

The Use of Custody Under the *Youth Criminal Justice Act*:
A Review of Section 39, Prohibitions on the Use of Custodial Sentences

By

Marianne D. Krawchuk

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Department of Sociology
University of Manitoba
Winnipeg, Manitoba

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Abstract

The problem of youth deviance is a concern to many people. Canadian youth justice legislation has changed dramatically in the past century; from a child-welfare approach under the *Juvenile Delinquents Act* (1908), to a more legalistic ‘due process’ paradigm under the *Young Offenders Act* (1984), to the current *Youth Criminal Justice Act* (YCJA, 2003) which promotes the rehabilitation and responsibility of young offenders. The following study examines cases to determine the manner in which a specific section of the YCJA, s. 39 (prohibitions on the use of custodial sentences) is being used in judges’ decisions, and if so, if it is being used consistently and appropriately. Quantitative and qualitative analysis were used to examine related Canadian case law. The databases LexisNexis Quicklaw and WestlawECarswell, using the search terms “*YOUTH CRIMINAL JUSTICE ACT,*” “*YCJA,*” and “*s. 39*” were used to narrow down cases in which this section of the YCJA was mentioned. This search process yielded a total of 210 cases, seventy-seven of which were appeals. The appeals were analyzed qualitatively and the other cases were analyzed quantitatively. It was found that one problem in implementing s. 39 and using it consistently in sentencing appears to be judges’ uncertainty about the appropriate use of the legislation resulting from the lack of clarity within the legislation itself. Parts of the legislation were left open for interpretation, such as the definition of a violent offence, or what was to be considered an exceptional case. It is argued in this study that for any legislation to work, it must be clearly written to reduce as much subjectivity and level interpretation as possible. While judges are often criticized for their decision-making in sentencing, they are limited by the legislation that is in place. Therefore, if there are problems in the practice of the court system, the solution lies in revamping the written law first.

Table of Contents

1.	Introduction	p. 1
2.	Canadian Youth Justice Legislation	
	a. The History of the Canadian Youth Justice Legislation	p. 5
	b. Section 39 of the <i>Youth Criminal Justice Act</i>	p. 24
3.	Methodology	
	a. Ethical Considerations	p. 32
	b. Methodology and Sample Selection	p. 32
	c. LexisNexis Quicklaw and WestlawECarswell	p. 34
4.	Data Analysis	p. 38
5.	Findings	
	a. Descriptive Quantitative Findings	p. 43
	b. Findings from Qualitatively Analyzed Appealed Cases	p. 48
6.	Concluding Remarks	
	a. Limitations of Data	p. 73
	b. Methodological Issues	p. 74
	c. Potential Future Studies	p. 78
	d. Conclusion	p. 80
7.	Appendix A – S. 39 of the <i>YCJA</i>	p. 85
8.	Appendix B – S. 38 of the <i>YCJA</i>	p. 87
9.	Appendix C – Codebook	p. 89
10.	Case Law & Works Cited	p. 97

Chapter 1

Introduction

The problem of youth deviance¹ is a concern in most societies around the world. Concern exists not only because of the crimes that these youths are committing, but also because of the distress felt by society because these offenders are young, and have their whole lives ahead of them, and the fear is that the extent and seriousness of their crimes may increase as they grow older. The level of the fear, based on the perceived level of youth crime, is largely due to exposure to the media (Schissel 1997). “In the 1990s, Canadians were bombarded with media accounts that stressed the growing seriousness of youth crime. Newspapers routinely proclaimed that youth were becoming more violent and out of control” (Smandych 2001a: 148; Smandych 2006: 20). The public perceives this ‘huge increase’ in youth crime to be factual, even though data proves different. Thus, there is a continuous debate regarding the ways in which the criminal justice system responds to youth crime – whether we need to ‘get tough on crime’ or whether these young offenders need a more restorative approach to put an end to the perceived increase in youth crime. The media also depicts that all youth get is a ‘slap on the wrist’ for their offences. However, what the media does not tell the public is that while it is up to the judges in the courts to determine a youth’s sentence, they are limited in their options by the legislation that is in place. Nor do media sources talk about the justice institutions that are over-crowded with youths who have committed minor offences, or the impact that this has on government resources, and the need to keep these youth out of jail for both financial, as well as rehabilitative reasons.

¹ Youth deviance refers to the acts of young persons that are not considered to be socially acceptable; for the matters of this thesis, youth deviance refers to crimes committed by young persons.

This research involves a comprehensive history of Canadian legislation regarding youth justice, including a comparison of legislation over time. The historical portion also identifies problems that existed within the legislation in the past, and the ways in which these problems were attempted to be resolved in later law. The historical overview of the legislation provides a basis for the reasoning behind studying the section of *Youth Criminal Justice Act* (hereafter referred to as the *YCJA*) that deals with custodial sentences, since the overuse of custody for young offenders and the drain that this has on the justice system's resources has long been a concern for those in the legal system, as well as many citizens.

“Recent controversy over youth crime and justice is nothing new, reflecting differing views about the causes of crime and the appropriate ways of responding to it as specific manifestations of more fundamental and conflicting ideological assumptions regarding views of human nature, the degree of individual responsibility for behaviour, and the fundamental values of society” (Hartnagel 2004: 355). Typically, Canada's justice system has adopted an increasingly punitive approach in dealing with young offenders – the attitude is held that to deter future crime, you have to ‘get tough on crime.’ However, through the years, this has been proven not to be the case. In fact, under Canada's previous youth justice legislation, the *Young Offender's Act (YOA)*, this paradigm led to an over reliance on the criminal justice system as a way to deal with young offenders. There was an overuse of the court system, which led to lengthy legal processes, ultimately developing a large period of time between the criminal act itself, and the punishment (if any) the youth received. This limited the connection made by the youth between their act, and the consequences. In response to this, and many other issues,

the *YCJA* was introduced. This study examined a specific part of the *YCJA*, s. 39, in great detail to assess its role in influencing a judge's decision-making process during sentencing. This section details the prohibitions on the use of custodial sentences for young offenders. "The sentencing provisions contained in Part 4 of the *YCJA* represent a significant break with the past: they constitute the most systematic attempt in Canadian history to structure judicial discretion regarding the sentencing of juveniles" (Roberts and Bala 2003: 396). This thesis examined selected cases in which s. 39 (prohibitions on the use of custodial sentences) were considered during sentencing to examine how these provisions are being used in practice. Canadian case law dealing with young offenders was collected from the LexisNexis Quicklaw and the WestlawECarswell databases. These cases, which involved the consideration of s. 39, were selected and each court case was examined in an attempt to determine the ways in which s. 39 is being used in practice. Some cases were analyzed quantitatively to study trends within the cases, while appeal cases were examined qualitatively to closely examine what is being said, by judges, about s. 39 during their sentencing decisions. The purpose of the following research was to examine the ways in which s. 39 of the *YCJA* is, or is not being used and/or considered by judges in their sentencing of young offenders. This research aims to outline some of the problems with the current legislation, and provide some insight into possible ways to study the legislation, identify concerns, and resolve them to in order to make the legislation even more beneficial and effective.

The largest problem found was the lack of clarity within the *YCJA*. Although this legislation is far more detailed than the previous Acts, there is still much room for interpretation of some of the wording. For example, s. 39 states that a youth cannot

receive a custodial sentence unless at least one of four conditions outlined are met. One of the conditions listed is that the youth has committed a violent offence; however, there is no clear definition within the legislation outlining what constitutes a violent offence. Another condition is that the case be considered 'exceptional,' however; there is no definition of what should be considered an exceptional case. It is lack of clarity, such as these cases, which led for subjectivity and interpretation on the behalf of the judges, leading to inconsistencies when implementing and considering s. 39. It can be argued that defining the term 'exceptional' limits the law and restricts its use too much, however some guidelines should be provided as to what is 'exceptional' so that it is not misused.

Chapter 2

Canadian Youth Justice Legislation

This chapter provides a historical overview of Canadian youth justice legislation, and examines how it has changed and developed over time. To understand the development of any legislation, it is important to do a comparative analysis with the one previous to examine what kinds of problems and issues existed within it, and how they were (attempted to be) resolved in the legislation that followed. Also, a more in-depth examination of s. 39 is carried out in order to better understand the purpose and the basis of the current research. The intent of this chapter is to provide insight into the foundation of my thesis, and to provide a better understanding of how and why the *YCJA* as a whole, and more specifically, s. 39 of the *YCJA* were developed.

The History of Canadian Youth Justice Legislation

To examine any legislation, it is first important to understand the changes that have occurred in the legislation, in this case, the ones leading up to the development of the *Youth Criminal Justice Act*. In the past century, Canada's legislation regarding young offenders has undergone three major shifts. The legislation has gone from one based on child welfare principles, to new legislation which focuses on offender responsibility and proportionality between the offender's actions, and their sentence. Also, the legislation has become far more structured, with more specific guidance on policies and procedures outlined within the legislation. Finally, legislation which has depicted harsher punishment

and incarceration² as the key to dealing with youth crime has diminished, and the focus is now on extrajudicial measures³ and restorative justice (Doob & Sprott 2004). The *YCJA* adopts a bifurcated approach, which is different than the legislation that was in place prior to it. A bifurcated approach means that the aim of the *YCJA* is not to focus only on giving less harsh and more meaningful sentences to youths who have committed less serious crimes, or first time offenders, but also to give harsher punishments to youths who have committed more serious violent crimes and repeat offenders. Thus, the *YCJA* actually has two purposes, instead of only attempting to reduce over-reliance on the use of custodial sentences; it is also aimed at providing harsher penalties for more serious offenders.

As noted, since 1908, there have been three major changes in Canada's youth justice system. The first was that there has been a drastic change from a justice system based on child welfare toward a more punitive, tough on crime paradigm that aims to hold kids accountable for their actions. Secondly, there has been more structure developed, and more guidance provided through legislation for youth justice professionals. And finally, recently a realization has set in that the traditional punitive justice system, which dealt with adolescent delinquents by incarcerating them, does not work (Doob & Sprott 2004).

First, it is important to look back at the *Juvenile Delinquents Act (JDA)*, implemented in 1908. This Act was based on a philosophy to 'rescue' children who were at risk of becoming delinquents, and it was very much a welfare-oriented approach to

² For the purposes of this study, 'incarceration' and 'custody' are used interchangeably. "Custody means simply that a custodial sentence was imposed on one or more charges in the case" (Doob & Sprott 2005: 4).

³ Extrajudicial measures refer to any means of dealing with an offender outside of the formal justice system, including warnings, fines, and conferences to name a few. For more details, see Department of Justice Canada 2002; Department of Justice Canada 2003: 6; Doob & Cesaroni 2004: 151; Harris et. al 2004: 376; Smandych 2001b:290.

dealing with youth crime, which offered a large amount of discretion to judges and correctional officers in their dealing with young offenders (Bala et. al 2002: 31). The former *JDA* also adopted a *parens patriae* paradigm. This meant that the justice system acted as a 'kind parent' for the young offender. This occurred in cases where it was perceived that the state had to intervene since the family of the accused was unable to care adequately for them. "While this philosophy might be seen as a humanitarian gesture on the part of the new juvenile court to ensure the 'care' of young persons who came in contact with the law, the tenets of this approach provided enormous discretion to the professionals who were entrusted to deliver services to young offenders" (Reid-MacNevin 2001: 129). Additionally, by acting as a 'kind parent,' the state lent itself to using an abundance of resources and time to act as a caregiver, instead of enforcing the law to prevent recidivism. "In many instances, there was little if any relationship between the disposition or sentence imposed and the offence committed" (Reid-MacNevin 2001: 129). This lack of relationship was in part due to the fact that there was often little or no punishment for the offender, and instead, they were nurtured, seemingly minimizing the seriousness of their offence. According to Hylton (1994), by not punishing young offenders for their actions, "they were neither deterred nor rehabilitated. Therefore, the *JDA* actually contributed to an escalating crime problem among youth" (233). Since there was often no association made between the crime and the outcome, the Act itself did not serve as a deterrent for juveniles. In many cases "intervention with youth was based on the assumption that "professionals within the juvenile justice system had some body of theory or 'superior expertise' that could justify placing the offender's needs over his or her legal rights" (Cousineau and Veevers 1972 as cited in Reid-MacNevin 2001: 129).

“The contradictions and injustices for youth under the *Juvenile Delinquents Act* led to extensive consultation and discussion regarding the nature and purpose of the juvenile justice system over a 25-year period until the *Young Offenders Act*” (Reid-MacNevin 2001: 130). There were many problems with the *JDA* that were attempted to be corrected in the *YOA*. First, the scope was too broad. Second, the *JDA* emphasized the principles of a child welfare system, not a criminal justice system. And finally, sentences and practices were indeterminate, allowing too much discretion and variation (Doob & Spratt 2004). Regardless of these issues, however, the *JDA* was in place from 1908-1984 with little change. However, in 1984, the Young Offender’s Act (*YOA*) was established. The primary goal of the *YOA* was to move away from a child welfare paradigm. Due process rights were a huge part of the implementation of this act, noting the importance of a quicker process through the court system, and the importance of upholding the rights of both the victim and the offender. The *YOA* showed only minor evidence of intent on providing treatment to offenders. For example, the legislation only hinted at using alternative measures (i.e. keeping youth out of jail), and left a huge amount of discretion to the provinces to decide how they wanted to deal with young offenders.

The *YOA* tried to combine the *parens patriae* model of the *JDA* with more of a ‘control’ paradigm. The *YOA* made an attempt to hold young persons accountable and responsible for their actions, while addressing “the rights of society and the special needs and rights of the individual youth. The *YOA* also acknowledged the responsibility of the community to take reasonable measures in the prevention and control of youthful crime” (Reid-MacNevin 2001: 130). However, the new Act also acknowledged that the *parens patriae* paradigm was not leading to deterrence of juveniles. Therefore, a ‘get tough on

crime' paradigm was adopted, and the justice system, in response to societal demands, attempted to impose harsher punishments. However, the end result of the *YOA* was an over-reliance on the use of custody as a response to young offenders. This led to overcrowded youth facilities, and also exemplified the fact that again the legislation which was in place, was not serving as a deterrent to young persons, and was exhausting available resources.

“A House of Commons report on youth crime and the youth justice system, released in 1997, one year prior to the introduction of the *YCJA* into Parliament, found that youths are given custodial sentences at a rate four times higher than that of adults, and that Canada's youth incarceration rate was twice that of the United States and ten to fifteen times that of many European countries, Australia, and New Zealand” (Canada, House of Commons 1997 as cited in Bala and Anand 2004: 252). As a result, the Canadian government realized that their initiative to ‘get tough on crime’ was not doing anything to ultimately solve the problem of, or reduce the occurrence of youth crime. This was dually pressured by the public, as a result of their fear of perceived youth crime based on media accounts. “By the mid-1990s, the widespread growing public disdain for the *YOA* had prompted the Federal and provincial governments to appoint task forces and special commissions to develop recommendations for reforming the youth justice system” (Smandych 2001b: 148). Because of this realization by the government that ‘getting tough on crime’ did not appear to be doing anything for deterrence and was only leading to increased youths in the prison population, in combination with the pressure by the public, the Canadian government realized that change was needed. The realization included the idea that for some crimes, there was an over-reliance on custodial sentences

causing an overcrowding of youth facilities involving youths who did not need incarceration, and for whom more lenient sentences would be more beneficial. However, the *YCJA* attempts to combine this implementation of more lenient sentences with the knowledge that some young offenders who commit more serious offences, or are repeat offenders, should still receive harsher, sometimes custodial sentences, which are proportionate to their crimes.

According to the Department of Justice, the Canadian Federal government took on a “Strategy for the Renewal of Youth Justice” in the late 1990s, which involved a plan to increase spending and new legislation. The Strategy aimed at keeping young offenders out of the justice system, and to use alternative measures (i.e. community based) in helping with the rehabilitation of young offenders. In addition to increasing access to services and support in the rehabilitation process, the Strategy also looked at increasing the sentences of more serious, violent offenders. Provincial and Territorial governments were consulted and were involved in negotiations regarding how and where they felt the increase in spending should be allocated. After considering sentencing, funding and other issues, the Strategy involved steps to develop The *Youth Criminal Justice Act* to replace the existing *YOA* (Department of Justice Canada, 1998 as cited in Bala et al 2002). At the same time that this overall strategy was being implemented, Liberal MPs also recognized the importance of dealing with first-time and less serious offenders through more rehabilitative and restorative approaches, and keeping them out of the formal justice system (Smandych 2001b).

In order to examine what amendments were made in the legislation, and why, it is first imperative to identify the problems noted with the *YOA*. As identified by Endres

(2004) in the article “The *Youth Criminal Justice Act*: The New Face of Canada,” there were four major problems identified by the Canadian Department of Justice that pertain to sentencing issues, and the use of extrajudicial measures in relation to the *YOA*. The first major problem was that “in the Western world, Canada had the highest rate of youth incarceration” (Endres 2004: 527; Roberts and Bala 2003). Under the *YOA*, there was little differentiation made in the use of incarceration for less versus more serious crimes. In other words, there was an over-reliance on the prison system as a sentence for youth crime without discretion. This resulted in over-populated youth facilities, and was doing little to deter juveniles from committing future crimes. Under the *YCJA*, “there is considerable movement away from sentences involving custody to a less custodial based approach for dealing with young persons ... By differentiating between serious, violent and less serious, non-violent offences, and dealing with less serious offences through extrajudicial measures and sanctions, the overreliance on the formal court system should dissipate” (Endres 2004: 527, 533). This differentiation in the Act has two purposes: first, it is an attempt to impose more severe, adult sentences upon those juveniles who commit the most serious offences. Additionally, it aims to identify the less serious cases, and impose sentences that are proportionate to the acts so that there are fewer youths incarcerated, and the use of the courts is limited (Roberts and Bala 2003). This reiterates the premise that “the *YCJA* is a renewed methodology to sentencing that is principle-based and focuses on holding the young person accountable for his or her actions by imposing a sentence proportionate to the seriousness of the offence” (Endres 2004: 534).

