the issue of consent to treatment, as it relates to minors, is not confined to the Young Offenders Act. Almost a decade ago it was studied by the Uniform Law Conference which proposed legislation which certain jurisdictions have adopted with respect to the provision of health care services generally to minors. It should also be noted that the issue is controversial outside Canada as well.

II. SUMMARY OF CONCERNS

With respect to assessments, the following issues have arisen:

- whether the conditions for which an assessment may be ordered are appropriate; and
- whether youths who are remanded for in-patient assessments should be detained in a facility separate and apart from adult inmates.

At the dispositional stage, the most appropriate means to respond to the special needs of a young offender is at issue. Specifically, the following concerns have been noted:

- philosophically, the primary issue is whether sections 20(1)(i) and 22 of the Young Offenders Act concerning treatment orders properly allow for a balancing of the principles of the Act, most notably those which speak to the special needs of young persons and their rights, and to the right of society to be protected;

- whether young persons convicted of criminal offences should have the right, as they presently do, to consent to treatment before a youth court may make such an order;

- to what form of treatment intervention should the requirement for consent apply? Central to this problem is the absence of a definition of treatment in the Act. Another component of the problem is whether the nature of the treatment should be the governing factor as compared to whether the treatment is provided on an in-patient versus an out-patient basis. At present, the consent requirement in the Young Offenders Act only applies to in-patient treatment at a hospital or other such facility;

- what test should be applied to determine the capacity of youth to consent? At present, it is presumed that all youths possess the capacity to consent. It must be questioned whether the requirement for consent results in some youth being precluded from treatment because they lack capacity and/or they fall outside of provincial mental health/child welfare legislation;

- where a youth is found to lack capacity to consent to treatment, should the Young Offenders Act contain provisions to authorize treatment? If so, what treatment and under what circumstances;

- where a youth possesses the capacity to consent, should the Young Offenders Act specify the process to be followed for obtaining informed consent? At present, the Act is silent on this issue;

- where a treatment order is made and consent is subsequently withdrawn by the young person, parent, or facility, what should the nature of the review be? At present, there is no provision for review

where a treatment order is made and consent is subsequently withdrawn by any of the parties.

It is arguable that, beyond the above-noted concerns, there are more fundamental issues which need to be resolved. In the area of assessments and interventions, one must ask whether there are appropriate resources for, and resort to assessments to determine the needs of a given youth; whether there is adequate programming to respond to the needs of a young offender which are pertinent to his/her offending behaviour; and what research and evaluation should be undertaken to determine the effectiveness of treatment-oriented interventions.

The respective roles of the child welfare and juvenile justice systems must also be subject to closer scrutiny. In this regard, the exclusion of child welfare services from the Young Offenders Act should not preclude a youth in need of such services from being directed to them. The involvement of the juvenile justice system does not foreclose the involvement of other systems such as health, child welfare, or education that are mandated to meet the needs of youth - rather it requires in certain cases, their coordination in a manner which recognizes the respective roles of each.

III. HISTORY OF TREATMENT PROVISIONS

There is no comprehensive and authoritative source to determine treatment practices available under the former Juvenile Delinquents Act. A number of dispositions were used in various jurisdictions to respond to the special needs of young persons. Several of these sentencing options reveal more than anything else the blending of child welfare and juvenile justice that was at the core of the Juvenile Delinquents Act. No conclusions with respect to the availability of treatment, its appropriateness or its effectiveness are being made here.

According to caselaw under the Juvenile Delinquents Act, the above-noted dispositions permitted the following interventions:

- committal of a child to the care or custody of a person outside the province;
- committal of a child to a provincial Minister of Social Services; and
- under the terms of a probation order, that the juvenile attend a wilderness camp.

IV. OPTIONS AND ANALYSIS

A. WHETHER THE CONDITIONS FOR WHICH A COURT MAY ORDER AN ASSESSMENT, THAT ARE STATED IN SECTION 13(1), ARE APPROPRIATE?

As it currently stands, section 13 permits an assessment to be ordered where the court "has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation..."