The second and third major problems with the *YOA* were interconnected, and were also associated with the first problem. As already mentioned, the *YOA* was based on

crime-reduction via a 'get tough on crime' paradigm, which led to an overuse of the courts. Furthermore, this overuse of courts was a reflection of a lack of outcomes that were proportionate to the crimes since the majority of cases before the courts were "less serious nonviolent offences that could easily and more efficiently be dealt with outside of the court system" (Endres 2004: 527). Under the *YOA*, the youth justice system was far too reliant on custody as a way to deal with young offenders, and seemed to neglect the need to implement and make use of alternative programs and rehabilitative services for youth to better help them become more contributing members of society (Hylton 1994).

When the *YOA* reached its final vote in Canada's federal House of Commons, it received support from all political parties, a feat that is quite unusual. However, as soon as the *YOA* was implemented in April 1984, problems arose from the legislation, and controversy began. "There were a number of technical problems that occurred almost immediately (e.g. in a few of the provisions having to do with records of youth justice matters). But there were also substantive concerns. A new offence – failure to comply with a disposition (largely a breach of probation order) – was introduced into the *YOA* in 1986. Fourteen years later, this single offence would be responsible for 23 percent of the custodial sentences handed down in the country" (Doob & Sprott 2004: 201). This offence was largely put in place to provide the appearance that the government was getting tough on young offenders who did not abide by their probation orders.

The introduction of this new offence, failure to comply, however, was one of the largest failures of the *YOA*. It was considered a repeat offence, which initiated the use of incarceration in sentencing. Since so many young offenders did not comply with their probations order, there was an over-use of the court system to deal with this offence in

juvenile justice. Young offenders, who were committing relatively minor offences, were being placed in incarceration, leading to huge costs for the government. Specifically, female young offenders were being charged with breaches (noncompliance charges) more often than ever before. In fact, the number of breach charges in 1995-96 rose to 27.3 percent of the total cases involving female young offenders, from only 6.1 percent in 1985-86. Similarly, for males, breach charges accounted for 21.6 percent of the cases in 1995-96, up from 3.9 percent in 1985-86. Research also showed that under the *YOA*, girls were being sentenced to custodial sentences if found guilty of a noncompliance charge. In fact, “Gagnon and Doherty (1993) found the *more* Canadian youth who had been found guilty of these noncompliance offences were sentenced to custody, than those found guilty of a violent offence” (as cited in Reitsma-Street 2001: 172). In 1991-92, 47 percent of those found guilty of committing a breach were sentenced to custody, compared to only 38 percent of those who had committed a violent offence. The importance of proportionality needed to be brought into place. Incarceration was to be used only for the most serious crimes to prevent a prison overload of youths.

Despite Quebec’s opposition, there were many problems in the *YOA* that called for a new law to be implemented by the federal government in Canada. With the *YOA*, there was a huge reliance on the use of courts and custody for short sentences and minor offences. Also, since there was little clarity in the legislation there was vast provincial variation. As shown by Sprott and Doob (1998), “although all of the provinces (were) guided by one law, there (was) enormous variation in the use of incarceration” (317). Additionally, Quebec seemed to be the only province in support of the existence of the *YOA*, since in Quebec, the law appeared to work (Trépanier 2004). Finally, there was a

huge Aboriginal over-representation⁴ across Canada within the justice system. Something needed to be done. The legislation needed to be changed so that Aboriginal people were not over-represented and their rights to their traditional practices were upheld. As well, the legislation needed to prevent the continuation of the overuse (and misuse) of incarceration to deal with minor criminal offences.

Before the implementation of the *YCJA*, some people argued that the *YOA* was not flawed, and new legislation was unnecessary, since any problems with the *YOA* were a result of it being implemented inappropriately. According to the Department of Justice, however, this position failed to acknowledge and consider the seventeen years of experience with the *YOA* that indicated that it lacked clear legislative direction and appropriate guidance in several areas. It stated further that “the absence of clear legislative direction [was] an important factor, although not the only factor, that ... contributed to the problems in the youth justice system” (Department of Justice Canada 2002: 1-2).

According to the Department of Justice Canada, there were also several other problems with the *YOA* and the youth justice system. In fact, its rationale for the need for a new and improved legislation was based on eight major flaws which they identified with the *YOA*. First, the Department of Justice Canada argued that the *YOA* did not have a clear or coherent philosophy in regard to youth justice. Secondly, it was said (and proven by research, as demonstrated later) that incarceration was overused as a sentencing option. Under the *YOA*, Canada’s youth incarceration rate was the highest in the Western world, even higher than the United States. Related to this, it was argued that the court

⁴ See Green & Healey 2003:91

system was being over-used for minor cases, and should be reserved for more serious cases, instead of those which would be better dealt with using a non-judicial response (such as a warning, or a conference). Further, the justice system under the *YOA* did not differentiate between serious violent and less serious offences, causing an overload and backed up youth courts. Another flaw with the *YOA* illustrated by the Department of Justice Canada was that it was vague, and left too much room for judge's discretion, which lead to disparities and unfairness in youth sentencing decisions. The *YOA* also did not provide any measures to ensure the effective reintegration of a young offender back into society after release from a custodial sentence. Related to this was the concern that the *YOA* did not properly address the concerns and interests of the victims of the crimes, and did not sufficiently take their needs into consideration. Additionally, the process used to transfer a youth to an adult system was complicated under the *YOA* and "has resulted in unfairness, complexity and delay" (Department of Justice Canada 2002: 1-2).

Specifically, the Department of Justice acknowledged that:

There are limitations on what can be accomplished through legislative change alone. That is why the new legislation should be seen as only part of the Government's much broader approach to youth crime and the reform of Canada's youth justice system. Major non-legislative factors in this broader approach include: significantly increased federal funding to the provinces and territories, crime prevention efforts, effective programs, innovative approaches, research, public education partnerships with other sectors (such as education, child welfare, and mental health), improvements to aboriginal communities, and appropriate implementation by provinces and territories. (Department of Justice Canada 2002: 2)

However, legislative Acts are always being reworked and redeveloped to improve on prior statutes. Therefore, the *YCJA* was primarily a step taken toward what was hoped to be more concise and effective legislation.

S. 39 of the *Youth Criminal Justice Act* is aimed directly at placing restrictions on the imposition of custodial sentences, to reduce the number of youths sentenced to incarceration of any type. Since there was no clear outline in the *YOA* pertaining to when imprisonment should and should not be used as an appropriate sentence (Doob 1992), there was a wide discrepancy in the use of incarceration for youths across Canada. Directly related to this is the third major problem, as already identified, that “under the *YOA*, there was no clear distinction made between serious violent offences and less serious nonviolent offences” (Endres 2004: 529). As a response to this discrepancy and lack of clarity, the *YCJA* aims to reserve the more serious sentences for the most serious crimes, and reduce the use of unnecessary custodial sentences for less serious, nonviolent offenders. To respond to this vagueness, the *YCJA* laid out very detailed sections and statements to define the purpose of sentences, as well as the principles that were to be used by judges when determining an appropriate sentence (Endres 2004; Doob and Cesaroni 2004). The *YCJA* lays out the ‘rules’ of sentencing, and the restrictions, so that judges can impose an appropriate sentence on the individual to promote the juvenile’s acceptance of responsibility, as well as hold them accountable for their actions, and provide rehabilitation when necessary. Unlike the previous *YOA*, the *YCJA* makes clear recommendations for policies and provisions that are to be implemented across Canada. Where the *YOA* was vague in its policy implications, the *YCJA* is very specific (some argue too specific) and has clear direction for the treatment of youth through the criminal justice system.

The fourth major problem identified was sentencing discrepancies across Canada under the *YOA*. “Because there are numerous youth courts across the country, sentencing

decisions under the *YOA* resulted in disparities and unfairness ... Not only was there an over reliance on the courts, but court proceedings were used disproportionately across the country” (Endres 2004: 527-529). Again, as previously mentioned, the *YCJA* aims to rectify this problem by stating clear guidelines pertaining to sentencing of young persons, with special consideration given to custodial sentences in hopes of limiting this discrepancy across the country.

“The public, media, and law enforcement concerns (had) certainly not gone unnoticed by federal and provincial bureaucrats and politicians, who (had) been subject to considerable pressures from various interest groups-victims’ rights groups, community groups specifically organized for the purpose of reforming the *YOA*, the police, and municipal governments” (Corrado & Markwart 1994: 347). Therefore, in 2003, as a response to the inefficiency of the *YOA*, new Canadian youth crime legislation was put in place. The new *YCJA* adopted a more bifurcated approach to justice – it aimed to be tougher on violent offenders, and offer a more restorative outcome for less serious offenders. “The aim of the *YCJA* was to provide a more effective, efficient, equitable, and clearly directed approach to dealing with young persons in the justice system” (Endres 2004: 527). According to Doob and Spratt (2006:23):

The Government of Canada, in its 2003 changes in the law governing young offenders, managed to appear to be ‘tough on crime’ while, at the same time, attempting to reduce the use of the formal youth justice system. This was accomplished by focusing public statements on tough, symbolic measures that had little impact on the manner in which young offenders were punished while at the same time promoting, in its legislation, an attempt to reduce the rates of formal processing and of incarceration of young people

The main premises of the *YCJA* were that the sentence and treatment of the youths be proportional to their crime as well as to the person, and that the methods used for

dealing with the youth must encourage their rehabilitation, not just punish them for their actions. Additionally, the *YCJA* aims at holding the youth accountable for their actions, making them take responsibility. Finally, the *YCJA* emphasizes and encourages the use of extrajudicial measures (such as police warnings and community-based treatment) to reduce the number of youths who are incarcerated. “Prior to a young person being charged under the *YCJA*, the applicable extrajudicial measures must be considered ... In the *YCJA*, however, the extrajudicial measures must be considered first, and the court process is resorted to only if the extrajudicial measures are not appropriate or adequate” (Endres 2004: 529-532). In other words, under the *YCJA* a custodial sentence is not even an option until all possible extrajudicial measures have been considered and rejected. Additionally, even when a youth is sentenced to custody, it is “to be followed by a period of supervision in the community as an attempt to foster the rehabilitation and reintegration of the youth into the community” (Endres 2004: 535). According to Endres (2004: 53), under the *YOA*, many young offenders appeared before the courts on non-violent, less serious offences, and a survey of youth court judges done by the Department of Justice Canada in 2003 “found that 54% of the judges believed that half or more of the cases coming before them could have been dealt with as adequately or more adequately outside of the youth court.” The *YCJA* demands alternative measures to be considered in response to this concern, and the seemingly senseless use of the criminal justice system’s time and resources. The provisions for the use of an alternative to a custodial sentence are outlined in s. 39(3) (See Appendix A). According to Green and Healey (2003), limiting the ability of a youth court judge to impose a custodial sentence upon a first time offender

makes “unlikely the chances of a youth with little or no record being incarcerated for a non-violent offence” (142).

A Summary of the Objectives and Criticisms of the YCJA

It is easy to see how Canadian legislation has developed over time. The *JDA* was focused primarily on the child welfare model, and the *YOA* concentrated on protecting society through the use of punitive measures. The *YCJA*, however, is not limited to either of these perspectives and instead focuses on proportionality and rehabilitation, with a diverse ideological perspective (Campbell 2005). According to Doob and Sprott (2004: 236), “what is most noteworthy about this piece of legislation is its attempt, for the first time in Canadian history, to draft criminal legislation that explicitly and implicitly describes what it is trying to accomplish and that lays out a policy for the manner in which it should be administered.” As far as sentencing guidelines, Doob and Sprott expect that the *YCJA* is as close as Canada is likely to get for some time in the area of criminal law.

However, in addition to the positive points made about the *YCJA* and its objectives, many criticisms also exist. First, the *YCJA* has been criticized for being too specific, and too complicated with little flexibility in the proceedings of youth justice. Within the *YCJA*, there are many details provided regarding policies and practices, clearly outlining the process of youth justice. The Act was developed in so much detail with the intention to diminish the amount of interpretation needed when implementing the principles of the Act, thereby hopefully limiting variation. However, because the Act is very detailed and

specific, it may be criticized at times for being too ‘wordy’ and complicated, making it difficult for both understanding the Act, as well as implementing it.

The new *YCJA* can be seen as a balancing act which tries to appease people who adopt the outlook that the justice system treats juveniles too leniently, as well as trying to respond more effectively to youth crime through the use of restorative measures, since the traditional ‘get tough on crime’ punitive system has been shown not to help the individual. “Unlike the (*YOA*), victim concerns are specifically recognized throughout the *YCJA*” (Roach 2003: 965). The intent of the *YCJA* is to bring the offender and the victim together to resolve the conflict, and repair the harm done by jointly deciding in the outcome. This is a new initiative, leaving the process up to persons not involved with the traditional court system. Instead, the *YCJA* attempts to make reparations by involving the people who were actually impacted by the crime.

As Russell Smandych (2006) illustrates, there are many factors which may undermine the objectives of the *YCJA*, particularly related to the restorative approach it aims to undertake. One such factor is the availability of resources, or lack thereof. For example, reliance on extrajudicial measures places a huge demand on volunteer youth justice committees, as well as many other committee groups, which may in time become overwhelmed and burdened by the number of youth cases placed upon them, disabling them from being an effective resource. Similarly, resources may simply not be available at the local level for some provinces/territories to effectively implement alternative measures. Another problem is that the *YCJA* gives power to the provincial and territorial governments to provide their own guidelines for implementing extrajudicial conferences. This allows, and even encourages, huge amounts of inter-provincial variation to exist.

Any or all of these problems might well lead to overburdened communities, striving unsuccessfully to implement a more effective justice system, and this might be especially so in some of Canada's rural Aboriginal communities. This may result in a racially derogative attitude to develop toward Aboriginal persons as failures, when in fact, the problem will be a lack of available resources, and not one of lack of initiative or attempt. Consequently, it is crucial that the Federal Government continues to grant funding to provide programming since extrajudicial measures largely depend on it, and the quality of diversion programs offered is dependant on the amount of money allotted to develop/improve the program. "The actual use of various diversion programs...under the *YCJA* in many provinces may depend on whether and how the federal government uses its spending power to affect the local administration of justice" (Roach 2003: 981). In other words, money must be directed toward extrajudicial programming to make them readily available and efficient, rather than on the expenses related to an excessive number of young offenders being held in custody.

In addition to inter-provincial variation, there are differences within provinces with respect to the programs offered. There are also differences which exist within provinces, between courts. For example, in a study done by Harris, Weagant, Cole and Weinper (2004), four Toronto-area judges described their experiences working under the new *YCJA*, and described it as working 'in the trenches.' While all four judges in this study worked in the Toronto, Ontario area, "each judge presides in a different courthouse, with different local practices and organizational priorities, so their experiences and expectations vary considerably" (367).

While the majority of Canada was accepting of the *YCJA*, Quebec was resentful toward the new Act. In Quebec, they felt that the *YOA* was working just fine, and was working adequately to address the problem of youth crime. According to Green and Healy (2003), Quebec did in fact have far fewer youth cases in its youth justice system in the year 2000, however, when measured per capita and considering those youths who actually appeared in youth court, its rate of youth incarceration was similar to the rest of Canada. This implies that Quebec was already concentrating on dealing with many ‘less serious’ young offenders outside of custody. Hence, they did not feel as though there was an over-reliance on keeping youth in custody in their province, and were therefore hesitant toward the idea of enacting the *YCJA* (Trépanier 2004). However, the *YCJA* was developed largely as a legislation which took most of the provincial arguments into consideration, and what emerged was a compromise. However, with each province having different demands, another potential barrier was created under the new legislation, namely, interprovincial variation. Peter Carrington and Sharon Moyer examined this discrepancy in the implementation of the *YOA* in their article “Interprovincial variations in the use of custody for young offenders: A funnel analysis” (1994). This research showed that “in 1990, six years after the proclamation of the *YOA*, there was still substantial variation in the numbers of young offenders receiving and serving custodial dispositions. This variation appeared to be due mainly to interprovincial variation in the per capita rates of juveniles being charged, and in the lengths of custodial dispositions” (Carrington and Moyer 1994: 271). Their findings showed that “68 percent of the interprovincial variations were due to pre-court processes (the laying of charges and/or court intake screening), and 32 percent to the dispositional process, mainly the sentence

length, rather than the type of disposition” (286). Doob has also shown that there may be some other factors that account for interprovincial variation, including variation of the behaviour of juveniles between provinces and communities. Additionally, variation may exist between provinces and communities in relation to the resources available, specifically in those that deal with young offenders outside of the courts, less formally (Doob 1992).

The *YCJA* aims to clearly outline the pre-court process, as well as provide clear guidelines for the justice system to follow to prevent this discrepancy between jurisdictions. However, some of the wording in the *YCJA* leaves open this possibility of sentencing variation. For example, it is outlined in s. 38(2)(b) that “the sentence must be similar to the sentences imposed in the region on similar young person found guilty of the same offences committed in similar circumstance” (Roberts and Bala 2003: 405). This, then, may account for interprovincial variation; however, there should be little variation within provinces if this provision is followed.

In the current study of the use of Section 39 of the *YCJA*, I take into account the possibility of inter-provincial variation in sentencing. Specifically, the study tracks the province in which each court case took place in an attempt to compare the use of custody as a sentence cross-provincially. This study will also track the reasons judges provide for their decisions on whether or not to use a custodial sentence by examining their expressed sentencing rationales, as well as the availability of extrajudicial measures. This methodology will be discussed further in the methodology chapter of my thesis.

Section 39 of the YCJA

The most serious sentence that a youth can receive is a custodial sentence (Juristat), and therefore, the use of custody should be reserved for use only for the most serious cases. In fact, for many youths who have committed relatively minor offences, sentencing them to custody will undoubtedly be more detrimental than helpful⁵. Custody can cause them to miss out on education and potentially create connections with other youth in the justice system that may be bad influences on them. When the *Youth Criminal Justice Act* was being composed, s. 39 was created in response to the issue of an over use of incarceration for young offenders. “The *YCJA* employs several strategies to reduce the use of incarceration as a sanction in youth courts: (a) by providing a clear enunciation of the principle of restraint regarding custody, (b) by creating explicit criteria that must be fulfilled before a court can send a young offender to prison, and (c) by providing judges with new alternative sanctions. In addition, if a custodial term is imposed on a young offender, sections 94(1) to (2) of the *YCJA* mandate an annual review by a youth court judge - the purpose being to establish whether the imprisoned young person should be released into community supervision at a date prior to his scheduled release” (Roberts 2003: 423). However, this review only takes place after youth are sentenced to custody, a process that is outlined in sections 38 and 39 of the *YCJA*. S. 38 is seen as a ‘gatekeeper’ to s. 39, determining if custody is a possible sentence before determining whether or not it can be implemented.

Before looking at s. 39, it is imperative to look at the previous section of the Act, s. 38. S. 38 acts as a gatekeeper for s. 39, outlining the principles of sentencing to therefore determine whether or not a custodial sentence should even be considered. S.

⁵ For more information on the detrimental effects of custody on young offenders, see Howell (2003).

38(1) outlines the purpose and principles of sentencing under the *YCJA*. The purpose outlined is to hold a young person accountable for their actions through an appropriate sentence, and make sure that there are meaningful consequences associated with their actions. Also, the *YCJA* aims to help in the young offenders' long term rehabilitation and reintegration into society (See Appendix B). S. 38(2) outlines the principles and conditions of sentencing under the *YCJA*. All of these principles must be kept in mind by the judge when imposing a sentence on a youth. If it is decided that a custodial sentence may be appropriate for the youth, s. 39 is considered.

Specifically, “s. 39 imposes conditions on the use of custody that have resulted in more use of community-based responses to youth crime” (Bala and Anand 2004: 256). In Part 4 of s. 39, the situations in which custody should, and should *not* be used are clearly outlined (see appendix A). S. 39 clearly states that “a youth justice court shall not impose a custodial sentence under s. 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determining that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in s. 38” (Canada, House of Commons 2003). The *YCJA* is the first act to clearly lay out the principles and conditions under which a youth should be sentenced to custody, and is clear in illustrating that custody should only be used as a last resort, only for the most serious crimes, and only once all other non-custodial available options have been considered, and determined to be insufficient. While the *YOA* tried to limit the use of custodial sentences for young offenders, it “provided very little guidance on how to

effectively and correctly utilize the alternative measures, and this resulted in inadequate and inconsistent use” (Endres 2004: 531).

Incarceration is not supposed to be used for individuals who do not commit serious, violent crimes, or for those individuals who have not committed these serious offences previously. Incarceration is supposed to be restricted for use with the most severe offenders/offences. With the introduction of a new charge during the period of the *YOA*, “Failure to comply with a Disposition,” the use of incarceration was increased even more. “Youths were being placed in custody for behaviour that normally would not warrant state intervention of any kind” (Sprott 2006: 610). This may be a result of the perception by the justice system that a failure to comply with a sentence “shows disrespect for the justice system. It could also be felt that a term of custody is the only way in which to reinforce the importance of abiding by conditions in the community” (Sprott 2006: 611). S.39(1)(b), of the *YCJA* states that a custodial sentence should only be considered if the young offender has already failed to comply with a previous sentence. Sprott’s research shows that during the first year that the *YCJA* was in place, there appeared to be a rather large reduction in the use of custody for those charged with a failure to comply. However, since the *YCJA* was only in place for a year at the time of Sprott’s study, it is impossible to make any conclusions as to whether this pattern will persist under the *YCJA* (Sprott 2006). In light of Sprott’s (2006) research, the current study attempts to examine youth charged with a failure to comply in order to examine whether or not it is being considered in the sentencing decisions. As Green and Healey (2003: 44) note: the wording in s. 39(1)(b) which includes the wording ‘unless the young person has failed to comply with non-custodial sentences,’ leaves a great dependence on

judges' interpretation. For example, since the goal of s. 39 is to reduce the number of youth in custody, it is hoped that the judges will interpret this part of the Act so that only the repeat offenders who impose real harm on the public will be sentenced to custody, and that less serious repeat offenders will still receive non-custodial sentences. Overall, the *YCJA* "is complex and the interpretation of its principles and provisions will doubtless constitute a challenge for youth justice court judges and appellate courts for years to come" (Roberts and Bala 2003: 397). However, it provides far more structure and guidelines in sentencing than the *YOA*.

It is important to examine s. 39 in more detail to better understand the conditions and provisions it gives to judges to follow in their sentencing decisions. S. 39 has nine subsections (See Appendix A). The first section illustrates the four conditions under which a youth can be sentenced to a custodial sentence. For a judge to impose a custodial sentence at least one of the four conditions must be met; otherwise, a non-custodial sentence must be handed down. The conditions are 1) that the youth has committed a violent offence, 2) that the youth has not complied with a previous non-custodial sentence, 3) that the youth has committed an indictable offence for which an adult would receive a imprisonment term of two years or longer, as well as has a history or a pattern of behaviour which would indicate guilt, and finally 4) that the case is an exceptional case in which a custodial sentence must be used because a non-custodial sentence would not be consistent with s. 38 of the Act, which indicates that the sentence must be proportionate and fair to the offence.

The conditions that must be met are not as 'black and white' as they may seem. The condition says that the youth must have committed a violent offence. The problem

with this condition is that it is subjective and interpretative. Depending on who is defining a 'violent act,' the definition may change from case to case, judge to judge, and/or province to province. The determination and definition of what constitutes a 'serious violent offence' is outlined by Nicholas Bala:

The *YCJA* has special provisions for those youths found guilty of a serious violent offence, especially if it is a third such offence. The term "serious violent offence" and the process for determining whether an offence is a serious violent offence had no equivalent under the *YOA*. Section 2 of the *YCJA* defines the term "serious violence offence" to mean "an offence in the commission of which a young person causes or attempts to cause serious bodily harm." The third conviction for such an offence is clearly indicative of a pattern of serious violent offending. It is, however, that there has been a proper determination that each offence was a "Serious violent offence," and not merely a "violent offence." ... "A "serious violent offence" will usually involve a significant physical injury to the complainant, or an attempt to cause injury. A sexual assault involving significant psychological injury will also be a "serious violent offence." The definition of "serious violent offence" relied on the concept of "serious bodily harm" which is not defined in either the *YCJA* or the *Criminal Code*. (Bala 2006: 490-495)

The second condition is the condition that the youth has not complied with a previous non-custodial sentence creates a problem in itself. An example of this being problematic is the offence of breaking out of custody. This offence does not meet any of the criteria, except possibly if the judge considers it an exceptional circumstance. Technically this young offender has not breached a non-custodial sentence, or committed a violent offence, thereby not satisfying either of these conditions. Therefore, basic logic would lead to the understanding that condition two has not been met – the young offender has not failed to comply with a non-custodial sentence and therefore, unless they have committed a violent offence, or met another one of the conditions while they escaped, they would not be able to be subjected to a custodial sentence.

The second subsection of s. 39 indicates that all non-custodial sentences must first be considered and rejected before a custodial sentence can be imposed. Extrajudicial measures include taking part in a conference, “taking no further action, warning the young person, police caution, referrals to community programs, crown cautions, extrajudicial sanctions, notice to parents, informing victims” (Dept. of Justice 2002: 5). These must be considered and used if they satisfy the purpose and principles set out in s. 38 (see Appendix B). If, however, they are not found to be appropriate, a custodial sentence can then, and only then be considered.

S. 39(3) outlines factors to be considered when looking at whether or not there is a practical alternative to custody that can be used. According to this section, a youth judge must consider the alternatives that are available, the chances and likelihood that the youth will comply with a non-custodial sentence which includes looking at their past compliance, or non-compliance with non-custodial sentences, and that the alternatives being considered have been previously used for youth who committed similar offences under similar conditions.

S. 39(4) looks at whether or not the imposition of a particular non-custodial sentence does not preclude another court from imposing the same, or any other non-custodial sentence for another offence. S. 39(5) clearly indicates that a custodial sentence must not be used as a method of child welfare or child protection, or as a substitute for mental health or other social measures. Under s. 24 (1.1)(a) of the *YOA*, this principle was to be taken into consideration when sentencing, however, if deemed appropriate, a custodial sentence could be used for child welfare/protective services (*R. v. S.L.* [2003]). As Roberts and Bala (2003) illustrate, however, that “this seems to preclude imposing a

custodial sentence for rehabilitative purposes if doing so would represent a disproportionately intrusive response to the offence” (409). S. 39(6) of the *YCJA* states that “before imposing a custodial sentence... a youth justice court shall consider a pre-sentence report and any sentencing proposal made by the young person or his or her counsel.” Pre-sentence reports generally include details as to the youth’s situation and family situation, as well as their employment and education information. This may influence the judge’s consideration of what is or is not an appropriate sentence for the youth, and what will and will not have meaningful consequences for their actions.

S. 39(7) states that a pre-sentence report may not be required and dispenses with the report if a prosecutor and the young person consent to its omission. S. 39(8) indicates that when considering the length of a custodial sentence, the judge must consider the principles and purpose of sentencing outlined in s. 38. In other words, if it is decided that a custodial sentence is to be used, the judge must consider what the maximum length of time it is anticipated is needed to have meaningful consequences and be fair and proportionate to the offence, and not impose a sentence longer than this time, or longer than an adult could be sentenced for the same offence.

The final subsection of this section is s. 39(9), which states that should a custodial sentence be used during sentencing, the judge must provide an explanation as to why a non-custodial sentence would not be considered adequate, including if applicable, their justification as to why they consider the case to be exceptional. Many of the cases studied in this thesis, which are examined in more detail in the following chapters, were determined to be exceptional cases because of considerations of the circumstances of the youth, and the crime itself. For example, one case involved a youth destroying property at

a church. The extent of damage, as well as the significant impact that this had on the community led the judge to determine that this was an exceptional case, and therefore, was open to the possibility of a custodial sentence.

The subsections of s. 39 were put in place as a way to limit the number of conditions under which a young offender could be sentenced to custody for their offence. “Although there are still several roads that can lead to the incarceration of the young offender – and the criteria could have been still more restrictive – these preconditions are likely to have two principal effects. First, they should reduce the volume of sentenced admissions to custody. A number of young offenders now being sent to prison will no longer qualify for a custodial sentence, as their profile will not conform to one of these four criteria” (Roberts 2003: 425). For example, a young offender accused of committing a non-violent property crime that has no previous record, and has not breached a non-custodial sentence, can no longer be sent to jail as they would not meet any of the criteria which would allow them to receive a sentence of incarceration. Therefore, except in cases that are considered to have exceptional circumstances, these offenders will be sentenced to some alternative form of sanction. “The second effect of the restrictions on the use of custody is that they will likely change the composition of the youth custodial population to increase the proportion of violent and serious cases and reduce the number of repeat offenders convicted of property crime” (Roberts 2003: 425).

Chapter 3

Methodology

The following chapter describes the methodology and sample selection of the research. The discussion around sample selection illustrates what types of cases were analyzed in this thesis, and what type of group they represent. To properly understand the findings of a study, it is crucial to understand what types of data are being analyzed, and to what extent the findings are generalizable. The following methodology gives insight into this process.

Ethical Considerations

This study used secondary data from cases, which are publicly accessible to individuals via the use of LexisNexis Quicklaw and WestlawECarswell. Since this research did not involve any human subjects, nor does it involve any confidentiality or anonymity issues since the accused cannot even be identified by the researcher, there were no ethical considerations pertaining to research involving human subjects. Therefore, the research did not require approval from the Ethics Review Board at the University of Manitoba.

Methodology and Sample Selection

The methodology for this study involved both qualitative and quantitative analysis of Canadian case law. The cases were accessed via the E.K. Williams Law Library at the University of Manitoba, using two data bases; LexisNexis Quicklaw and

WestlawECarswell. The cases were selected based on a search for Canadian cases that contain the phrase “*Youth Criminal Justice Act*” or “*YCJA*,” as well as “s. 39.” This limited the number of cases exclusively to those cases, which refer at some point within the case, to s. 39 of the *YCJA*. This term was crucial to the proposed study since it aimed to examine this specific section of the Act to determine whether or not the restrictions on the imposition of custody are being considered as outlined in the *YCJA*. The researcher acknowledges that while a judge may not have directly referred to, or quoted s. 39 in their decision, they still may have considered it in their judgment. However, to stay within the scope of this study, only cases which cited s. 39 directly were used. Using these search terms, 184 cases were retrieved from LexisNexis Quicklaw on February 22, 2007. 154 Cases were retrieved from the WestlawECarswell data base on February 12, 2007. The cases were each given a unique file name consisting of the initials of the young offender, as well as a numeric value given as a case ID to easily identify cases once they are entered into SPSS. For example, the name of a file became M.K – 2. After saving the cases individually, lists were printed out illustrating which cases were retrieved from LexisNexis Quicklaw, and which were retrieved from WestlawECarswell. By looking at the file name, it was easy to quickly identify potential duplicate cases where the same case was found in both data bases. When there was a potential duplicate, the cases were both opened and compared. All duplicates were deleted to ensure that no cases were double-counted in the analysis. If they were not, both cases remained for future usage. After all of the duplicates were removed, a total of only 133 cases were analyzed quantitatively. During this process, appeals were also identified and saved in a separate

folder since they were going to be analyzed qualitatively, separate from the quantitative part of the study.

LexisNexis Quicklaw and WestlawECarswell

The data in this study was collected from two sources – LexisNexis Quicklaw and WestlawECarswell. Both are internet case law databases, made available through the E.K. Williams Law Library at the University of Manitoba.

The data on LexisNexis Quicklaw is collected differently based on province or territory. Depending on how efficient the jurisdiction is, more or fewer cases may be submitted to LexisNexis Quicklaw to be put in the database. This research also involved e-mailing the Youth Justice courts across Canada. The e-mail addresses were retained from the internet, and the e-mail was brief. The e-mail introduced the researcher and the topic of this thesis, and asked for any information they could provide as to how cases come to be written, and put onto the databases. Responses came from court and law library personnel, as well as a judge by both e-mail and telephone. The overall answer to the question “what differentiates what does and does not get published in these databases?” was generally the same – it depends on the judge, and each province has its own method and system.

A woman from the Manitoba law courts responded by informing the researcher that it is each judges’ discretion as to whether or not a case’s outcome should include a written decision, and whether or not the written decision should be published. In Manitoba, she informed the researcher, it is routine to write and send case decisions that set a potential precedent for future cases. Also, unpublished decisions are accessible

through the E.K. Williams Law Library at the University of Manitoba. In Manitoba, these written cases are routinely submitted to the publishers.

Personnel from the Saskatchewan Law Society Library responded because in Saskatchewan, the Law Society is involved in the process of written cases getting published. She informed the researcher that each judge decides what they believe can and cannot be made public. In Saskatchewan, it is primarily the provincial court judges who deal with youth cases, and typically, they are the judges that write the least number of decisions (compared to Queen's Bench judges). The reason that provincial judges write fewer cases is because it is not structurally possible for them to write case law for all matters that come before them since they generally deal with between eight and ten thousand cases per year per judge. However, the written cases are then passed on to the court staff, who prepare and pass them on to WestlawECarswell and LexisNexis Quicklaw to be published.

From the Northwest Territories, a response came from a library technician at the M.M. de Weerd Law Library. Similar to the other provinces, the courts in the Northwest Territories do not publish any cases that would violate a court ordered or legislated publication ban. Therefore, it is up to the judges to provide written decisions if they wish and provide them to the M.M. de Weerd Law Library, but if the case presents a breach of confidentiality with respect to the Youth Justice Court, a decision is not provided to WestlawECarswell or LexisNexis Quicklaw.

I received a response from the Senior Judges' Assistant from the Territorial Court of Yukon. Her response was that all of their cases are published electronically onto LexisNexis Quicklaw, except, of course, if they breach publication bans. Also, she

indicated that all cases must follow the ban that is in place, that is, publication of identifying information is prohibited by s. 110(1) of the *YCJA*. The Territorial Court of Yukon, as well as the Nova Scotia Court publish their cases on their respective websites. The Nova Scotia courts indicated that they release the decisions to the databases everyday at 1:00 p.m., via a single e-mail to publishers, which include WestlawECarswell and LexisNexis Quicklaw, among others. However, some cases may not be published if a judge has not used the accused's initials in the written decision, because if released, it would thereby publish identifying information. As well, other case decisions are stated orally, and not reduced to writing. Because of these restrictions, the Decision Database Administrator from the Nova Scotia Courts advised that she suspected that the number of cases from their courts is fairly limited.

As in the other provinces and territories, a response came from the Newfoundland and Labrador Courts indicating that it is up to the judges which cases are and are not published onto the databases. Some judges take hold of this opportunity, and opt to release their decisions via the databases, while others do not.

The responses from the youth courts across Canada illustrate the nature of the cases that can be found on WestlawECarswell and LexisNexis Quicklaw, as well as the nature of the cases my research data was collected from, and limited to. However, knowing that the judges specifically decide to write decisions for these cases means that most are probably not typical cases. Being that judges decided to write on these means that they likely have some sort of importance whether it was in regard to setting a precedent, or legislative or sentencing issues.

Despite the limitations of the data used in this study, such as the inter-provincial differences, these data are still useful as a window into some of the problems with the *YCJA*. These cases, although not generalizable or representative of all youth cases across Canada, provide insight into some of the issues judges are encountering with implementing the *YCJA*. The cases were selected based on very specific search terms which further limited the number of available cases. In conjunction with the fact that each province publishes case law based on their own standards, the scope of the sample was very narrow. However, having these cases is better than none at all. The 210 cases studied, however limited and non-generalizable, still show that there are many problems with the *YCJA* which need to be addressed so that the justice system professionals may interpret, understand and implement the *YCJA* to the best of their ability. It is important to study the implementation of new legislation in detail early on in its enactment to identify problems so that they can be rectified making the justice system more efficient and effective, and to allow legislation to be implemented to its fullest potential.