Some are of the view that the term "learning disability" is not necessary in that it is encompassed by other more general terms determined by the nature of the learning disability. Others have suggested that behaviour disorder be specifically referenced.

Three options suggest themselves:

Option 1: Status Quo

Option 2: That the conditions for which an assessment may be ordered be restricted to "mental, physical or psychological illness or disorder".

Option 3: That the conditions be restricted as per option 2 and that these conditions be defined in the Act.

OPTION 1

Status Quo

SUGGESTED ADVANTAGES:

- it provides a broad list of conditions which, it is arguable, offers the court the necessary latitude to order an assessment where the circumstances of a given case so warrant; and
- the inclusion of such terms as learning disability serve an educational function and may provide an appropriate incentive to the court to order an assessment where one might not otherwise be ordered.

SUGGESTED DISADVANTAGES:

- several jurisdictions are of the view that the term "learning disability" is not necessary in that it is

encompassed by other more general terms;

- it has been submitted that, given the broad list of conditions, it would be appropriate to include "behaviour disorder" or some similar term; and

- the present listing of conditions places the judge in a position of determining with certainty the appropriate examination to be ordered.

OPTION 2

That the conditions for which an assessment may be ordered be restricted to "mental, physical or psychological illness or disorder".

SUGGESTED ADVANTAGES:

- it provides the court with sufficient flexibility and avoids duplication; and

- it respects the fact that a more detailed list would always pose the risk of being interpreted to exclude certain conditions.

SUGGESTED DISADVANTAGE:

- it may exclude or be interpreted to exclude conditions or circumstances, such as a behaviour disorder, which would suggest that an assessment should be ordered in order that the most appropriate disposition be chosen.

OPTION 3

That the conditions be restricted as per Option 2 and that these conditions be defined in the Act.

SUGGESTED ADVANTAGES:

- it has the advantages of Option 2; and

- definitions would serve an educational function by helping to translate these terms into generally understandable language and thereby help to ensure that assessments are ordered where appropriate to do so.

SUGGESTED DISADVANTAGES:

- practically speaking, it may be quite difficult to arrive at definitions of the terms that would meet with consensus amongst the health sciences; and

- definitions may inappropriately lessen the flexibility of the court.

B. WHETHER A YOUTH WHO IS REMANDED FOR THE PURPOSES OF AN IN-PATIENT ASSESSMENT SHOULD BE DETAINED SEPARATE AND APART FROM ADULT ACCUSED?

At present, a youth court may order, pursuant to subsection 13(3), that the young person be remanded "to such custody as it directs..." The initial intent of this provision was to provide flexibility by enabling access to facilities generally available in the community.

Two options suggest themselves:

Option 1: Status quo

Option 2: that the principle of separate and apart be incorporated into the remand for assessment provisions with exceptions similar to those contained in subsection 7(2) to permit sufficient flexibility where in-patient assessment separate from accused/convicted adults is not reasonably available; or where, the Young Offenders Act cannot, having regard to his/her safety or the safety of others, be detained in an assessment facility for youth.

OPTION 1

Status Quo.

SUGGESTED ADVANTAGES:

- it provides the most flexibility by allowing access to assessment facilities generally available in the community;
- it recognizes the resource ramifications of having to provide separate in-patient assessment services; and
- it reflects the benefits for a youth of being remanded in an assessment facility that is as close as possible to the youth's community.

SUGGESTED DISADVANTAGES:

- it allows for the detention of young persons for assessment purposes in facilities which house adult inmates which seems to be an unjustifiable departure from the standard for detention and custody which is "separate

and apart from adult inmates;" and

- given that an in-patient assessment can be for a period of up to 30 days, the possibility of detention with adult inmates is undesirable.

OPTION 2

That the principle of "separate and apart" be made applicable with the same exceptions as are applicable to pre-trial detention.