Chapter 4

Overview of Data Analysis

This thesis attempted to examine s. 39 in detail to determine what the best predictors of custodial sentences are for young offenders, as well as whether or not judges seem to be using s. 39 consistently. To have the best understanding of s. 39, both quantitative and qualitative analysis were used to gain as in depth analysis as possible. This chapter discusses the analysis that took place, and describes the sample used to provide a better understanding of the scope of the results.

Data Analysis

Bala and Anand (2004) note, “most youth justice court judges appear to have accepted the principle that under the *YCJA* a youth sentence must be a ‘fair and appropriate’ response to the offence that the youth has committed, and they have *not* used custodial sentences to achieve child welfare objectives” (256). This study examined whether or not this is still the case since Bala and Anand’s conclusions were made in 2004, early in the implementation of the legislation. The *YCJA* emphasizes fair and proportional treatment of minors, and takes the seriousness of the crime, as well as the offender’s previous record into consideration. In research done on “Factors affecting custodial dispositions under the *Young Offenders Act*” by Carrington and Moyer (1995), it was found that “although some ‘offence orientation’ was evident, the primary factor in deciding between custodial and non-custodial dispositions in this sample of youth court cases appeared to be the offender’s prior record” (Carrington and Moyer 1995: 154; Doob and Cesaroni 2004). The current study looked at whether or not the young

offender's prior record seems to have an influence on their disposition. One of the conditions in s. 39 is that if the accused's prior record indicates a pattern of findings of guilt, and the young person has committed an indictable offence for which an adult could be sentenced to custody for a period of more than two years. Therefore, prior record was examined to see if it was ever considered by a judge during sentencing decisions where the youth had not committed a violent offence. If, in fact, a judge sentenced a young offender to custody based on their previous charges and convictions alone, this does not satisfy s. 39(1)(c) of the *YCJA*, and unless other exceptional circumstances exist, custody would not be an appropriate sentence.

Once the cases were obtained, content analysis was done to examine in more detail how s. 39 of the *YCJA*, "Committal to Custody," was used to rationalize the judge's decision the case outcome. Analysis used both quantitative and qualitative measures (see Appendix C). The quantitative measures included the coding of thirty-seven variables describing the case. Many of the variables are demographic in nature, related to the accused's gender, age, ethnicity, employment status and level of education, in cases where these data are available. Other variables relate directly to the case itself, describing the criminal aspect of the case such as the crimes the accused was charged with, the court outcome, as well as details of sentencing for each charge. Finally, variables related specifically to s. 39 of the *YCJA* were coded to see if they are determinants of when/how judges use custody as a sentence. The variables included the accused's prior record, whether or not they have breached non-custodial charges, whether or not the judge deemed the incident to be a 'violent crime,' and whether or not alternative measures were considered.

Cross-tabulations were done to examine the relationships (if any) that exist between the variables. Also, a multiple regression was going to be done to examine the effects of the variables on sentencing outcome. This was going to be done to examine whether or not a custodial sentence can be predicted by the factors outlined in s. 39 of the *YCJA*, or if there are other variables affecting the court outcomes. As cited in Carrington and Moyer (1995), Doob and Meen found that for the sample cases in their study (in which they examined court dockets for Toronto Youth Courts under both the *JDA* and the *YOA*), “dispositions under the *YOA* were more offence oriented under the *JDA*” (135). This is a positive finding that illustrates that court outcomes reflect the crimes committed, and are not subjective. The study aimed to examine cases across Canada in which s. 39 was considered to see whether or not, in the sample, dispositions under the *YCJA* are more offence, or offender related. This was proposed to be done by comparing outcomes to different variables tracked in the study to see what the best determinants of sentencing were, and if they matched the provisions outlined in s. 39. However, since there was so much missing data in the cases, a multiple regression could not be done. Therefore, bivariate analysis was done in place of a multiple regression (although not as statistically sound) to determine the relationships, if any, between different variables.

Qualitative content analysis was also used on the selected cases. The cases selected were those in which a sentence was appealed based on a discrepancy between the sentence given and the provisions outlined in s. 39. The purpose of the analysis was to look for themes among the cases in relation to s. 39, and how judges in actual cases are utilizing it. It was hypothesized that themes would be found demonstrating judges’ use of s. 39, and the lack of discretion given to judges when it comes to deciding whether or not

to sentence a youth to a custodial term. Qualitative analysis was used to identify any issues and concerns pointed out by judges during sentencing. As well, qualitative analysis was done to gather information on what extrajudicial measures judges are (or are not) considering during the sentencing procedures. Related to this, this study also attempted to examine what the reasons are for choosing whether or not to use a custodial sentence as opposed to a non-custodial sentence.

Another theme to be examined, as suggested by Bala and Anand (2004) and Carrington and Moyer (1994), was whether or not the *YCJA* is being used differently across Canada, across provinces. According to Bala and Anand (2004), “it is ... clear that there will remain very substantial variation across [Canada] in how the youth justice system operates. In particular, the decision of the Quebec Court of Appeal in *Reference Re Bill C-7* likely means that courts in that province will take a more welfare-oriented approach than courts elsewhere in Canada” (268-269). The qualitative analysis examined specific themes identified through the cases, such as judges’ discourses in relation to the case. This gave a better, more detailed picture of exactly how judges use s. 39 of the *YCJA*, and how it is referenced in their decisions. Also, while sentencing outcomes may differentiate across provinces, it was imperative to examine whether or not this variation also existed within the provinces since, as previously mentioned, the *YCJA* maintains that “the sentence must be similar to the sentences imposed in the region on similar young person found guilty of the same offences committed in similar circumstances” (Roberts and Bala 2003: 405).

The following chapter describes both the quantitative and qualitative findings from this research. The quantitative section reports the findings of bivariate analyses

done and other descriptive characteristics of the analyzed cases. In the qualitative section, a more in-depth approach is taken to look at the problems and the themes found within appeal cases in which s. 39 had a place in the argument for the grounds to appeal. Many themes were found within the cases, however only the most prominent and repeated themes are discussed below as they appear to be the most relevant. Additionally, while many cases were analyzed, only the cases which fell into the prominent categories, or had unusual or highly problematic circumstances are discussed. Problematic cases are those in which the judges raise questions or concerns about s. 39, and/or in which someone within the judicial system (i.e. the Crown or Defense lawyers, or the judges) had problems implementing s. 39.

Chapter 5

Quantitative & Qualitative Research Findings

Quantitatively Descriptive Findings

The discussion below shows some of the descriptive characteristics found in the cases in which s. 39 was considered during sentencing. The cases used in this part of the study are reflective of the appellant case law analyzed in a later chapter. These findings show what types of charges commonly lead to the consideration of custodial sentences, as well as descriptive characteristics of the accused. The original intent of this study was to examine if there were any other predictive variables (i.e. Other than the ones listed under the *YCJA*) that were able to demonstrate a predictive pattern of sentencing. However, due to the large amount of missing data, this was not possible. Therefore, the bivariate analyses discussed below, although limited, are the only meaningful quantitative outcomes available.

First, out of the total 133 cases analyzed quantitatively, sixteen (twelve percent) of the accused were female, while 117 (88 percent) were male, and with the range in age of the accused between fourteen and seventeen years. The average age was sixteen for both male and female accused, and the mode (most common age of accused) was seventeen. This age of the accused, being so close to the age of adulthood (18) may be a reflection of a) older adolescents committing more serious crimes, therefore having more of a possibility of receiving a custodial sentence; b) a reflection of the criminal justice system's opinion that older adolescents should 'know better' and therefore receive harsher sentences; or c) a reflection of a criminal past fulfilling requirements of s.

39(1)(c) (see appendix A) which denotes that if a youth's past record shows signs of repeat offences in which non-custodial sentences did not work, a custodial sentence is an option.

The cases analyzed were all cases in which sentences were being decided. Variables were created to analyze which of the cases where custody was being considered actually met one of the four criteria under s. 39 of the *YCJA*. The first criteria, s. 39(1)(a) is that the offence be considered a violent offence. Of the cases analyzed, 52 percent of the offences were considered to be violent (44 percent for females and 53 percent for males).

S. 39(1)(b) allows the consideration of a custodial sentence if the young person has not complied with a non-custodial sentence. Data from the charge information showed that only 35 percent of the male accused in the cases analyzed and 44 percent of the females were charged with a failure to comply with a previous non-custodial sentence.

Out of the 133 cases analyzed, 63 percent of the male accused had a previous record, while 56 percent of the females did. This shows that because of s. 39(1)(c), the condition that allows consideration of a custodial sentence if the young person has committed an indictable offence and also has a previous record that predicts further non-compliance with a non-custodial sentence.

Finally, in s. 39(1)(d), the legislation says that a condition under which a custodial sentence is appropriate is when the case is considered an 'exceptional' case. Most of the cases (86 percent) were not considered to be exceptional cases. Identifying these cases was problematic since in some cases, the judge did not clearly state why the case was

considered to be exceptional, and this was difficult to track. More insight into exceptional cases can be seen in the qualitative analysis reported later in this chapter.

Ninety-two of the 133 cases analyzed were cases in which the accused received a custodial sentence. The range of length of custodial sentence was between one and fifty-four months⁶, with an average custodial sentence of seven months. It was found that the most common type of sentence received was secure (or closed) custody. Out of the cases that had data available on the type of custody the youth received, 36 percent of the youth who received a custodial sentence were sentences to secure/closed custody as opposed to open or deferred custody. Thirty-five percent of the cases that received custody served it as an open custody, and the remaining 29 percent received either as deferred custodial sentences, or the judge granted them credit for time served, and they received no further custodial sentence. This even distribution of the use of the different types of custody (based on available data) indicates that judges are, in fact, considering what type of sentence would be, in fact, best suited for the offender, and would best promote their rehabilitation, in addition to holding them accountable for their actions with the most minimal, but effective sentence.

Figure 1 shows the breakdown of charges for those accused that received custodial sentences for their offences, split by gender. Since the tracking schedule consisted of space for five possible charges for each one accused, the data are indicative that some persons were charged with more than one crime. Eighty-three men received custodial sentences, and nine women did. Twenty-four of the men were charged with at

⁶ Although the maximum sentence under the *YCJA* is 36 months, in *R. v. B. (A.A.)* [2006], the young offender was found guilty of criminal negligence in operation of motor vehicle causing death, and flight in motor vehicle from pursuing police officers causing death and received an adult sentence of 54 months incarceration concurrent on both charges.

least five crimes, as were three women. If an accused was charged with five or more crimes (which occurred in only a few cases), only the five charges which the researcher felt were most crucial to the case were used in analysis. Some of the charges have been combined, such as manslaughter and all types of murder were grouped as 'homicide;' all types of physical assault charges (i.e. Aggravated, with a weapon) were grouped as 'assault;' sexual assault charges were grouped as 'sexual assault;' 'property charges' includes theft, break and enter, arson and robbery; breach of non-custodial sentences includes failure to comply with undertaking, recognizance, court order and probation, and 'other' includes everything else that does not fit into one of these categories, or drug, traffic or weapons charges. Figure 1 shows the charges for which young offenders received a custodial sentence. The number at the top of each column represents the number of accused who received a custodial sentence. The figure is a count of which charges the accused received custodial sentences for. The Total N is so much larger than the N=83 for the males because many were charged and convicted of multiple offences, and sentenced to custody for multiple offences. It is evident that similar to the research outlined by Reitsma-Street (2001), out of the charges that were given custodial sentences, breaches still remain at the top, with a higher percentage of custodial sentences being given to noncompliance sentences than violent offences.

Figure 1. Charges for which Young Offenders Received Custodial Sentences by Gender

Type of Charge	Female N=9		Male N=83		Total N=92	
	N	%	N	%	N	%
Homicide	0	0.00%	7	3.02%	7	2.83%
Assault	0	0.00%	27	11.64%	27	10.93%
Sexual Assault	0	0.00%	3	1.29%	3	1.21%
Property	2	13.33%	49	21.12%	51	20.65%
Breach	10	66.67%	58	25.00%	68	27.53%
Drug	1	6.67%	7	3.02%	8	3.24%
Traffic	0	0.00%	17	7.33%	17	6.88%
Weapons	0	0.00%	12	5.17%	12	4.86%
Other	2	13.33%	52	22.41%	54	21.86%
Total*	15	100.00%	232	100.00%	247	100.00%

*The total for the columns is more than the number of accused because some of the accused received custodial sentences for more than one charge.

Originally, analysis was going to be done on cases both between, as well as within provinces to find out if there were any notable differences. However, due to the large quantity of missing data, as well as the wide distribution between provinces, this analysis could not be completed.

Appeals

The appeals in this research were separated from the rest of the case law, and analyzed qualitatively. There were seventy-seven appeals in total that were analyzed. Some of these were very insightful and relevant, while others, during analysis, were found to have little or nothing to do with s. 39, especially regarding how it was used in the appeal. When analyzing, the intention was to look for trends in how s. 39 was being considered and verbalized in the judges' decisions. Some common issues were found while reading the cases and some themes emerged related to the problems that come with imposing a custodial sentence under s. 39. The appeals were handled separately from the non-appeal cases mainly because the appeals were missing a variety of data since they discussed the cases themselves and not the accused themselves or the specific circumstances of the case. Also, the non-appeal cases did not include as much in-depth qualitative data as the appeal cases which discussed the issues surrounding sentencing. Therefore, in the appeals, judges were more descriptive in their analysis and consideration of s. 39 and the issues it created in sentencing. Some cases showed the judges largely considering s. 39 as part of their sentencing decisions, while in other cases, it was merely mentioned and did not seem to have much impact on the sentencing. The manner in which appeal court judges discussed s. 39 is outlined below.

Definition of an Appeal

The following section examines appeal cases in which s. 39 was considered. Before we can look at how s. 39 was used in appeals, it is important to define and understand what an appeal is. The following is an excerpt from an appeal which defines

what constitutes an appeal case, and on what grounds an appeal can be made. In short, an appeal is an argument by one of the parties involved contending that the judgment and/or sentence imposed by the judge in the original trial was flawed in some way, usually based on interpretation or implementation of the legislation. In one case the judge stated:

An appellate court may vary a sentence if it is demonstrably unfit, or where there has been an error in principle, a failure to consider a relevant factor, or an overemphasis of appropriate factors: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at para. 90; *R. v. McDonnell*, [1997] 1 S.C.R. 948, 114 C.C.C. (3d) 436 at para. 46. The approach with respect to fitness is one of deference. To justify appellate intervention, the sentence must be demonstrably unfit, that is clearly unreasonable or excessive or inadequate. As stated by the Supreme Court in *R. v. M.(C.A.)*, supra at para. 92, an appellate court's role is limited to "reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada". See also *R. v. Shropshire*, [1995] 4 S.C.R. 227, 102 C.C.C. (3d) 193 at paras. 46-50; *R. v. McDonnell*, supra at paras. 15-16. (*R. v. C.D.* [2004])

The most common grounds for appeal are either a) a misinterpretation of the legislation, or b) error in principle. The following section examines examples of some of the appeals that were qualitatively analyzed which were repeatedly found. First, there was considerable discussion and debate about what constitutes a serious violent offence, and whether charges such as sexual assault, robbery or arson are inherently violent, and whether or not they satisfy s. 39(1)(a), thereby justifying a custodial sentence. Other problems regarding s. 39 in the appeal cases surrounded definitional issues, as well as conflicts with other sections of the *YCJA*. Some appeals revolved around the interpretation and definition of what constituted an 'exceptional case,' thereby fulfilling s. 39(1)(d), and allowing the judge to deem a custodial sentence as appropriate. Finally, in some appeal cases, the appealing party argued that a custodial sentence was not

appropriate in the case at hand due to the accused's family background or life history. As seen in some of these cases, just because an offence satisfies one or more of the conditions of s. 39, sometimes based on other subjective variables, a youth is still given a non-custodial sentence if it is held that it is more appropriate. On the other hand, in some cases, cases are deemed 'exceptional' and despite no other conditions of s. 39 being satisfied, a youth may still receive a custodial sentence for their crime if seen as appropriate under the circumstances.

Definition of a 'violent offence'

The most prominent problem found in the appeals that were analyzed were the issues surrounding the definition of a 'violent offence.' Under s. 39(1)(a), it is said that one of the determinants of whether or not a custodial sentence can be imposed is if the young person has committed a violent offence. However, the Act does not state specifically what constitutes a 'violent offence'. A 'serious violent offence' is defined in s. 2(1) of the *YCJA* as 'an offence in the commission of which a young person causes or attempts to cause serious bodily harm'. However, a 'violent offence' is not specifically defined. It can be argued that it is not appropriate to base the definition of a 'violent offence' solely by referring to the definition of a 'serious violent offence' as outlined in the *YCJA*. Additionally, in *R. v. C.D.*, *R. v. C.D.K [2005]*, the judge argues that the definition of a 'violent offence' under the *YCJA* should be narrowly constructed since the intent of the *YCJA* is to limit how many young offenders are sentenced to custody, and to reduce the amount of subjectivity and interpretation needed on the part of the judges. However, because a violent offence is not defined in the *YCJA*, it remains up to the

judges to determine what constitutes a 'violent offence' and satisfies s. 39(1)(a) of the *YCJA*, allowing custody to be considered an appropriate sentence.

This is problematic as it leaves this condition open to interpretation, and subject to being used differently by different people and different courts. The difficulty of what constituted a violent offence had a wide variety of occurrences in the appeals. In some cases, it was argued that while sexual interference is inherently a violent crime, it does not meet the standard that most people within the court system use to define an act as violent. Other crimes that were debated as to whether or not they were violent crimes included trafficking cocaine, which was argued to cause the buyers to act in a violent way thus perpetuating violent behaviour by trafficking the drug, as well as break and enter. In one of the appeals, it was argued that again, while a break and enter may seem inherently violent, it cannot be defined as such unless there is a victim of a physical assault; otherwise, it remains defined as a property offence. Another charge that was not deemed to be a violent offence, but may be considered by some people as a violent offence, is accessory to murder. As discussed in *R. v. R.E.W.* [2006], s. 39(1)(a) did not consider all offences in the Criminal Code, the most serious offence missed being an 'accessory after the fact to murder.' Therefore, since this was a youth accused that was an accessory to an adult accused, but he had not actually committed a violent offence, by definition, he should not have been sentenced to six months secure custody as he was. However, the judge determined that due to the youth's age, his dishonesty to the police and the magnitude of the case, this was an 'exceptional case' and therefore satisfied s. 39 1(d) and the youth could be sentenced to custody. The appeal in this case was dismissed, and the custodial sentence was upheld.

Also left open for subjective discretion of the judges was determining whether or not a violent offence had actually occurred making custody a possible sentence. Some judges felt that the crime need only be considered violent, while others tried to determine whether or not it was a 'serious violent offence.' While the legislation only says that a 'violent offence' need be committed to consider a custodial sentence, some judges in the analyzed cases interpreted a 'violent offence' dependent on the definition given of a 'serious violent offence.' Therefore, there was argument around what was and was not a violent offence, and further, whether or not the violent offence was serious. This problem may be a result of discretion on the part of the judges; however, it seems that it is likely that the problem is a direct result of confusion in the wording used in s. 39.

In *R. v. C.D.; R. v. C.D.K.* [2005], the judge discusses the definition of what constitutes a violent offence, and determines that any offence in which the offender has the intent to, threatens to, attempts to or actually harms another individual should be considered a violent offence. The judge also suggests that having a fault-based definition of a violent offence is more consistent with Canada's youth justice system than a harm-based approach. Also, it is stated that a fault-based does not only measure the amount of harm resulting from the offence, but instead the intentions of the accuser. This approach allows for a better understanding of the nature of the offence and of the offender when deciding whether or not a custodial sentence is appropriate, while a harm-based approach focuses more on the outcome (or the level of harm caused), and not the intent, rationalization or thought processes that went on behind it. As Roach (2003) points out, however, "it may be unfair to hold the offender accountable for unforeseen harm" (973). Therefore, this debate continues between individuals who believe that intent is enough to

classify an offence as violent, and those who do not. In *R. v. C.D.*, *R. v. C.D.K.* [2005] the young offenders plead guilty to multiple charges including arson to property offences and a dangerous driving offence. The appeal in this case is based on the argument that an offence should not be considered violent based only on a *possibility* of harm to another individual, but on whether or not bodily-harm is actually caused. Again, the problem arises as to which approach is more appropriate – a harm-based approach of a force-based approach. Without solely relying on physical bodily harm, it is difficult to place a concise definition of ‘violence’ if one begins to include other factors such as intent, or possibility.

In *R. v. C.D.* [2004], the judge states that “the definition of a violent offence must exist within both the common sense meaning attributable to the phrase and the purpose and scope of the Act” (at para. 35). The judge also argues that first, the definition must be narrow to avoid the possibility that many offences be considered violent unnecessarily. Additionally, thus judge also argues that a ‘violent offence’ is something different than a ‘serious violent offence,’ and encompasses many more charges. Therefore, the problem lies in which charges should be considered to fall into the ‘violent offence’ category. Basing it simply on intended bodily harm makes it too vague, and therefore, a narrow, specific definition is necessary.

Sexual Assault as a Violent Offence

Under Canadian law, a sexual assault is defined as any act in which a person forces any sexual act, either directly or indirectly, on another person without consent. There is large debate over whether or not a sexual assault is inherently violent and should be considered a violent offence by nature, regardless of the presence of, or lack of bodily

harm. In *R. v. T.W.C.* [2006], the judge determined that the sexual assault that took place was indeed to be considered a violent offence, and therefore a custodial sentence was appropriate. In *R. v. T.W.C.* [2006], the judge emphasize that one of the main principles of the *YCJA* is that the sentence imposed promote a sense of responsibility in the young offender for what they did. The judge classified the sexual assault as a violent offence, and considered extrajudicial measures but found them to be inappropriate. Therefore, to promote responsibility in T.W.C. for what he did, the judge determined that a custodial sentence would be most appropriate. However, this was not the occurrence in all cases involving sexual assault charges. In some cases, even when a sexual assault took place, the judge determined that it was not a violent offence since no ‘serious harm’ had been done to the victim, physically.

In *R. v. B. (K.G.)*. [2005], the judge determined that the sexual assault that took place did not constitute a serious violent offence as defined in s. 2(1) of *YCJA*. Depending on this definition, the judge felt that the offence did not satisfy s. 39(1)(a) of the *YCJA*, even though it states a ‘violent offence,’ which is different from a ‘serious violent offence’ as defined in the introduction of the *YCJA*. Therefore, the two perpetrators received probation sentences after pleading guilty to the offence. The judge determined that this was not an exceptional case as defined under s. 39(1)(d) and therefore custody was not an available sentence. However, the Crown appealed on the allegation “that the youth justice court judge erred in principle in his interpretation of the provisions of s. 39(1)(d) of the *Youth Criminal Justice Act* thereby leading to the exclusion for consideration of the provisions contained therein in arriving at a proper sentence and in doing so arrived at an unfit sentence.” The appeal was allowed, and the

sentences were overturned. In turn, the young offenders received secure custodial sentences.

In *R. v. J.A.* [2004], the accused was sentenced to custody after being found guilty of sexual assault for having sexual intercourse with a fifteen-year-old girl⁷. This was considered to be a violent offence by the judge who in turn imposed custody. However, the accused made an application to be released from custody and argued that he was new to the country, did not know that this was illegal, and had made significant progress since the incident by taking part in a program on sexual behaviour propriety. The application was allowed, and the accused was released from custody, on the basis that there would be far more counseling and programs for him to take part in from the community, as opposed to being incarcerated. This shows the problem with being of the opinion that all sexual assaults are violent, resulting in a custodial sentence having to be appealed at a later date. Instead of making the assumption right away that all sexual assaults are violent, judges need to take the time to determine whether or not each incident is violent in itself.

Robbery as a Violent Offence

In some cases, (*R. v. M. (A.M.)* [2003] and *R. v. M. (B.)* [2003]), it was the Crown who appealed the sentence. In both cases described in this section, it was argued that the sentence was too lenient, and since at least one of the conditions of s. 39 were met, custody should have been used as a sentence since it was available, and appropriate in the

⁷ The accused was not charged with sexual interference because the victim was over the age of consent, and he was also 15 at the time. He was charged for sexual assault for a sexual act that took place under the influence of alcohol at a party. The accused related to the court that he did not fully understand the ways in which men and women communicate their affection for each other in Canada, and that he was sorry.

cases. In *R. v. M. (A.M.)* [2003], the Crown argued that the sentence was not harsh enough, and that the “accused was not entitled to leniency.” The argument made was that due to the personal circumstances of the accused, and because of the seriousness of his offences, a sentence of probation would be inconsistent with the principles of the *YCJA*. The Crown argued that a sentence of only probation was an err on the part of the sentencing judge, and did not implement s. 38 and s. 39 properly. It was determined that because of the young offender’s history, and because robbery should be considered a violent offence, a custodial sentence was appropriate, and a non-custodial sentence would not be effective for the youth. Therefore, the appeal was allowed, and the sentence was changed from eighteen months supervised probation to six months custody and supervision, and twelve months supervised probation, as well as restitution.

In *R. v. C. (J.J.)* [2003], the youth pleaded guilty to breaking and entering into a dwelling, and numerous other charges. The youth was sentenced to three months secure custody, and twenty-one months probation. However, during the appeal, it was argued that custody was not an appropriate sentence since the youth did not meet any of the criteria listed under s. 39(1) which make custody available. The defense argued that “Home invasion cannot prima facie be characterized as violent offence within meaning of s. 39(1)(a). Home invasion may be a violent offence if evidence presented at trial proves existence of bodily harm of more than transient or trifling nature. There was no evidence of bodily harm on facts of this case. Custodial sentence was no available option.” Therefore, the appeal was allowed and the sentence was varied to 2 years probation for each offence.

Considering Offences with Potential Risk to Humans as Violent

For the purposes of this section, the consideration of drug charges, arson charges and driving charges as violent crimes were combined. This was done because they all share a common debate – whether or not they should be considered violent crimes because of the potential risk they create to humans. In other words, some judges in the appeals stated that drug charges should be considered violent since they have the potential of creating addictions to drugs which may in turn cause violent behaviour to occur. The same argument was made regarding dangerous driving. Additionally, some Crown Prosecutors argue that arson should be considered a violent offence for the same reasons. In *R. v. C.D.* [2004], the sixteen-year-old male accused was sentenced to six months deferred custody for a charge of arson. The appeal was entered on the basis that “none of the factors required to impose a custodial sentence had been established by the Crown.” However, at sentencing, the trial judge determined that in this case, arson should be considered a violent offence. The respondent Crown argued that the act of arson may, for some people, constitute violence against property. However, the Crown also states that even if people do not believe that to be true, the risk of harm to persons through the act of arson is reasonably foreseeable, and therefore arson should be considered a violent offence. In *R. v. C.D.K.* [2004], the sentencing judge “determined that the gate to a custodial sentence was opened under s. 39(1)(a) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (the “Act”), classifying dangerous driving as a violent offence. She concluded that “the violence of a car, speeding through the city chased by the police is, by anyone’s definition, violent.” The appellant in this case argued that a dangerous driving charge should not be considered violent since no one was injured. However, the judge dismissed

the appeal and stated that “In this instance the potential for harm is obvious. High speed chases are very dangerous and can easily result in serious injury or death. (The judge) therefore conclude(d) that the sentencing judge did not err when she determined that the offence was violent and that a custodial sentence was available.”

Definitional Issues & Conflict with Others Sections of the YCJA

Another problem with s. 39 that came out of both the sentencing cases as well as the appeals pertains to a definitional argument. This is apparent through definitional problems between sections of the Act, as well as provisions which conflict within the Act, possibly leading to difficulty in imposing a sentence which meets all of the requirements of the Act, and abides by all provisions.

As shown in case *R. v. M.S.* [2005], there is a debate as to how many non-custodial sentences must be breached before it is decided that non-custodial sentences are not appropriate for the individual. According to Nicholas Bala (as cited in *R. v. M.S.* [2005]; *R. v. J.E.C.* [2004]), at least two breaches of non-custodial sentences must occur before this subsection’s requirements are fulfilled. In other words, if a youth does not meet any of the other criteria for receiving a custodial sentence, and has only breached a non-custodial sentence one time, they should still be given a proportionate and reasonable non-custodial sentence. However, if they have failed to comply with numerous non-custodial sentences, but do not meet any of the other provisions listed in s. 39, a custodial sentence should be seen as appropriate. Again, this lack of clarity leaves room for interpretation and large amounts of discretion⁸ for the sentencing judges. Another

⁸ Roberts and Bala (2003) “conclude that the *YCJA* facilitates a more uniform treatment of young offenders, though the courts will continue to exercise considerable discretion” (395).

problem with the interpretation of s. 39(1)(b) is evident in the case *R. v. J.B.W.* [2004]. In this case, the young offender pleaded guilty to charges of transportation fraud, possession under \$5000, a breach of an undertaking and a breach of probation. The youth was sentenced to restitution, community service, and probation, despite having breached a non-custodial sentence. The appeal was based on the argument that the judge erred in their interpretation of s. 39(1)(b), and the appeal was allowed. The judge in this case contended that the youth's previous sentence was not a non-custodial sentence since he was sentenced to probation and open custody, therefore determining it to be a custodial sentence, thereby not fulfilling s. 39(1)(b). The appeal was allowed, however, custody was not imposed, even though it was found to be an available sentence, due to the length of time that passed and the youth's development in that time.

Escaping from custody is an offence that is problematic in sentencing under the *YCJA* because although the young offender has escaped from custody, unless they have committed a violent offence or the case is deemed exceptional, they have not fulfilled any of the criteria required as per s. 39(1) eliminating custody as an available sentence. This is seen in *R. v. A.D.H.* [2004] where the young person escapes from custody, but the judge is technically unable to impose a custodial sentence because no criteria of s. 39(1) have been fulfilled. The judge states that even though his decision to sentence the offender to custody anyway may be considered an 'illegal' one, it is his only decision because no other sentence would be consistent with the Preamble of the *YCJA*.

In *R. v. C.C.A.* [2004], a conflict can be seen between s. 39 and s. 38. In this case, the accused young person pleaded guilty to several charges of breaking and entering, theft, joyriding and failing to comply with his sentence. The judge determined that a

custodial sentence was not appropriate as the youth already spend four and a half months in pre-sentence detention. The appeal was based on the argument that since the judge took the young offender's pre-trial custody into consideration, the sentence was custodial in nature. It was argued that this was not justified since the crimes committed did not lend the youth to be sentenced to custody, and that the case was not considered to be exceptional in any way. However, the appeal was dismissed on the basis that the sentencing judge did not, in fact, sentence the youth to custody, and that the judge was required to take the pre-trial detention into consideration as per s. 38(3)(d).

Similar to this, in *R. v. B.(T.)* [2006] the judge imposed a 33 month sentence on the young offender for robbery and disguise with intent taking into account the youth's pre-trial custody. However, the judge also sentenced the young offender to time served for trafficking since the young person had spent six months in pre-trial custody. However, when these sentences were added together, the total sentence was 39 months (including pre-trial custody) which exceeds the 36-month maximum specified in s. 42(15) of the *YCJA*. Therefore, although the judge was required to take into account the young persons pre-trial custody as per s. 38(3), the sentence was still too lengthy, although the judge felt it appropriate, and it conflicted with s. 42(15). Therefore, the appeal was allowed and the sentence was changed to 36 months total (including pre-trial custody). While the Preamble of the Act states that the sentence must be appropriate and promote rehabilitation, the judges are limited in what they can impose. Difficulty may be experienced in trying to impose a sentence that is appropriate and also consistent with all of the sections and provisions in the *YCJA*.

In *R. v. B.W.P.* [2004], it was argued by defense counsel that the custodial sentence which the youth received for manslaughter (justified by the judge's determination that it was a serious violent offence) was a violation of the youth's rights. "In his cross-appeal, BWP argues that the serious violent offence determination (the SVO determination) breaches s. 11(i) of the Charter of Rights and Freedoms (the Charter). S. 11(i) entitles a person found guilty of an offence to the benefit of the lesser punishment where the punishment for the offence has been varied between the time of the commission of the offence and the time of sentencing. The *YCJA* came into effect after BWP's guilty plea but before the sentencing. BWP contends that the SVO determination is greater punishment and therefore offends s. 11(i) of the charter." This appeal and cross-appeal were dismissed. The judge did not base his sentence on deterrence, which is not an appropriate justification for sentencing under the *YCJA*. Instead, the judge concluded that a one-day custodial sentence was appropriate, and followed the goals of the *YCJA* to promote rehabilitation, reintegration and accountability.

In *R. v. C.N.* [2006], the young offender and his co-accused stalked a victim, and then violently stabbed him with a box cutter. The young offender was seventeen at the time of the offence, and had no prior record. Based on s. 39(2), which states that a custodial sentence should only be used as a last resort, the judge imposed a sentence of two years probation on the youth. The Crown, however, appealed on the basis that despite the judge's feelings that the youth deserved a non-custodial sentence, the fact was that the aggravated assault that took place was a serious violent offence, thereby fulfilling s. 39(1) of the *YCJA*, allowing custody as an available sentence. The appeal was allowed, and that youth's sentence was changed to include custody. This illustrates that depending

which section judges take into account during sentencing the outcome may look very different.

Consideration of Offender's Criminal History and Family Life

S. 38(2)(d) of the *YCJA* states that special considerations in sentencing should be given to Aboriginal⁹ offenders. “Special attention to the circumstances of Aboriginal offenders is mandated by the last-minute amendments to the *YCJA* initiated by the Senate” (Roach 2003: 983). An example of this consideration is seen in *R. v. D.R.S.* [2006], in which a fourteen-year-old male was appealing his sentence for drug charges. The youth plead guilty to trafficking, possession for the purposes of trafficking and breach of probation and was sentenced to four months in secure custody followed by two months of community supervision. This sentence was appealed, and the disposition was varied to one year probation. The judge stated that this was an appropriate variation given the “given the extreme youth of this aboriginal offender.”

In *R. v. B. (T.L.)* [2006], the sixteen-year-old accused did not meet any of the requirements of s. 39, and the judge acknowledged this. However, the judge determined that he was a flight risk, deemed the case to be exceptional, and therefore sentenced him to six months secure custody. The sentence was appealed based on the argument that s. 39 was not satisfied and therefore, custody could not be imposed, however, it was determined that “Mr. B. has failed to meet the requirements of s.679(4) of the *Criminal Code* and therefore will not be released on bail pending his appeal” (14).

In *R. v. C. (F.C.)* [2004], the accused plead guilty to assault, and was sentenced to a two-year custody and supervision order, and one year supervised probation. The appeal

⁹ See Roberts & Bala 2003: 410

was based on the argument that the sentence was too harsh, and did not fall within the principles of the *YCJA*. However, the appeal was dismissed since the crime met three out of the four requirements of s. 39(1), and therefore, custody was an available sentence. It was determined that the sentencing judge had appropriately taken into account the accused's lengthy and serious criminal record, his difficult personal background, the lengthy period of time he spend in pre-trial detention, the nature of the violent offence, and the youth's remorse and acceptance of responsibility based on the accused's guilty plea. A two-year custodial sentence was determined, during the appeal, to be appropriate and meaningful to the youth considering his record and violent behaviour, and that a more lenient sentence would not help with his rehabilitation and reintegration into society.

Exceptional Cases

In some cases, custody can be deemed an appropriate sentence based on the provision that the circumstances were exceptional in some way. For this to occur, the judge must justify why they consider the case to be exceptional. This is a subjective judgment since it is left up to the judge's discretion as to what he or she feels can be considered exceptional circumstances. In most cases, the judge's determination of an exceptional case was based on either the number/type of charges, or the young offender's history (i.e. family life or medical conditions). To follow are examples of cases deemed to be exceptional because of their circumstances, and a discussion of what the exceptional circumstances were, and how they affected the outcome of the case. In these cases, since they were determined to be exceptional, and consistent with s. 39 1(d), a custodial

sentence was an available sentence for these cases, should it be found to be an appropriate one.