SUGGESTED ADVANTAGES:

- it recognizes the benefits of detention separate and apart from adult inmates wherever possible and sets this as the standard for in-patient assessments;
- it respects resource limitations;
- it respects the reality that in some cases the generally available assessment facility may not be appropriate in terms of the young person's safety and/or the safety of the other residents.

SUGGESTED DISADVANTAGE:

- the requirement to house young offenders separate and apart could be problematic for a jurisdiction.

C. WHAT IS THE MOST APPROPRIATE MEANS TO RESPOND TO THE SPECIAL NEEDS OF A YOUNG OFFENDER AT THE DISPOSITIONAL PHASE IN A MANNER WHICH IS PERTINENT TO THE OFFENDING BEHAVIOUR AND COMMENSURATE WITH THE OFFENCE?

In summary, section 20 authorizes a youth court to direct that a youth be detained for treatment subject to such conditions as the court considers appropriate, in a hospital or other place where treatment is available, where:

- a section 13 report recommends that the youth undergo treatment for a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation;
- the young person, parents, and hospital or place of treatment consent. (Note: the court may dispense with the parents' consent where parents are unavailable or are not taking an active interest in the proceedings).

Three options have been advanced to respond at the dispositional phase to the numerous issues involved where a young offender has special needs which appear pertinent to the offending behaviour. These three options were all developed to respond to the concerns associated with the current treatment order provisions contained in sections 20(1)(i) and 22.

The options are as follows:

Option 1: It would allow for treatment via a probation order and via a custodial order where authorized by the court and consented to by the Provincial Director and the facility.

Option 2: It would allow for treatment via a probation order and via custody, using an expanded version of the temporary absence mechanism in section 35 to permit absences beyond fifteen days.

Option 3: It would blend Options 1 and 2 and thereby allow for treatment in the following ways: first,via a probation order (Options 1 and 2 permit this); second, via a custodial order with an authorization for treatment by the court (Option 1); and third, via a custodial order where correctional authorities have discretion to release beyond the current fifteen day limit for circumstances which develop after the court has made its order (option 2).

Before providing an analysis of each option, it should be noted that the three options have several important features in common:

- all repeal the existing treatment order provisions;
- all address the consent issue by providing that the requirements of consent, pursuant to provincial law and/or a particular rehabilitative treatment program, apply; and
- all would allow treatment needs to be met via a probation order, including residential placements.

OPTION 1

It would allow for treatment via a probation order and a custodial order where authorized by the court and consented to by the Provincial Director and the facility.

In addition to the features common to Option 1, 2 and 3 which are set out above, this option would

allow for:

- treatment needs to be addressed via a court authorization for treatment in a hospital or other place of treatment as part of a custodial disposition. This would occur where a judge has determined that a custodial order is appropriate and that, based on a section 13 recommendation, treatment to respond to identified needs would also be desirable. It should be noted that the judge's authorization would constitute a recommendation and not an order. In short, the authorization would pave the way for the provincial director to place the youth in the most appropriate facility to respond to the identified needs of the youth pertinent to his offending behaviour;

- such a placement could not be made without the consent of the provincial director and the facility.

SUGGESTED ADVANTAGES:

With respect to treatment being available as part of a probation order, as is presently the practice in many jurisdictions, this option would have the following benefits:

- it would allow a youth to access generally available treatment resources in the community in accordance with the health laws and policies of a province as does any other youth in the community. This allows for efficient use of limited resources by permitting equal access to existing community resources and avoiding the temptation of resort to the juvenile justice system to access specialized services not available to the general population;

- as the nature and degree of care required is a clinical as distinct from a judicial decision, this option recognizes the respective roles of the judiciary in making the disposition and the mental health practitioners in determining and administering the treatment program subject to provincial law;

- when treatment is via a probation order, the order is "to attend for or to reside at", it is not an order to comply with treatment. In practice, such orders have referred to a specific program or, where the service (e.g. counselling) may be available through different centres, the centre would not be specified. In either case, subsection 23(3) which requires communication of the probation order to the youth, allows for discussion and clarification of the order;