R. v. J. (C.D.) [2005] is a case in which the judge found the case to be exceptional and sentenced the youth to six months deferred custody for obstructing a police officer and trafficking in cocaine. The accused was 16 and had a prior record. During the appeal, it was argued, and shown, that the accused did not commit a violent offence, did not breach a non-custodial sentence, did not have a related prior record indicating a pattern of recidivism, and was in no way exceptional. Therefore, since the youth did not meet any of the required criteria under s. 39(1), custody was not an available sentence. Based on this argument, the appeal was allowed and the sentence was amended and the custodial portion was set aside. This was also found in *R. v. R. (N.)* [2005], in which the appeal was over turned because the judge was not clear in their description of the exceptional circumstances, and therefore the custodial part of the sentence was also set aside and the youth received eight months community supervision for the break and entering charges and the breaches he was convicted of. Additionally, in *R. v. M.J.S.* [2004], the appeal is allowed and the sentence given a young person's charges of theft (of a pepperoni stick) and failure to keep the peace was quashed based on the accused's argument that "the trial judge did not go on to elaborate what she considered to be the exceptional and aggravating circumstances in this case which warranted custody" (at para. 24). Since the judge did not properly qualify their consideration of the offense as 'exceptional' as set out in s. 39(1)(d), the appeal was allowed.

In some cases, such as *R. v. L.R.P.* [2004], it was not the circumstances or the accused that the judge determined to be exceptional, but instead the charges that were

exceptional. In this case, the youth was a fourteen-year-old first time offender who was convicted of six property related charges, and being unlawfully at large on an undertaking. “The judge considered the property offences exceptional and violent either because they were violent or because of their deleterious effects on the victims.” Therefore, the youth was sentenced to ten months secure custody and supervision, and two years supervised probation. The custody part of this sentence was removed after this appeal was allowed, on the basis that the judge erred in their decision, demonstrating “an impermissible preoccupation with denunciation and deterrence.”

If there are no guidelines as to what can be considered exceptional details, and what can not, how can a judge make a judgment based on the idea that the case was exceptional? It seems as though s. 39(1)(d) becomes almost a ‘catch-all’, or a way to impose a custodial sentence should the judge see it fit and appropriate. For example, in *R. v. R. (N.)* [2005], a judge considered a case in which an accused was charged with two indictable offences¹⁰ (breaking and entering) and six summary offences (breaches) to be exceptional. However, the appeal judge found that the sentencing judge erred by applying s. 39(1)(d) to summary offences. The appeal judge did not feel that the trial judge had adequately justified why he felt the case should be considered exceptional, and allowed the appeal. The youth’s sentence was reduced from sixteen months secure custody to one year probation. However, this is problematic since no where in the *YCJA* does it state that s. 39(1)(d) could not account for summary offences; s. 39(1)(d) refers to exceptional cases where the young person has committed an indictable offence, (and/or) the

¹⁰ An Indictable offence is “An offence which the accused must, or has the right to, choose between a trial by judge and a trial by jury, with the exception of a few minor offences,” and a Summary conviction refers to “minor offences tried on the basis of the information without other pretrial formalities” (Goff 2001: 462, 464)

aggravating circumstances of the case are such that a non-custodial sentence would not be appropriate. I use the term and/or since the *YCJA* does not state whether both of these conditions must be met or only one of them (see Appendix A). This may cause difficulty in a judges' understanding of the legislation. This can be seen in the above case where the appeal judge understood the legislation as meaning that s. 39(1)(d) only applies to indictable offences. However, the sentencing judge felt that although they were summary charges, a non-custodial sentence would not be consistent with the purpose and principles of the *YCJA*.

If no criteria exist as to what constitutes an exceptional case, and a judge can argue their perception of the crime as an exceptional case, then custody becomes available. To avoid this, and the possible misuse or over-reliance of custody, and the possible influence of a judge's biases, criteria should be laid out as to what constitutes exceptionality, and what does not, and sentencing options should be considered accordingly.

Other Themes found within Appeals

Another theme found within the appeals was that some sentences were overturned because they did not follow the principles of the *Youth Criminal Justice Act*. The purpose of the Act was to promote rehabilitation and reintegration into society for youth by applying a proportionate and reasonable sentence. However, in some cases, it was argued that the sentence demeaned the Act and undermined its principles. For example, in one case *R. v. T. (C.)* [2005] the young offender pleaded guilty to assault with a weapon, forcible confinement, possession of prohibited firearm, breach of undertaking and assault.

The young offender was sentenced to a 12 month custody and supervision order (8 months open custody and 4 months community supervision). During sentencing, the judge said that the sentence was necessary to denounce the accused's conduct. This sentence was overturned and was changed to fifteen months probation. The lawyer argued that the trial judges erred by making denunciation a principle of sentencing under the *YCJA*, when in fact, denunciation is not implied in the legislation. Therefore, by imposing a custodial sentence with the purpose of denunciation, it was argued that the trial judge did not adequately consider the principles outlined in the *YCJA* regarding rehabilitation and reintegration. In this case, the appeal was allowed.

Another problem lies in the wording of s. 38(3)(d) in which there is no clear explanation of how the judge is to take the time spent in custody into account. In fact, under the *YCJA*, the sentence of time served is not an option. However, in s. 38(3)(d) it states that judges are to take time served into account, but does explain the extent to which it should be taken into consideration since time served is not an available sentence. In *R. v. K.D.T.* [2006], the appeal was granted because it was argued that the court was required to take time served into account when determining a youth's sentence. It was determined that the judge by not taking the accused's pre-trial time in custody into consideration, as stated in s. 38(3)(d) and therefore, the sentence was made to be served concurrently instead of consecutively. However, this is not the case since s. 38(3)(d) does not make inclusion of pre-trial custody time a mandatory inclusion into sentencing, therefore, this argument was in (error). Similarly, this also occurred in *R. v. B. (T.)* [2006], in which the accused was convicted of robbery, having his face masked while committing robbery, trafficking in cocaine, breach of bail conditions and failing to attend

court, and was sentenced to a total of 39 months (including time-served). It was argued that this did not coincide with the purpose of the *YCJA* to issue fair and appropriate sentences, and that it “exceeded the 36-month maximum set out in s.42 (15) of the *YCJA*”. Additionally, in *R. v. R.M.* [2003], counsel for the accused argued that just because s. 38(3)(f) exists, and it says that time spent in pre-trial custody must be considered, “the phrase ‘take into account’ does not require a particular account be taken, but rather that time served shall be considered as a factor going to sentence.” In other words, this subsection requires that time-served be taken into account, but does not show any direction or impose any formal instruction as to how the judge should consider it, and whether or not they have to incorporate it into the youth’s sentence. Therefore, it is up to judges and their discretion as to whether or not the time a youth has already spent in custody should be reflected in their sentence.

In *R. v. B. (B.K.)* [2005], a sixteen-year-old male accused plead guilty to a series of charges which included theft, cocaine trafficking, failure to attend court, and obstruction of justice. He was sentenced to twelve months global custody based on the judge’s decision that his eleven prior convictions demonstrated a pattern of behaviour, and therefore under s. 39(1)(c) of the *YCJA*, a custodial sentence could be imposed. However, it was argued that in order to demonstrate a pattern of guilt, there must be some regularity or consistency with other cases similar to the offence the youth is charged with. Just looking at the youth’s prior record without any sort of demonstrated pattern is not enough reason to impose custody. In this case, it was evident from the youth’s criminal record that the seriousness of his charges was escalating, and there was a significant history of non-compliance. The youth continued not to comply with court orders and

procedures, leaving the judge no choice but to impose a custodial sentence, and did not err in doing so. In some cases pre-trial custody was considered, and in other cases, it was not. There was no consistency as to whether or not pre-trial custody should be taken into consideration when sentencing, and, if it is, what the youth should be credited with (i.e. double credit, 1.5 credit). “No guidance is given to judges with respect to the ratio of credit to be followed in youth justice courts, although it seems likely that a similar ration (to adults) will eventually emerge” (Roberts & Bala 2003: 413).

In the following case, the argument is made that a young person need not necessarily be found *guilty* of previous non-compliant charges, but that they just must exist. It also suggests that the non-compliance charges do not even necessarily need be related to the current charge as per s. 39(1)(b). Instead, the argument is made that breaches must have occurred, and that is sufficient for a custodial sentence to be considered¹¹.

Whether a young person has failed once, twice or three or more times to comply with the *same* non-custodial sentence does not seem to matter for purposes of counting under section 39(1)(b). Multiple incidents of non-compliance are irrelevant if there is only one non-custodial sentence which has been breached. Nor does it matter if it is the same condition of the same sentence that is breached several times, or, as in J.'s case, different conditions of the same order at different times. The language of section 39(1)(b) is unequivocal in requiring non-compliances of more than one non-custodial sentence... It should be noted at the outset that this view is simply a matter of judicial interpretation of statutory wording that is equivocal. It could be taken either way (*R. v. H. (J.)* [2004] at para. 18, 20)

In *R. v. M.J.S.* [2004], the accused female stole pepperoni and was sentenced to 90 days open custody. In this case, the Crown and defense both suggested that the

¹¹ See also *R. v. B.A.O.* [2005]

accused receive a non-custodial sentence, concurrent with the basis of the *YCJA* to keep youths out of custody for minor offences. “They had also both suggested repeatedly that the legislation did not permit or warrant a custodial sentence. The sentencing judge had imprisoned the accused in part because proper treatment services were not available. Also, the sentencing judge suggested that an earlier conviction for assault provided a basis for incarcerating the accused. This was based on s. 39(1)(a) of the *Youth Criminal Justice Act*, which permitted custody when a young person had committed a violent offence. The sentencing judge also suggested that s. 39(1)(d) of the Act, which dealt with indictable offences, permitted a custodial sentence. The accused had spent about five weeks incarcerated, most of it on remand.” The sentence in this case was quashed due to the appeal. It was said that “the sentencing judge misapplied or misinterpreted every section of the *YCJA* she referred to.” This illustrates the concern that judges still have considerable discretion under the *YCJA*, and that s. 39 is still open to interpretation based on what is considered a violent offence, and if an accused’s prior violent offence can be taken into consideration during the sentencing of another offence.

Conclusion

Out of the seventy-seven appeal cases analyzed, about half (49%) of the appeals were dismissed, while the remaining 51% of the appeals were allowed. The ones that were dismissed were largely based on arguments made for appeals with no basis or factual evidence supporting the argument. However, out of all of the appeals that were allowed, only three¹² of the accused had their sentences modified to include a custodial sentence, which was not part of their original sentence. In *R. v. B. (K.G.)* [2005] the

¹² See *R. v. B. (K.G.)* [2005]; *R. v. M. (A.M.)* [2003]; *R. v. M. (B.)* [2003]

appellant judge determined that the sentencing judge was mistaken by not considering a sexual assault a violent offence. In the other two cases, it was argued that the original sentence was too lenient based on the charges and the circumstances, and the sentences were varied to include custody. More striking, however, is the finding that the majority¹³ (77 percent) of the cases in which the appeal was allowed, the sentences were varied to either a) remove custody from the sentence or b) shorten the custodial sentence. This is a positive finding since it shows that when custody is perceived as being misused in less serious cases, the argument is being made that the young offender would be better dealt with outside of the courtroom. Additionally, this shows that s. 39 may be being put to good use in keeping young persons out of custody, as it was intended to do.

It is apparent that when using s. 39 in sentencing, regardless of how clear and detailed the provisions seem to be, there are still many issues when it is ultimately implemented. In the appeals, many cases were overturned based on disconnect between s. 39 and the sentence implemented. A lot of this disconnect can be attributed to a lack of understanding, and subjectivity during sentencing. The definition of what does or does not constitute a violent offence has a huge impact on sentencing since it either includes or eliminates many cases from custodial sentences depending on the definition and interpretation by the judge, and lawyers. It is possible that judges need even more refined laws further limiting the amount of discretion allowed (or needed) to be used in making their judgments. “In large measure, the (*YCJA*)’s effectiveness in reducing the use of custody will depend on the way that the criminal justice professionals, including and especially judges, interpret and implement the statute” (Roberts 2003: 428).

¹³ Out of the cases in which the appeal was allowed, 8 percent had custody added into their sentence, 77 percent had their custodial sentence either removed or shortened, and 15 percent had changes which did not affect the custodial part of their sentence.

Clearly, the biggest problem with the *YCJA* and s. 39 as seen in the appeal cases is a reflection of the discourse and words used in the legislation. Judges are left to interpret phrases such as ‘violent offence’ and ‘exceptional case,’ in addition to having to decide what ‘type’ of previous records exhibits a pattern of behaviour that likely predicts future non-compliance with non-custodial sentences. Phrases such as this need to be more clearly defined within the legislation, without leaving it up to the judge’s to interpret. However, these problems with the language would not be easy to foresee as they are new to the sentencing of young offenders. Also, instead of using words such as ‘a pattern,’ as Bala points out in *R. v. M.S.* [2005], a clearer, more detailed and descriptive language must be used to instruct judges on how to properly interpret the law and put it in place. As long as this disconnect exists between the legislation and understanding, it will be difficult for those in a position within the criminal justice system to properly understand and implement the legislation as it was meant to be used, as described in the preamble.

Chapter 6

Concluding Remarks

Limitations of Data

There were data limitations that affected the present study. The largest and most obvious problem was the lack of relevant data found in the cases. The research study was originally designed to collect data on thirty-seven variables on each case. However, there was not a single case in which the data for every single variable was found. Most cases were missing data for numerous variables which made analyzing the data problematic. In future studies, if time and resources allow for it, it would be useful to do a pilot study to determine for which variables the data existed, and if the data sought after was not available through the method selected, then it would be wise to find another method to collect the data from another source where more complete and more meaningful data could be accumulated. When developing this study and designing the tracking schedule, a few cases were looked at to determine if it would be possible. However, it is possible that not enough random cases were selected for the pre-test which may have alerted the researcher of the problem of missing data. This problem is a reflection of the fact that case law is not written with the intention of being statistically analyzed. Therefore, there are no guidelines indicating what specific content should be reported, and in what format it should be reported in. So, the case law is not written uniformly, and thus the information and detail provided varied greatly from case to case, both within and across provinces.

In addition to the lack of data, another issue was the irrelevance of the data available, and that most of the cases were not that informative. In many of the written decisions, the judges used ‘one-liners’ in relation to s.39 of the *YCJA*. They would refer to this section, but they (for the most part) did not go into great detail about their consideration of it. In addition, there was not always a lot of detail as to why a case was considered to be ‘exceptional.’ Instead, judges often said ‘this case is considered to be exceptional’ without expanding on their reasons. This made it difficult to do analysis on exceptional cases since the basis for considering a case to be exceptional was often not included.

Another problem was that of examining what extrajudicial sanctions were considered. It turned out that there was little data on this. In most cases, the only other sanction (as opposed to incarceration) imposed was probation, with or without the concurrent penalty of a fine or community service. It often said that extrajudicial measures were considered and rejected, but did not expand on which measures these were, making it difficult to decipher what extrajudicial measures custodial sentences were being considered to be more appropriate than.

Methodological Issues

There were also a number of methodological issues with this study that were not identified prior to beginning the study, and later proved to be difficult, or sometimes impossible to overcome. A list of thirty-six variables was initially created to be tracked through the cases. However, as the research progressed, it was found that important information was not being tracked. Therefore, a variable explaining whether or not the

case was considered to be 'exceptional' (as defined by s. 39 of the *YCJA*) was added early into the study, making it thirty-seven variables tracked for each case.

Information regarding co-accused and victim information was attempted to be tracked, but there was not enough data available to make any sort of conclusions about this information. It should be noted that some cases did involve co-accused offenders, and this at times had an impact on custodial sentences after determining who was more/less responsible, and what sentence the co-accused received. However, detailed information was not available so no meaningful conclusions could be made. Finding a way to add these variables to future research could provide insight into whether or not being co-accused affects a young offender's chances of receiving a custodial sentence for their crime. For example, if a person had access to court data (instead of only written case law), future research could include collecting and comparing sentencing information between the co-accused in a case. This way, it would be possible to study, in greater detail, what differences (if any) exist between co-accused, and which differences impact the consideration/implementation of custodial sentences. Additionally, if more detailed information about the victim were available (i.e. ethnicity, gender, age), it is possible that this may provide insight into whether or not the victim's demographic profile impacts the consideration of sentencing at all. It would also be interesting to study the victim's involvement in the process since a popular extrajudicial measure is a Family Conference, which may involve the victim's participation. It is possible that if this option was considered, but the victim was not willing to participate, it may have an impact on the judge's sentencing decision.

The collection of the data on the degree of remorse and responsibility of the accused was also problematic. In many cases, such as *R. v. C.(F.C.)* [2004] for example, a guilty plea was understood as a demonstration of remorse, and an acceptance of responsibility on the part of the accused. However, this is not always true. In some cases, a guilty plea may be used as part of a plea bargain to get a reduced sentence, and does not always correlate with a measure of remorse and/or responsibility. However, the researcher in this study did not automatically assume that remorse was felt or responsibility was taken when a guilty plea was entered. Instead, the presence/absence of remorse/responsibility was only collected if it was clearly stated in the case law. Additionally, a new sentence, ISSP (Intensive Support and Supervision Program), was difficult to examine since the wording in the case law differed from case to case. Some cases used wording that was clear, for example, “the youth was sentenced to 6 months custody and 3 months ISSP,” while others were unclear, such as “the youth was sentenced to 6 months custody and 3 months supervision.” It was unclear whether the term ‘supervision’ referred to a sentence of ISSP, supervised probation, or something else. This was difficult to interpret for each case since I only had access to the case law, and not the detailed court documents which may have clarified this. Therefore, Supervised Probation was tracked only when those specific words were used in sentencing. If it was unclear what the judge meant during sentencing, only the clearly understood parts were tracked. This is problematic since data were now missing from cases where the sentence imposed on the youth was not clearly worded.

Another methodological problem with the current study is the level of generalizability. Since the cases were collected from the two databases based on limited

search terms, it is difficult to determine what kinds of cases are represented. Also, since it was made clear to the researcher that the cases are put into the databases differently in each province and territory, and it is basically up to the judges' discretion, one must question what cases are actually put into the databases, or if they are part of a certain cohort of cases, with something in common, which separates them from the cases which are not in the databases. In addition to this, the findings are only representative of the cases studied, not necessarily all Canadian youth case law. The number of cases studied was small in comparison to the number of Canadian youth cases that have occurred. However, the sample selection was limited by selecting cases based on their relevance to s. 39 of the *YCJA*. Additionally, not all youth cases are published, further limiting the available number of cases from which the sample was collected.

Analysis could not be done on which types of cases result in a guilty verdict/plea since decisions are only written for cases in which there was a guilty verdict/plea, and not for cases that are stayed. Therefore, this study could not shed any light into verdicts, but only sentences, which is satisfactory for this study because the aim was to look at the ways in which s. 39 is, or is not, being used. However, this would be valuable in future research.

Analysis was going to be done to identify the similarities and differences in the cases and the use of custody among judges, as well as across provinces. However, this could not be done either. The quantity of missing data was far too large, and the results would not be reasonable or useful. This, however, would be interesting to do if it could be completed in a different, more comprehensive way to provide some meaningful data and outcome.

It is important to note that quantitative analysis is not recommended by this researcher on case law since the decisions are not written with the intention of someone studying them, and therefore, a plethora of missing data is the result since they are not all written with the same guidelines and requirements for content. The qualitative analysis was better since qualitative data allowed the researcher to develop themes as the research progressed, and not be limited to the tracking schedule created. However, there were still problems with the qualitative analysis since, in some cases, the original case could not be found and the written appeal did not always provide enough detail into the case to allow for meaningful analysis.

Potential Future Studies

This study provides the framework for many potential future studies. It represents just the beginning of the amount of research that can be conducted on the *Youth Criminal Justice Act*. To start with, a study similar to the one I have undertaken could be done on virtually any section or subsection of the *YCJA*. This would provide insight into how judges are implementing other sections of the *YCJA*, or any legislation. Further research following up on the findings in this study from the analysis of the Appeals could be done to examine whether or not they are actually representative of Canadian case law.

Another potential study would be to examine how separate sections of the Act are related, and how they work with, or against each other. This would aid with the writing of more coherent and complete legislative amendments in the future. Examining how the sections influence and interact with each other would provide a better understanding of how and why judges reach the conclusions that they do regarding sentencing based on the

legislation they are required to follow. For example, s. 38 is considered to be the 'gatekeeper' to s. 39. Therefore, a study of cases in which s. 38 was used may provide insight into what types of cases actually lend themselves to the consideration of s. 39.

A study looking at joint recommendations on behalf of the Crown and the defense would also shed some light onto sentencing, since, as Bala (2003: 493) notes:

The judicial discretion to determining that an act is a serious violent offence is more limited than the discretion held by judges for most sentencing issues. This is because such a determination can only be made on application by the Crown. This limit is important when, for example, joint submissions are made by Crown and defence counsel as a result of plea negotiations. Where an application to have a determination that an offence is a serious violent offence is made by the Crown and conceded in a joint submission, the judge is not necessarily bound by this submission. Notwithstanding such a submission, the judge may decline to determine that the crime was a serious violent offence. However, if, as a result of making a joint submission, the Crown does *not* make such an application under s. 42(9), the judge cannot make a determination that the offence constituted a serious violent offence.

Joint submissions are not always accepted by judges during sentencing since the judges are still bound by the rules of the legislation in place. Therefore, a study looking at cases when the judges had to reject the joint submissions because of the legislation would be interesting to conduct. For example, in *R. v. J.C.N.* [2005], the joint submission was disregarded by the judge whom imposed a harsher penalty. However, this was appealed and later overturned based largely on the argument that just because the judge considered the offender a dangerous person did not give justification to overruling the joint submission to impose a harsher sentence. A study looking at the arguments made by both the Crown and the defense lawyers in these types of cases, as well as the judges' justifications would be interesting.

Another interesting potential study would be to look at cases in which there were more than one accused, and examining how this affects the outcomes of the cases. This would provide insight into whether or not an accused's personal demographics affect sentencing outcome.

Interviews with court personnel (i.e. Crowns, defense lawyers, and judges) may provide more insight into their thought process when considering custodial sentences. It would also allow for more of the researchers questions to be answered instead of depending on case law, in which the data varied from case to case, and much desired information was not included.

Finally, research into the treatment of Aboriginal offenders by the court system would provide an understanding of their struggles and the barriers they face, as well as the efforts being made to reduce the over-representation of Aboriginal offenders in custody. Similarly, looking more in-depth at extrajudicial measures and the ways that they are (or are not) being used would further reveal the ways in which s. 39 of the *YCJA* is being put into practice, and provide knowledge about the methods being used to keep young offenders out of the criminal justice system.

Concluding Remarks

Many problems with the *YCJA* have been examined. Some seem to be resolvable with some ease; for example, the lack of clarity within the Act. Judges repeatedly debated about the definition of a 'violent offence.' By compiling a comprehensive definition of a violent offence, there would be less subjectivity, and judges would not have to rely as much on subjectivity or previous case law. Also pointed out was the problem with

deciding which cases are considered exceptional, and why. If s. 39(1)(d) was more detailed, and specifically outlined what embodies an exceptional case, judges would be better able to implement the Act as it was intended. While it is not possible to completely revamp the legislation every time an issue is raised with it, amendments can be made for clarity if there is a strong demand for it. Obviously not every concern and misunderstanding of legislation can be rectified solely by adding definitions, but legislation has to be clear and concise and provide clarity on its intent so that it can be imposed properly.

While legislation in regard to youth crime has changed over time, it is crucial to examine the legislation that is being replaced, and the legislation that existed before in order to understand what works, and what does not. It is also important to closely follow the new law and study it to examine how the new laws are being put in place, and how they are being practiced. Examining one section of the *Youth Criminal Justice Act* in great detail allows for a display and understanding of how legislation may or may not vary from the Act itself when it is actually put to use. It is also important to acknowledge that if there is a discrepancy between the way the law is written, and the way that the law is used, that this inconsistency must be identified. The discrepancy between policy and practice, if any, must be identified because it is problematic. Out of the research that has been done on the *Youth Criminal Justice Act* in its short time in existence, no studies have examined the use of s. 39 of the legislation in this amount of detail. To examine one part of the legislation thoroughly allows us to better understand, in greater detail, how policy is put into practice. This research attempted to build and expand on previous research that has been done to show the strengths and weaknesses of the *YCJA*, this is just

a different approach, and a more in depth look at one specific section of the Act, as opposed to examining Canadian youth crime outcomes as a whole.

By limiting the cases in which incarceration can be used as a sentence, there should continue to be a decline in incarceration rates of youths in the future. This is a positive pattern since it is the goal of the *Youth Criminal Justice Act* to rehabilitate kids, not incarcerate or inhibit them. The inclusion of prohibitions on the use of custody in youth cases by s. 39 of the *YCJA* is just one of the ways that the justice system is attempting to alleviate the over reliance on custodial sentences for youths, and it thus far seems to be effective. In the 2004/2005 Juristat released by Statistics Canada, it was found that “the incarceration rate (had) decreased by one-third since 2002/2003 and 10% from the prior year. Although the rate has decreased substantially since the implementation of the *YCJA*, the overall youth incarceration rate has been on the decline over the last decade, decreasing 57% since 1995/1996” (Juristat p.9). This indicates that the *YCJA* is contributing to some degree to the reduction of incarcerated youth, and is overall a positive and effective legislation, since it is meeting, at least to some degree, its purpose.

This research has potential to make a valuable contribution in regards to policy implications as it examines how legislation is put into use, and it is the first study to go into such explicit, comprehensive detail of a particular section of the *Youth Criminal Justice Act*. While no solid broad conclusions can be made, insight is given into the fact that there continues to be a lack of understanding, and a difference in implementation of the legislation between jurisdictions, and between judges. If there are other factors, other than just the ones identified in s. 39 of the *YCJA*, being used to determine whether or not

custody is a suitable sentence, these need to be identified, since the legislation aims to set out the criteria in such great detail. Also, excessive variation between judges and across provinces is also indicative of a problematic system, in which maybe the premise of the legislation is not clearly understood. Differences that occurred between cases and within provinces show that there is disconnect between policy, training and practice. While the *YCJA* is very detailed and concise, it still leaves some sections open to interpretation, and leaves the judges some level of discretion. Future research on this section, or any other section of the *YCJA* or other legislation, may identify more problems that exist, as well as to examine and demonstrate the strengths that exist in this legislation. It is essential to thoroughly examine legislation to identify its strengths and weaknesses so that it can be implemented to its full potential, and allow for improvements to be made to it, as well as any future legislation that may be put in place. It also allows for a demonstration of how legislation can evolve over time, in this case, by looking at how the *Youth Criminal Justice Act* responds to the difficulties that existed under the *YOA*. While it is still too early to determine the long-term effect that this law will have on young offenders, this study is a reasonable start. “How we respond to this important legislation – whether we act decisively and deliver sensible justice for youth who never asked to be brought before us, whether we just pay lip service – will determine the type of society we convey to future generations” (Harris et. al 2004: 386). It is said best by the judge in one of the appellant courts when they said that “the remedy must lie with the legislature and not with the courts” (*R. v. A.D.H.* [2004]). In other words, the courts can only impose what is acceptable within the limits of the legislation.. While it can be argued that being too specific in the legislation restricts its use further, definitions for the terms that are used

need to be included so that it can be better understood. It can be argued that providing narrow definitions for such a broad problem is in itself problematic, however, it is evident that a lack of definitions (as is the case in the current *YCJA*) is causing confusion and misuse. Therefore, if there are problems in the practice in the court system, the solution lies in revamping the written law first

Appendix A.
Section 39 of the Youth Criminal Justice Act
(The House of Commons of Canada 2003)

Committal to custody

39. (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless:

- (a) the young person has committed a violent offence;
- (b) the young person has failed to comply with non-custodial sentences;
- (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or
- (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

Alternatives to custody

(2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

Factors to be considered

(3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

- (a) the alternatives to custody that are available;
- (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
- (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

Imposition of same sentence

(4) The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.

Custody as social measure prohibited

(5) A youth justice court shall not use custody as a substitute for appropriate child protection, mental health or other social measures.

Pre-sentence report

(6) Before imposing a custodial sentence under section 42 (youth sentences), a youth justice court shall consider a pre-sentence report and any sentencing proposal made by the young person or his or her counsel.

Report dispensed with

(7) A youth justice court may, with the consent of the prosecutor and the young person or his or her counsel, dispense with a pre-sentence report if the court is satisfied that the report is not necessary.

Length of custody

(8) In determining the length of a youth sentence that includes a custodial portion, a youth justice court shall be guided by the purpose and principles set out in section 38, and shall not take into consideration the fact that the supervision portion of the sentence may not be served in custody and that the sentence may be reviewed by the court under section 94.

Reasons

(9) If a youth justice court imposes a youth sentence that includes a custodial portion, the court shall state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1), including, if applicable, the reasons why the case is an exceptional case under paragraph (1)(d).

Appendix B.
Section 38 of the Youth Criminal Justice Act
(Department of Justice Canada)

Purpose

38. The purpose of sentencing under section 42 (youth sentences) is to hold a young (1) person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

Sentencing principles

- (2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:
- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
 - (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
 - (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
 - (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and
 - (e) subject to paragraph (c), the sentence must
 - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
 - (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
 - (iii) promote a sense of the responsibility in the young person, and an acknowledgment of the harm done to victims and the community.

Factors to be considered

- (3) In determining a youth sentence, the youth justice court shall take into account
- (a) the degree of participation by the young person in the commission of the offence;
 - (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
 - (c) any reparation made by the young person to the victim or the community;
 - (d) the time spent in detention by the young person as a result of the offence;
 - (e) the previous findings of guilt of the young person; and
 - (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

Appendix C.
An Examination of Custody Used For Youth Charged Under the YCJA
Code Book

- 1. Case ID**
The number assigned to the front of the case file for reference purposes
- 2. Case Name**
The title of the given file (i.e. R. vs. M.K)
- 3. Province/Territory**
The province/territory in which the court sessions were held
 1. Alberta
 2. British Columbia
 3. Manitoba
 4. New Brunswick
 5. Newfoundland
 6. Northwest Territories
 7. Nova Scotia
 8. Nunavut
 9. Ontario
 10. Prince Edward Island
 11. Quebec
 12. Saskatchewan
 13. Yukon
 14. Other (indicate location of court)
 99. Don't Know/No Information
- 3a. Name of Court**
- 4. Gender of Accused**
 1. Female
 2. Male
 99. Don't Know/No Information
- 5. Age of Accused**
 - Indicate Age of the Accused in *years* at the time of the incident
 99. Don't Know/No Information
- 6. Ethnicity of Accused**
 1. Caucasian
 2. Aboriginal
 3. Asian (Chinese, Vietnamese)
 4. African/Caribbean
 5. Phillipino
 6. Other (indicate Ethnicity of Accused)
 99. Don't Know/No Information

7. Employment of Accused

1. Employed
2. Unemployed
3. Full time Student
99. Don't Know/No Information

8. Education of Accused

1. Completed Grade 9 or Less
2. Completed some of Grade 10 – 12
3. Completed Grade 12
4. Other (please indicate type of education)
99. Don't Know/No Information

9-13. Charges¹⁴

1. First Degree Murder
2. Second Degree Murder
3. Third Degree Murder
4. Manslaughter
5. Attempted Murder
6. Assault
7. Assault with a Weapon
8. Aggravated Assault
9. Sexual Assault
10. Sexual Assault with a Weapon
11. Aggravated Sexual Assault
12. Abduction
13. Robbery
14. Other Weapons Charges (i.e. Possession of Firearm or prohibited weapon etc...)
15. Break and Enter
16. Break and Enter with Intent
17. Theft under \$5,000
18. Theft over \$5,000
19. Fraud
20. Mischief
21. Disturbing the Peace
22. Prostitution
23. Arson
24. Impaired Driving
25. Other traffic Offences (i.e. Fail to stop/remain etc...)
26. Drug Charges
27. Breach of Probation
28. Breach of Recognizance
29. Failure to attend Court
30. Other (indicate charge)
88. Not Applicable
99. Don't Know/No Information

¹⁴ Adapted from Evans, John and Alexander Himelfarb, "Counting Crime," In Rick Linden (ed.) *Criminology: A Canadian Perspective*. Nelson: Toronto, Ontario (2004), p. 104-105.

14. Previous Record of Accused

- 1. Yes
- 2. No
- 99. Don't Know/No Information

14a. What type of Previous Record does Accused have?

(If accused has multiple previous charges, indicate the most serious)

- 1. Sexual Assault (rates #1 in seriousness)
- 2. Violent Crime (rates #2 in seriousness)
- 3. Property Crime (rates #3 in seriousness)
- 4. Breach of Previous Sentence (rates #4 in seriousness)
- 5. Other (indicate type of record) (rates #5 in seriousness)
- 88. Not Applicable (no previous record)
- 99. Don't Know/No Information

15. Failure to Comply with non-custodial Sentences

Were any of the charges for this case "failures to comply with previous non-custodial sentences"?

- 1. Yes
- 2. No
- 99. Don't Know/No Information

16. Alcohol/Drug Involvement

- 1. Accused was sober at time of incident
- 2. Accused was intoxicated by alcohol at time of incident
- 3. Incident took place at a 'party,' but it is unclear whether or not accused was intoxicated by alcohol or on drugs at time of incident
- 4. Accused was on drugs at time of incident
- 5. Accused was intoxicated by alcohol, and was using drugs at time of incident
- 99. Don't Know/No Information

17. Weapon Involvement

- 1. No weapon was used in incident
- 2. Blunt Weapon (i.e. Hammer, baseball bat, stick etc...)
- 3. Sharp Weapon (i.e. knife, broken glass etc...)
- 4. Gun
- 5. 'Homemade' Weapon (i.e. cue ball in sock etc...)
- 6. Other (specify)
- 7. Car
- 99. Don't Know/No Information

18. Gang Affiliation

- 1. Yes – Gang Member
- 2. Yes – Gang Associate
- 3. No
- 99. Don't Know/No Information

- 18a. If accused is a member/associate of a gang, specify which one**
88. Not Applicable (no gang affiliation)

19. Considered a Violent Crime

Did the Judge define this crime as 'violent' throughout the case law?

- 1. Yes
- 2. No
- 99. Don't Know/No Information

20. Detained in Pre-trial Custody

Was the accused detained before their trial?

- 1. Yes
- 2. No
- 99. Don't Know/No Information

20a. If the accused spent time in pre-trial custody, how long?

- Indicate length of time in *days*

- 88.** Not Applicable

21. Familial Support

According to the case law, did the accused have any familial support throughout the duration of their court case?

- 1. Yes
- 2. No
- 99. Don't Know/No Information

22. Acceptance of Responsibility

According to the case law, did the accused assume any degree of responsibility for their actions?

- 1. Yes
- 2. No
- 99. Don't Know/No Information

23. Demonstration of Remorse

According to the case law, did the accused demonstrate any degree of remorse for their actions?

- 1. Yes
- 2. No
- 99. Don't Know/No Information

24. Type of Legal Representation

What type of legal representation did the accused have?

1. Lawyer
2. Legal Aid
3. Self-Represented
4. Other (specify)
99. Don't Know/No Information

25. Case Outcome

What was the outcome of the court case?