- clear-cut options for review would be available. For

example, where a youth is convicted of a sexual assault and it is recommended, pursuant to a section 13 assessment, that a youth would benefit from participation in a specialized program for sexual offenders, a judge may order that the youth attend for treatment as a condition of probation having determined that the youth would be willing to attend such a program. At the treatment facility, consent between the youth and the mental health practitioners is an ongoing issue. Should a youth at some point in the program refuse to consent to some portion of the treatment, the clinicians involved would assess whether the remaining portions of the program would be likely to benefit the youth. If it is believed that the treatment should not continue, this would be reported to the probation officer who would seek a review and the court could impose an alternate condition. If the youth had out and out refused to even go to the facility, the probation officer would likely proceed as if there had been a breach of probation.

With respect to treatment being made available through a custodial order:

- it responds to the issues of consent, capacity, proper forum for obtaining informed consent and others listed above by leaving the issue of consent to a specific treatment plan to be resolved between the clinician, youth, and where applicable, parents in accordance with provincial and civil law;

- the treatment needs of the youth are recognized and addressed within the specified parameters of a custodial order;

- the problems associated with review are resolved as the withdrawal of consent to treatment is dealt with by a return to a custodial facility as per the original order;

- it would permit a judge on review to address needs which were not identified at the time of the original custodial order; and

- it allows optimum use to be made of mental health resources within the community.

SUGGESTED DISADVANTAGES:

- that the custody population may increase owing to the perception that needs of a youth would be met through involvement in the juvenile justice system;

- as this option more clearly places responsibility with

correctional authorities to access mental health resources, it may be of concern to correctional authorities and the judiciary; and

- the option may increase expectations that treatment will occur, which if not met, might lead to frustration for the youth, parents, the judiciary, corrections personnel and mental health clinicians. In fact, the treatment may not occur for two distinct reasons: unavailability of appropriate resources or no known treatment.

- it is submitted that treatment needs are not always apparent at the sentencing stage and resort to the review provisions to reflect newly identified needs or circumstances is not desirable.

OPTION 2

In addition to the features which are common to Options 1, 2 and 3 and set out above, this option would also allow for treatment via custody, using an expanded version of the temporary absence mechanism in section 35 to permit leaves beyond fifteen days. The effect would be that the provincial director, upon the recommendation of a qualified person and upon the consent of the treatment facility, could release the youth to a hospital or other place for an unlimited period of time within the duration of the custodial order.

SUGGESTED ADVANTAGES:

- as decisions would be administratively determined, this mechanism would militate against the dangers of unrealistic expectations and inappropriate resort to custody for treatment purposes.

- it would enable timely transfers to treatment facilities which would not necessitate resort to the review process and which would realistically take into account the needs and circumstances of a youth which may have changed since the disposition.

SUGGESTED DISADVANTAGES:

- while the concern for widening the net is appreciated, it is not clear that option 2 offers any greater protection than option 1 against the unacceptable sentencing practice of ordering custody to gain access to treatment resources where a custodial sentence is not warranted. While the expectation may be less visible through the temporary absence route, the risk remains nevertheless; and

- this would remove the discussion of the most appropriate intervention to respond to the needs of the youth pertinent to his/her offending behaviour from open court.

OPTION 3

This option would blend options 1 and 2 with the result that treatment would be available through a probation order (options 1 and 2 allow for this); a custodial order with an authorization for treatment in a non-designated custodial facility (option 1); and a custodial order where correctional authorities use the temporary absence provisions to access treatment facilities for circumstances which develop subsequent to the dispositional hearing (modified option 2).

SUGGESTED ADVANTAGES:

- it recognizes that option 1 and option 2 are not mutually exclusive;
- it has the benefits of both options; and
- it recognizes the merit of accessing facilities which are not designated as custodial wherever possible for treatment needs which are identified at the time of sentencing; and
- it acknowledges the benefits of flexibility for correctional service administrators to respond to those circumstances which develop subsequent to the dispositional hearing.

SUGGESTED DISADVANTAGES:

The concerns noted in respect of option 1 are applicable here.