1. Stay of Proceedings
2. Stay of Proceedings with a Peace Bond
3. Stay of Proceedings for Counseling
4. Found Not Guilty
5. Plead Guilty
6. Found Guilty
7. Other (specify)
99. Don't Know/No Information

26-30. Sentencing Information

- Indicate charge accused was found/plead guilty to (see var. 9-13)
- Indicate sentence corresponding with each charge that accused was found/plead guilty to

1. Fine (complete variable #31)
2. Restitution (complete variable #31)
3. Community Service (complete variable #32)
4. Curfew
5. Supervised Probation (complete variable #33)
6. Unsupervised Probation (complete variable #33)
7. Custody (complete variable #34)
8. Other (specify)
88. Not Applicable
99. Don't Know/No Information

- 31. Amount of Fine/Restitution**
- If a fine/restitution was received as a sentence, record the total amount in *dollars*?
 - 88.** Not Applicable
- 32. Length of Community Service**
- If community service was received as a sentence, record the duration in *hours*?
 - 88.** Not Applicable
- 33. Length of Probation**
- If probation was received as a sentence, record the duration in *months*?
 - 88.** Not Applicable
- 34. Length of Custody**
- If custody was received, record the duration in *months*?
 - 88.** Not Applicable
- 34a. Type of Custody**
- If custody was received, record the *type* of custody
 - 1.** Open Custody
 - 2.** Secure Custody
 - 3.** Deferred Custody
 - 88.** Not Applicable
- 35. Was Pre-trial Custody Considered in Sentencing?**
- 1.** Yes
 - 2.** No
 - 88.** Not Applicable
 - 99.** Don't Know/No Information
- 36. Alternative Measures Used (if any) or Considered**
- Did the accused receive any sort of alternative measure (i.e. other than incarceration/time in custody, not court ordered) as an outcome if found/plead guilty? Write out details of any Alternative Measures that were used, or considered.
- 37. Was this considered to be an exceptional case?**
- Did the judge determine that this was an exceptional case? Did this affect their sentencing and consideration of section 39? What made this case exceptional?

An Examination of Custody Used For Youth Charged Under the YCJA

Tracking Schedule

Case Information

- 1. Case ID _____
- 2. Case Name _____
- 3. Province/Territory _____
- 3a. Name of Court _____

Accused Information

- 4. Gender of Accused _____
- 5. Age of Accused _____
- 6. Ethnicity of Accused _____
- 7. Employment of Accused _____
- 8. Education of Accused _____

Charge Information

- 9. Charge 1 _____
- 10. Charge 2 _____
- 11. Charge 3 _____
- 12. Charge 4 _____
- 13. Charge 5 _____

Factors in Case which may Influence Outcome and/or Sentencing

- 14. Previous Record _____
 - 14a. Type of Previous Record _____
- 15. Failure to Comply with non-custodial Sentences _____
- 16. Alcohol/Drug Involvement _____
- 17. Weapon Involvement _____
- 18. Gang Affiliation _____
 - 18a. If yes, which one? _____
- 19. Considered a Violent Crime _____
- 20. Detained in Pre-trial Custody _____
 - 20a. Record duration in *days* _____

- 21. **Familial Support** _____
- 22. **Acceptance of Responsibility** _____
- 23. **Demonstration of Remorse** _____
- 24. **Type of Legal Representation** _____

Case Outcome

25. **Case Outcome** _____

26. **Sentencing Information**

- (26a.) **Charge** _____
- (26b.) **Outcome** _____
- (26c.) **Outcome** _____
- (27a.) **Charge** _____
- (27b.) **Outcome** _____
- (27c.) **Outcome** _____
- (28a.) **Charge** _____
- (28b.) **Outcome** _____
- (28c.) **Outcome** _____
- (29a.) **Charge** _____
- (29b.) **Outcome** _____
- (29c.) **Outcome** _____
- (30a.) **Charge** _____
- (30b.) **Outcome** _____
- (30c.) **Outcome** _____

- 31. **Amount of Fine/Restitution** (record in *dollars*) _____
- 32. **Length of Community Service** (record in *hours*) _____
- 33. **Length of Probation** (record in *months*) _____
- 34. **Length of Incarceration** (record in *months*) _____
- 34a. **Type of Custody** _____
- 35. **Consideration of Pre-Trial Custody** _____
- 36. **Alternative Measures Used or Considered**

37. **Was this case considered to be exceptional? If so, why?**

Cited Case Law

- R. v. A.D.H.*, [2004] B.C.J. No. 2529; [2004] BCCA 616
- R. v. B. (A.A.)*, [2006] 2006 CarswellNS 85
- R. v. B. (B.K.)*, [2005] CarswellAlta 1539
- R. v. B. (K.G.)*, [2005] Carswell NB No. 605
- R. v. B. (T.L.)*, [2005] CarswellNfld 206
- R. v. B.(T.)*, [2006] 78 O.R. (3d) 721; [2006] O.J. No. 584
- R. v. B.A.O.*, [2005] A.J. No. 838; [2005] ABPC 182
- R. v. B.W.P.*, [2004] M.J. No. 267; [2004] MBCA 110
- R. v. C. (J.J.)*, [2003] CarswellPEI 106
- R. v. C.C.A.*, [2004] M.J. No. 358; 2004 MBCA 140
- R. v. C.D.*, [2004] A.J. No. 179; [2004] ABCA 14
- R. v. C.D.*, *R. v. C.D.K.*, [2005] 3 S.C.R. 668; [2005] SCJ. No. 79; [2005] SCC 8
- R. v. C.D.K.*, [2004] A.J. No. 237; [2004] ABCA 77
- R. v. C. (F.C.)*, [2004] M.J. No. 393; [2004] MBCA 164
- R. v. C.N.*, [2006] O.J. No. 3825
- R. v. D.R.S.*, [2003] S.J. No. 434; [2003] SKCA 64
- R. v. J. (C.D.)*, [2005] CarswellAlta 1309
- R. v. J.A.*, [2004] O.J. No. 1680; [2004] ONCJ 18
- R. v. J.B.W.*, [2004] O.J. No. 2024
- R. v. J.C.N.*, [2005] S.J. No. 295; [2005] SKCA 64
- R. v. J.E.C.*, [2004] B.C.J. No. 2244; [2004] BCSC 1341
- R. v. H. (J.)*, [2004] 2004 CarswellOnt 5346

R. v. K.D.T., [2006] A.J. No. 501; [2006] ABCA 151
R. v. L.R.P., [2004] N.B.J. No. 544; [2004] NBCA 76
R. v. M. (A.M.), [2003] CarswellMan 529
R. v. M. (B.), [2003] CarswellSask No.923
R. v. M.J.S., [2004] N.S.J. No. 64; [2004] NSSC 38
R. v. M.S., [2005] N.J. No. 199
R. v. R. (N.), [2005] CarswellNfld 255
R. v. R.E.W., [2006] O.J. No. 265
R. v. R.M., [2003] O.J. No. 3977
R. v. R.N., [2005] CarswellNfld 255
R. v. S.L., [2003] B.C.J. No. 2397; [2003] BCCA 563
R. v. T. (C.), [2005] M.B.C.A. 156; [2005] CarswellMan 476
R. v. T.W.C., [2006] O.J. No. 1513

References

- Bala, Nicholas, "Youth Criminal Justice Law," Toronto: Irwin Law, 2003.
- Bala, Nicholas and Sanjeev Anand (April 2004), "The First Months Under The *Youth Criminal Justice Act: A Survey And Analysis Of Case Law.*" *Canadian Journal of Criminology and Criminal Justice*, Vol. 46 (3), pp. 251-271.
- Bala, Nicholas, Joseph P. Hornick, Howard N. Snyder and Joanne J. Paetsch (eds), "Juvenile Justice Systems: An International Comparison Of Problems And Solutions," Toronto: Thompson Educational Publishing Inc, 2002.
- Barber, Jody and Anthony N. Doob (2004), "An Analysis Of Public Support For Severity And Proportionality In The Sentencing Of Youthful Offenders," *Canadian Journal of Criminology and Criminal Justice*, Vol. 46(3,) pp. 327-342
- Barnhorst, Richard (Apr 2004), "The *Youth Criminal Justice Act: New Directions And Implementation Issues,*" *Canadian Journal of Criminology and Criminal Justice*, Vol. 46 (3), pp. 231-250.
- Bender, David and Bruno Leone (eds.), "Juvenile Crime: Opposing Viewpoints," San Diego: Greenhaven Press, Inc, 1997.
- Campbell, Kathryn (2005), *Understanding Youth Justice in Canada*, Toronto, Ontario: Pearson Education Canada Inc.
- Canada, House of Commons, "Standing Committee On Justice And Legal Affairs Reviewing Youth Justice." April 1997, Report 13. Shaughnessy Cohen, Chair.
- Canada, House of Commons, "*Youth Criminal Justice Act.*" April 3, 2003, 37th Parl., 1st Sess. [Bill C-7, 2001].
- Carrington, Peter and Sharon Moyer (January 1994), "Interprovincial Variations In The Use Of Custody For Young Offenders: A Funnel Analysis," *Canadian Journal of Criminology*, Vol. 36, pp. 271-290.
- (July 1994), "Trends In Youth Crime And Police Response, Pre- And Post-YOA," *Canadian Journal of Criminology*, Vol. 36, pp. 1-28.
- (April 1995), "Factors Affecting Custodial Dispositions Under The *Young Offenders Act,*" *Canadian Journal of Criminology*, Vol. 37, pp. 127-162.
- Carrington, Peter J. and Jennifer L. Schulenberg (2004), "Introduction: The *Youth Criminal Justice Act – A New Era In Canadian Juvenile Justice?,*" *Canadian Journal of Criminology and Criminal Justice*, Vol. 46(3), pp. 219-224

- Corrado, Raymond R. and Alan Markwart (1994), "The Need To Reform The YOA In Response To Violent Young Offenders: Confusion, Reality Or Myth," *Canadian Journal of Criminology*, Vol. 36(3), pp. 343-378
- Denov, Myriam S. (2004) "Children's Rights Or Rhetoric? Assessing Canada's *Youth Criminal Justice Act* And Its Compliance With The UN *Convention On The Rights Of The Child*," *The International Journal of Children's Rights*, Vol. 12, pp. 1-20.
- Department of Justice Canada (April 15, 2002), "Extrajudicial Measures: Explanatory Text," retrieved from the World Wide Web April 4, 2007 (<http://www.justice.gc.ca/en/ps/yj/repository/3modules/01extjud/3010301a.html>)
- Department of Justice Canada, (2003) "The *Youth Criminal Justice Act*: Summary and Background," retrieved from the World Wide Web September 20, 2005 (www.justice.gc.ca/en/ps/yj/YCJA/explan.html)
- Doob, Anthony N. (January 1992), "Research Note: Trends In The Use Of Custodial Dispositions For Young Offenders," *Canadian Journal of Criminology*, Vol. 34(1), pp. 75-84
- Doob, Anthony N. and Carla Cesaroni (2004), *Responding to Youth Crime in Canada*, Toronto, Canada: University of Toronto Press Incorporated.
- Doob, Anthony N. and Jennifer M. Meen (1993), "An Exploration Of The Changes In Dispositions For Young Offenders In Toronto," *Canadian Journal of Criminology*, Vol. 35, pp. 19-29
- Doob, Anthony N. and Jane B. Sprott, (October 1996), "Interprovincial Variation in the Use of the Youth Court," *Canadian Journal of Criminology*, Vol. 38, pp. 401-412
- (March/April 1999), "Changes in Youth Sentencing in Canada," *Federal Sentencing Reporter*, Vol. 11(5), pp. 262-268
- "Youth Justice in Canada," *Crime and Justice: A Review of the Research* (M. Tonry and A. Doob, eds), Chicago: University of Chicago Press (2004) p. 185-242.
- (2005) "The Use of Custody under the *Youth Criminal Justice Act*," *A Paper Prepared for Youth Justice Policy, Department of Justice, Canada*
- (2006) Punishing Youth Crime In Canada: The Blind Men And The Elephant," *Punishment and Society*, Vol. 8(2), pp. 223-243.
- Endres, Karen (July 2004), "The *Youth Criminal Justice Act*: The New Face Of Canada's Youth Criminal Justice System," *Family Court Review*, Vol. 42 (3), pp. 526-539.

- Gendreau, P. and R.R. Ross, "Revivification Of Rehabilitation: Evidence From The 1980s," (1987) *Justice Quarterly*, Vol. 4, pp. 349-408
- Goff, Colin (2001), *Criminal Justice in Canada (2nd Edition)*, Canada: Nelson Thomson Learning
- Green, Ross Gordon and Kearney F. Healy (2003), *Tough on Kids*, Saskatoon, Saskatchewan: Purich Publishing Limited
- Harris, Peter, Brian Weagant, David Cole and Fern Weinper, (April 2004), "Working 'In The Trenches' With The YCJA," *Canadian Journal of Criminology and Criminal Justice*, Vol. 46(3), pp. 367-388.
- Hartnagel, Timothy F. (2004), "The Rhetoric Of Youth Justice In Canada," *Criminal Justice*, Vol. 4(4), pp. 355-374
- Hillian, Doug; Reitsma-Street, Marge; Hackler, Jim. (April 2004), "Conferencing In The Youth Criminal Justice Act Of Canada: Policy Developments In British Columbia," *Canadian Journal of Criminology and Criminal Justice*, Vol. 46 (3) p.343-366.
- Hogeveen, Bryan (2006), "Memoir Of A/The Blind," *Punishment and Society*, Vol. 8(4), pp. 469-475
- Howell, James (2003), *Preventing & Reducing Juvenile Delinquency: A Comprehensive Framework*, Thousand Oaks, California: Sage Publications
- Hylton, John H. (1994), "Get Tough Or Get Smart? Options For Canada's Youth Justice System In The Twenty-First Century," *Canadian Journal of Criminology*, V. 36(3) pp. 229-246
- JURISTAT, Canadian Centre for Justice Statistics. "Youth Custody And Community Services In Canada, 2004/2005," by Donna Calverley. Vol. 27(2)
- JUSTICE, "Restoring Youth Justice: New Directions In Domestic And International Law And Practice," London: Fretwells Ltd. (2000)
- Moyer, Sharon (2005), "A Comparison of Case Processing Under the *Young Offenders Act* And The First Six Months Of The *Youth Criminal Justice Act*," *A Paper Prepared for Her Majesty The Queen In Right Of Canada*
- Reid-MacNevin, Susan, "Toward A Theoretical Understanding Of Canadian Juvenile Justice Policy." In Russell C. Smandych (2001), *Youth Justice: History, Legislation and Reform* (Toronto: Harcourt Canada Ltd.): pp. 128-143.

- Reitsma-Street, Marge, "Justice For Canadian Girls: A 1990s Update." In Russell C. Smandych (2001), *Youth Justice: History, Legislation and Reform* (Toronto: Harcourt Canada Ltd.): pp. 169-189.
- Roach, Kent (2003), "The Role Of Crime Victims Under The *Youth Criminal Justice Act*," *Alberta Law Review*, Vol. 40(4), pp. 965-989.
- Roberts, Julian V. (2000), *Criminal Justice in Canada: A Reader*, Toronto, Ontario: Harcourt Canada Ltd.
- (November 2003), "Sentencing Juvenile Offenders in Canada: An Analysis of Recent Reform Legislation," *Journal of Contemporary Criminal Justice*, Vol.19 (4), pp. 413-434.
- Roberts, Julian V. and Nicholas Bala (2003), "Understanding Sentencing under the *Youth Criminal Justice Act*," *Alberta Law Review*, Vol. 41(2), p. 395-424
- Roberts, Julian V. & David P. Cole (1999), *Making Sense of Sentencing*, Toronto, Ontario: University of Toronto Press.
- Schissel, Bernard (1997), *Blaming Children: Youth Crime, Moral Panics and the Politics of Hate*, Halifax, Nova Scotia: Fernwood Publishing.
- Simon Fraser University, "The *Youth Criminal Justice Act*: A Step Forward for the Advocates of Restorative Justice?" Retrieved from the World Wide Web (<http://www.sfu.ca/cfrj/fulltext/charbonneau.pdf>) April 4, 2007.
- Smandych, Russell C. (2001a), *Youth Crime: Varieties, Theories, and Prevention*, Toronto, Canada: Harcourt Canada Ltd.
- Smandych, Russell C. (2001b), *Youth Crime: History, Legislation, and Reform*, Toronto, Canada: Harcourt Canada Ltd.
- Smandych, Russell, "Canada: Re-penalization And Young Offenders' Rights," in Muncie, John & Barry Goldson (Eds.) *Comparative Youth Justice*, London: SAGE Publications, 2006
- Smandych, Russell & Terry Hutchinson, (2004) "Juvenile Justice in Queensland and Canada: New Legislation Reflecting New Directions," *Australasian Canadian Studies*, Vol. 22(2) 2004 and Vol. 23(1) 2005.
- Sprott, Jane B. (July 2006), "Research Note: The Use Of Custody For Failing To Comply With A Disposition Cases Under The *Young Offenders Act*," *Canadian Journal of Criminology and Criminal Justice*, Vol. 48(4), p. 609-622

- Sprott, Jane B. and Anthony N. Doob (July 1998), "Understanding Provincial Variation In Incarceration Rates," *Canadian Journal of Criminology*, Vol. 40, pp. 305-322
- Trépanier, Jean. (2004), "What Did Quebec Not Want? Opposition To The Adoption Of The *Youth Criminal Justice Act* In Quebec," *Canadian Journal of Criminology and Criminal Justice*, Vol. 46(3), pp. 273-300
- Tufts, Jennifer and Julian V. Roberts (March 2002), "Sentencing Juvenile Offenders: Comparing Public Preferences And Judicial Practice," *Criminal Justice Policy Review*, Vol. 13(1), pp. 46-64
- Varma, Kimberly N., (April 2002), "Exploring 'Youth' In Court: An Analysis Of Decision-Making In Youth Court Bail Hearings," *Canadian Journal of Criminology*, Vol. 44, pp. 143-164
- White, Howard D. (2004), "Citation Analysis And Discourse Analysis Revisited," *Applied Linguistics*, Vo. 25(1), p. 89-116