ANCILLARY ISSUES RELATED TO ISSUE C, THE MOST APPROPRIATE MEANS TO RESPOND TO THE SPECIAL NEEDS OF AN OFFENDER AT THE DISPOSITIONAL PHASE.

NOTE: These ancillary issues are applicable to options 1, 2, and 3 above).

C.1. Whether the current clause in para. 23(2)(g) is sufficient for the purpose of securing a "treatment" intervention via a probation order?

Presently, para. 23(2(g) presently allows a judge to include the condition "that the young person comply with such other reasonable conditions set out in the order...including conditions for securing the good conduct of the youth and for preventing the commission

Presently, para. 23(2(g) presently allows a judge to include the condition "that the young person comply with such other reasonable conditions set out in the order...including conditions for securing the good conduct of the youth and for preventing the commission by the young person of other offences." Pursuant to this clause, a judge will order, for example, that a youth attend for counselling.

Two options suggest themselves:

Option 1: Status Quo

Option 2: To add a specific clause to make it clear on the face of the Act as to the scope for responding to those need of the youth which are pertinent to the offending behaviour via a probation order.

C.2. Whether a section 13 assessment should be mandatory where a probation order has a condition to reside for the purpose of receiving "treatment"?

There is presently no such requirement but s. 13 permits such an assessment if the court so chooses. It is arguable that such a report may be desirable to ascertain the exact nature of the youth's needs and to justify a residential order. On the other hand, one must consider whether the information in a section 14 report would be sufficient.

Two options suggest themselves:

Option 1: Status quo

Option 2: Mandatory Section 13 Assessment

C.3. At what stage should the consent of the provincial director and of the facility be obtained with respect to a court authorization for placement in a treatment facility as part of a custodial order?

Option 1 for Issue C above (page 119) envisions consent being obtained from the provincial director and the facility following court authorization. To respond to the criticism that court authorization without consent may unfairly set expectations for young persons to receive treatment, an alternative would be for the consent of the provincial director and the facility to be obtained prior to a court authorization being made.

Option 2: That the consent of the provincial director and the facility be obtained prior to a court authorization for treatment being made.

APPENDIX

The appended Resolution was adopted unanimously by provincial Attorneys General at their meeting in Charlottetown, Prince Edward Island, on June 9, 1989. It reflects concern on the part of the provincial Attorneys General about the following provisions of the Young Offenders Act:

- the test for transfer to adult court;
- appropriate sentences for youths convicted of murder;
- review of custody dispositions;
- evidence;
- treatment of young offenders with special needs; and
- federal contributions toward provincial/territorial expenditures under the Young Offenders Act.

The attached statement also indicates the provincial Attorneys General's proposals for the resolution of these concerns.

RESOLUTION

Provincial and territorial Attorneys General unanimously resolve that the following amedments to the Young Offenders Act and the Criminal Code are urgently required:

1. The test for transfer to adult court under section 16 of the Act should be amended so that protection of society is the paramount consideration.

2. The sentence for a young person convicted of murder in adult court be life imprisonment with eligibility for parole to be fixed by the trial judge at a period between 5 and 10 years inclusive.

3. The sentence for a young person convicted of murder in youth court be a maximum disposition of 3 years custody to be followed by conditional release for a period of 2 years less 1 day.

4. Where a young person has been released on a section 28 review and the public interest or the needs of the young person require it, the Act should provide for the apprehension and judicially authorized return to custody of the young person for the balance of the disposition.

5. Section 56 of the Act should permit the admission into evidence of a voluntary statement given to a person in authority by a young person notwithstanding a breach of the section where the interests of justice require it.

6. Treatment of convicted young persons should be facilitated by providing greater flexibility through expanded temporary release provisions.

It is further resolved that the recent unilateral decision to cap federal contributions towards provincial/territorial expenditures for young offenders represents a serious erosion of the federal government's commitment to the juvenile justice system in Canada.

NOTE: The Resolution is that of provincial Attorneys General and of the Minister of Justice of the Northwest Territories.